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.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Hilda Gonzalez Garza, Rosbell Barrera, and Mario Mascorro Jr. ("Plaintiffs") respectfully submit this response in opposition to Defendants' Motion for Summary Judgment (Dkt. 93) and request that the Court deny Defendants' motion in its totality. Plaintiffs incorporate by reference their previously filed motion for summary judgment against the County, including all cited exhibits and declarations, to this response. *See* Dkt. 92, 92-1.

I. INTRODUCTION

Defendants Starr County and county officials ("the County") are not entitled to summary judgment because the facts on which the County relies are either not in evidence or are disputed, and the County's legal arguments are inconsistent with constitutional standards and state law.

The County concedes that it enacted its Electioneering Regulations to prevent candidates and campaign workers from displaying campaign messages and approaching voters outside the polling place in order to ask the voters for their vote. *See, e.g.*, Dkt. 92-15 (District Attorney Escobar Depo.) Tr. 199:6-9; Ex. 1 (County Judge Vera Depo.) Tr. 40:22-41:6. The Electioneering Regulations restrict one type of expression (political campaign speech), apply only to polling locations, and apply only during the voting period. It is therefore undisputed that the Electioneering Regulations are content-based restrictions of protected speech and are subject to strict scrutiny. *See Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) ("[T]here is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs, includ[ing] discussions of candidates.") (internal quotations and citations omitted); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015) (holding that content-based regulations of speech are presumptively unconstitutional and subject to strict scrutiny).

The County offers no justification for the content-specific nature of the regulations. It does not provide any rationale for the underinclusiveness of the regulations, which ban peaceful campaign leafletters outside the polling place during voting at the same time that they permit singing by the high school glee club, a prayer meeting for peace, an assembly to read the U.S. constitution, fundraising for a charity, and the handing out of restaurant coupons. *See, e.g.*, Dkt. 92-15 (District Attorney Escobar Depo.) Tr. 110:25-111:12, 112:14-25, 113:1-114:4; Dkt. 92-8 (Commissioner Garza Depo.) Tr. 35:7-37:11; Dkt. 92-12 (Commissioner Saenz Depo.) Tr. 23:3-24:4; Dkt. 92-9 (County Attorney Canales Depo.) Tr. 95:20-98:22; Dkt. 92-11 (Commissioner Alvarez Depo.) Tr. 51:14-53:25; Dkt. 92-14 (County Judge Vera Depo.) Tr. 48:21-50:13. The County also offers no rationale for the overinclusiveness of the regulations, which restrict campaign activity in a substantial amount of public fora at every polling place owned by the County and even ban holding a sign and wearing a political t-shirt on sidewalks and grassy areas. *See* Dkt. 92-1 (P's Motion) at 23-28.

The County's argument that electioneering constitutes voter "harassment" and "intimidation" from which voters must be shielded flies in the face of the Constitutional protection of political expression. Beyond the 100 ft. buffer zone enacted by the Texas Legislature to provide a campaign-free space for voters entering the polls, candidates and voters must be allowed to exchange ideas. The specific campaign activities restricted by the Electioneering Regulations, including wearing a t-shirt, engaging voters in conversation, offering campaign cards, and holding up campaign signs, are essential to civic discourse and engagement.[1]

[1] The County's inability to justify its Electioneering Regulations as content-neutral time, place, and manner regulations outside the 100-ft. buffer zone also dooms the regulations under the Texas Election Code. *See* Dkt. 92-1 (P's Motion) at 37.

The County's remaining justifications for the Electioneering Regulations—e.g., to ensure adequate parking space and provide unimpeded passage across parking lots—even if assumed to be compelling, are limited to parking lots and cannot support the broad, content-specific restrictions on campaigning imposed by the Electioneering Regulations throughout the County.

As a result, the County does not come close to showing that the Electioneering Regulations survive strict scrutiny.

The County's argument in support of its Building and Property Use Policy is similarly flawed. The Policy arbitrarily bans persons under the age of 21 from securing a permit to speak or assemble on county property. Defendant District Attorney Escobar conceded that the County's age restriction is completely arbitrary. *See* Dkt. 92-15 (District Attorney Escobar Depo.) Tr. 181:20-182:20. None of the individual Defendants could articulate a single negative incident that involved the use of county property by persons under the age of 21. *See* Dkt. 92-9 (County Attorney Canales Depo.) Tr. 128:20-23; Dkt. 92-15 (District Attorney Escobar Depo.) Tr. 181:11-19; Dkt. 92-14 (County Judge Vera Depo.) Tr. 104:14-24; Dkt. 92-10 (Sheriff Fuentes Depo.) Tr. 77:24-78:2; Dkt. 92-12 (Commissioner Saenz Depo.) Tr. 53:21-24; Dkt. 92-11 (Commissioner Alvarez Depo.) Tr. 82:17-23; Dkt. 92-13 (Commissioner Peña Depo.) Tr. 103:5-8, 103:16-21. The County's defense of the Policy's age restriction not only applies the incorrect legal standard, but also fails to offer any evidence in support of its position. Therefore, summary judgment in favor of Defendants on the constitutionality of the Policy's age restriction is not warranted.

The County has also failed to show that it is entitled to summary judgment with respect to Plaintiffs' First Amendment challenge to the Property Use Policy. Here, the County offers a reading of the Policy that is squarely at odds with the plain text. Defendant County officials

agree with Plaintiffs' interpretation that the Policy reaches a substantial amount of public fora and that the Policy is a prior restraint of speech. *See* Dkt. 92-1 (P's Motion) at 30-37. In addition, the Policy's sweeping ban on signs on all county property is unconstitutional and unprecedented. Because the County cannot show that its Policy is a reasonable time, place, and manner regulation that is narrowly tailored to serve a significant government interest, summary judgment in favor of the County is not appropriate.

Finally, it is well-settled that prosecutors and law enforcement officials such as the Starr County Attorney, District Attorney, and Sheriff are proper defendants in Plaintiffs' suit for declaratory and injunctive relief because they are responsible for and indeed enforce the Property Use Policy and the Electioneering Regulations.

For these reasons and all reasons set forth in Plaintiffs' motion for summary judgment, *see* Dkt. 92-1, judgment in favor of the County is not warranted.

II. ARGUMENT

A. Defendants' Motion is a Partial Motion for Summary Judgment

As an initial matter, Defendants do not seek judgment on Plaintiffs' claims that the Property Use Policy and Electioneering Regulations are unconstitutionally overbroad and unduly vague. *See* Dkt. 63 (Compl.) ¶¶ 119-120, 127-128; *see also* Dkt. 92-1 (P's Motion) at 16-22, 24-29. Therefore, Defendants' motion is only a partial motion and judgment in favor of Defendants as to Plaintiffs' vagueness and overbreadth claims is not warranted as a matter of law.

B. The County Concedes That the Electioneering Regulations Restrict Political Speech and are Subject to Strict Scrutiny but Offers no Evidence that the Regulations are Narrowly Tailored to a Compelling Interest

Defendants do not dispute the Electioneering Regulations are a content-based restriction of protected speech and therefore subject to the most exacting standard of review. *See* Dkt. 93

(D's Motion) ¶ 39. In the First Amendment context, it is a well-established principle that government actors must have a compelling interest to enact a content-based regulation of speech, and the regulation must be narrowly tailored to address that interest. *See Reed*, 135 S. Ct. at 2231; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Therefore, to obtain judgment as a matter of law, the County must meet this heightened standard. *Id*. It has failed to do so here.

1. Defendants Do not Offer any Evidence Supporting a Compelling Interest and Therefore Summary Judgment is not Warranted

i. <u>There is no evidence of voter intimidation or harassment</u>

The County's central argument in favor of its Electioneering Regulations is that voters should be shielded from campaign activity. However, the County's characterization of campaign activity as "harassment," *see* Dkt. 93 (D's Motion) ¶¶ 1, 2, without evidence that voters were harassed or prevented from voting, is insufficient. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) (holding the government bears the burden of showing there is an "actual problem in need of solving.").

What Defendants vaguely refer to as "intimidation" and "harassment" of voters is in fact peaceful political speech. *See, e.g.*, Ex. 1 (County Judge Vera Depo.) Tr. 40:22-41:6 ("Q. . . . I want to make sure that we're clear that in the past, what was concerning about electioneering was campaign people calling out to voters outside the 100-foot buffer zone? A. Yes . . . ."); Dkt. 92-15 (District Attorney Escobar Depo.) Tr. 199:6-9 ("[T]he whole crux of this is that you're not going to be standing there electioneering, trying to engage the voters who are trying to get in and out of the polling location."); Dkt. 93-7 (District Attorney Escobar Depo.) at 65 (admitting campaign workers simply try to "engage the voter" or "give them a sample ballot, maybe just talk to them"); Dkt. 93-4 (Commissioner Alvarez Depo.) at 61 ("Q. Okay. And campaign

workers were doing what exactly? A. Campaigning . . . Asking for the vote."); Dkt. 93-10 (Commissioner Saenz Depo.) at 19 ("Q: Okay. So if I understand correctly, you think that a person approaching a voter to ask them to vote in a certain manner is voter intimidation? A. Yes."); *id.* ("Q: To your knowledge, were these politiqueras that you were talking about threatening the voters that they were talking to? A. No."); Ex. 2 (Commissioner Garza Depo.) Tr. 33:19-34:1 ("Well, when [the Regulations] came about . . . they just tell you about the process you cannot do electioneering, you know, going to talk to ask for them for your vote to support you in the parking lot in this area. Apparently they're calling it harassing the voters."); Ex. 4 (Commissioner Peña Depo.) Tr. 30:23-32:2 ("Q. So if I can get an accurate picture of what you're concerned about in the past during voting at the county courthouse, would it be fair to say that your concern was that as voters were approaching the entrance to the polling place, that candidates and campaign workers were calling out to the voters urging them to vote or insinuating that they should vote a certain way? . . . A.. . . What I saw whenever I would go was, yes, you had some people -- I'm not saying the candidates or campaign workers -- some people would just call out the names of the people going in to vote and reminding them who to vote for. Q. Okay. Was there anything else besides the activity of calling out to voters that raised concerns for you? A. No.").

Testimony in this case shows that electioneering speech is generally positive for voters and particularly beneficial to candidates who wish to challenge incumbents. *See* Dkt. 92-8 (Commissioner Garza Depo.) 86:17-87:10 (agreeing that electioneering, including holding up signs and asking people for their vote on sidewalks, is generally a positive thing); *id.* Tr. 13:18-14:8 (testifying that constituents include elderly and immigrants who recently became U.S. citizens and have never voted or cannot read and need assistance with voting); Dkt. 92-9 (County

Attorney Canales Depo.) Tr. 22:21-23:1 (testifying that as first time candidate for county attorney, "[t]he end results were very good for me where, I guess, it worked that asking people for their vote. A lot of times, especially older folk, appreciate you asking for their vote, you know, taking the time to do that."); Dkt. 92-5 (Garza-Galvan Decl.) ¶ 13 ("Electioneering activities are extremely valuable for a functioning democracy in Starr County. It is the main way challengers are able to reach and try to persuade voters, and it is especially significant for the non-incumbent."); Dkt. 92-4 (Garza Decl.) ¶ 9 ("In a county as rural as Starr, where door-to-door campaigning is not feasible, this kind of in-person, day-of-election electioneering and personal appeals to voters are critical to inform the voters and citizens of our community"); Dkt. 92-6 (Mascorro Decl.) ¶ 10 ("Engaging in electioneering activities is the principal way in which challengers like myself are able to attract and persuade voters during the voting period").

ii. Unsupported characterizations are not competent summary judgment evidence

The County claims that elections "had been overrun by politiquera harassment and chicken plates." Dkt. 93 (D's Motion) ¶ 1.[2] The County further claims that its policymakers "simply sought greater, harassment-free access to polls." *Id*. ¶ 2. However, these claims of harassment (accompanied by multiple references to chicken plates) are unsupported by any citation to an affidavit, declaration, or sworn statement by a qualified individual; the claims amount to nothing more than counsel's arguments and are not evidence the Court may consider for purposes of summary judgment. *See* Fed. R. Civ. P. 56(b)(1)(A); L.R. 7.7 ("When a motion or response requires consideration of facts not appearing of record, proof by affidavit or other documentary evidence must be filed with the motion or response"); *see also L.C. Eldridge Sales*

[2] The County similarly claims, without testimony or other evidence, that Defendants attribute higher voter turnout in the 2018 General Election, a statewide phenomenon, to enactment of the Electioneering Regulations. *Id*. ¶ 11, n. 2.

Co. v. Azen Mfg. Pte. Ltd., No. 6:11CV599, 2013 WL 2285749, at *7 (E.D. Tex. May 23, 2013) (citation omitted) ("Attorney argument is no substitute for evidence").

iii. Extremely vague and conclusory testimony is insufficient

The County also makes vaporous references to "concerns" and "issues" underlying the Electioneering Regulations. *See, e.g.*, Dkt. 93 (D's Motion) ¶¶ 11, 12. Again, these statements are unspecific and conclusory and may not be considered for purposes of summary judgment. *See Lechuga v. S. Pac. Transp. Co.*, 949 F.2d 790, 798 (5th Cir. 1992) (holding that testimony "based on conjecture" or that is "conclusory and unspecific" is insufficient).

The underlying testimony cited to support these statements is equally vague and insufficient. *See, e.g.,* Dkt. 93-8 (Commissioner Peña Depo.) ("A: . . . the courthouse gets very -- how do you call it? During election time, the courthouse gets very - - I'm looking for a word here. Hold on. It's, like, sort of very tense when elections start coming up."); *id*. ("A: . . . the courthouse . . . gets kind of chaos when you have an election because then everybody wants to be right off those hundred feet, right where the hundred feet ends. They want to be there electioneering . . . I mean, you've got to give more respect to an election . . . So here was not the respect that the courthouse needed. That's why I expressed my concerns about it."). Of note, Defendants' testimony revolves around one small geographic area: the rear parking lot of the County Courthouse. *See also* Dkt. 93 (D's Motion) ¶ 13 (conceding Defendants' deposition testimony about any purported issues with electioneering are limited to the Starr County Courthouse). There is simply no evidence of "concern" or "issues" related to any area other than parking lots. *See* Dkt. 92-8 (Commissioner Garza Depo.) Tr. 23:5-7, 24:11-15.

The only arguably specific incidents identified by Defendants occurred years before the County's enactment of the Electioneering Regulations and did not involve any voters at polling

locations. Defendant District Attorney Escobar claimed that "at one point" when he ran for district attorney in the 2012 primary election, someone purportedly burned his campaign signs. *See* Dkt. 93 (D's Motion) ¶ 12; Dkt. 93-7 (District Attorney Escobar Depo.) Tr. 15:1-18. However, Mr. Escobar did not say the damage to his signs occurred at a polling place or during a voting period. In fact, Mr. Escobar, who serves as district attorney for three different counties, did not even testify that this incident occurred in Starr County. Several witnesses also testified that in 2015 they heard (but did not witness) that workers for one campaign mistakenly placed their chicken on another campaign's barbecue pit in the rear parking lot of the Starr County Courthouse. *See, e.g*, Ex. 1 (County Judge Vera Depo.) at Tr. 26:4-6, 27:3-5, 33:21-23; Dkt. 93-7 (District Attorney Escobar Depo.) Tr. 65:9-13; Dkt. 92-8 (Commissioner Garza Depo.) Tr. 26:13-27:18. During the ensuing argument someone swept the piece of chicken off the barbecue pit to the ground. *Id*. The "chicken gate" incident happened once and did not involve any voters, let alone harassment or intimidation of voters. *Id*.

The County has thus failed to provide any evidence supporting its claimed "harassment" and claimed need to ban (county-wide) talking with voters, handing out campaign literature, holding signs, and the wearing of political t-shirts.

iv. <u>The purported "circus" environment at the Courthouse is a self-serving and unsubstantiated claim</u>

The County makes similarly vague and unsupported claims of a "circus" environment at the County Courthouse. *See* Dkt. 93 (D's Motion) ¶ 13.

As an initial matter, Defendants improperly cite to entire transcripts of deposition testimony of seven of the individual Defendants, *see id*., forcing Plaintiffs and this Court to hunt through the record to locate Defendants' purported summary-judgment evidence, *see Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) ("Rule 56 does not impose upon

the district court a duty to sift through the record . . . .") (internal quotation marks and citations omitted); *Pita Santos v. Evergreen All. Golf Ltd., LP*, 650 F. Supp. 2d 604, 611 (S.D. Tex. 2009) ("Rule 56 does not obligate this court to search for evidence to support a party's motion for . . . summary judgment) (citations omitted).

Second, simply calling something a "circus" does not make it so. The facts of this case show that in Starr County candidates and campaign workers gather outside the 100 ft. buffer zones at polling places, hand out literature, and speak with voters. *See* Dkt. 4-4 (Garza Decl.) ¶ 6 (testifying campaign workers and volunteers encourage people to vote and speak out about the issues and candidates they support); Dkt. 92-9 (County Attorney Canales Depo.) Tr. 19:4-24 (testifying that when he ran for office, he and his parents would "hang[] around" the polling places, including under campaign tents, "waiting for voters to come in to say hello, [and] ask[ing] them to vote for [him]"); Dkt. 92-14 (County Judge Vera) Tr. 85:3-13 (testifying candidates would stand outside the polling place and "shake hands, say hi and greet people.").

Voters have unimpeded access to the polling place. *See* Dkt. 92-13 (Commissioner Peña Depo) Tr. 33:7-12 ("Q. . . did you feel that when electioneering was going on at the courthouse, that voters still had physical access to the polling places . . . ? A. Yes, ma'am."); Dkt. 92-8 (Commissioner Garza Depo.) Tr. 26:1-4 (testifying voters are surrounded by people who are electioneering but are able to walk without obstacle to the polling place).

No person touches voters, threatens voters, or prevents voters from entering the polling place. *See* Dkt. 92-13 (Commissioner Peña Depo.) Tr. 33:13-16 ("Q. . . did you ever have a concern that a voter was going to be threatened with violence while entering the polling place? A. No, ma'am."); Dkt. 92-8 (Commissioner Garza Depo.) Tr. 26:5-12 (testifying he has never seen or heard of a voter being threatened, hurt, or injured on their way into a polling place); Ex. 7

(County Attorney Canales Depo.) Tr. 68:3-7 (testifying there had not been any brawls or physical fights); Dkt. 92-15 (District Attorney Escobar Depo.) Tr. 71:1-7 (testifying he has never seen a voter who wants to enter the polling place being physically prevented from doing so because of electioneering).

Voters shake hands with candidates, talk about their campaigns, and eat chicken plates at polling places. Dkt. 4-4 (Garza Decl.) ¶ 6; Dkt. 92-9 (County Attorney Canales Depo.) Tr. 19:4-24; Dkt. 92-14 (County Judge Vera Depo.) Tr. 85:3-13. Defendants themselves have engaged in these electioneering activities in the past. *See, e.g.*, Dkt. 92-9 (County Attorney Canales Depo.) Tr. 19:4-24; Dkt. 92-14 (County Judge Vera Depo.) Tr. 85:3-13; Dkt. 92-11 (Commissioner Alvarez Depo.) Tr. 65:14-23, 68:10-69:12.

Even if the conversations between campaigners are animated, these facts do not support Defendants' claim of "harassment" of voters. Even the presence of tents under which campaign workers talk, cook food, and give chicken plates to voters does not support the claim of "harassment" of voters or justify the County's content-based restriction of political speech.[3]

In their depositions, County officials do not detail a single incident of voter harassment or intimidation. Indeed, they failed to identify a single voter who complained to the County about safety, harassment, or intimidation related to electioneering on county property. *See also, e.g.*, Ex. 3 (Commissioner Alvarez Depo.) Tr. 21:8-14 ("Q. So, is it fair to say that in your long career

[3] There may or may not have been one occasion on which smoke from one campaign barbecue floated over to another campaign's tent. No witness had personal knowledge of the incident. *See* Dkt. 93-2 (County Judge Vera Depo.) at 37; Dkt. 93-11 (County Attorney Canales Depo.) at 60-61 (testifying he has no personal knowledge of the incident). Similarly, no witness saw an alleged incident of catcalling in 2018, which in any event occurred after the adoption of the Electioneering Regulations and could not have inspired the adoption of the regulations. *See* Dkt. 93-11 (County Attorney Canales Depo.) at 62. Neither of these incidents justifies a content-based regulation of speech. Smoke and catcalling are both problems that, to the extent they are actual problems in Starr County, the County can address through existing criminal statutes or a reasonable content-neutral regulation, without having to target political speech.

as a county commissioner you cannot recall with specificity any instance that related to electioneering being a problem in Starr County? A. I cannot pinpoint any single thing that I recall."); *id.* Tr. 24:13-15 ("Q. So, you don't recall any specific incidents where a voter was intimidated; is that correct? A. That's correct.").

Defendants' invocation of a compelling interest in protecting voters from harassment and intimidation is unsupported by any testimony showing that voters are, in fact, harassed or intimidated. As a result, Defendants fail to meet their evidentiary burden under the applicable heightened standard. *See Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 386 (5th Cir. 2018) (even when importance of asserted government interests is beyond dispute, invocation of such interest "must be justified with some evidentiary showing").

The weakness of the County's position is further evidenced by the dearth of any non-party witnesses or documents showing the claimed "harassment" and "intimidation" at the polls. Defendants' claims of voter harassment and intimidation are also directly at odds with testimony of Plaintiffs and other witnesses who testified they have never observed voter harassment or intimidation related to electioneering on Starr County property. *See, e.g.*, Dkt. 92-8 (Commissioner Garza Depo.) Tr. 20:1-7, 24:16-26:12, 79:14-19; Dkt. 92-5 (Garza-Galvan Decl.) ¶ 12; Dkt. 92-6 (Mascorro Decl.) ¶ 12; Dkt. 4-4 (Garza Decl.) ¶ 25; Dkt. 4-5 (Barrera Decl.) ¶ 13.

To establish that a compelling interest exists, the County must do more than offer policymakers' self-serving, conclusory and unspecific testimony, particularly when Plaintiffs have made a showing of their own to dispute the County's evidence. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) (in First Amendment challenge to constitutionality of state law limiting campaign contributions, holding that state met its

evidentiary obligation by presenting congressional testimony, newspaper accounts, reports, and specific incidents of corruption in the state, and noting that "more extensive evidentiary documentation" would be needed from the government if respondents had made a showing of their own to cast doubt on state's evidence of compelling interest); *Spencer v. FEI, Inc.*, 725 F. App'x 263, 268 (5th Cir. 2018) (self-serving testimony alone is generally insufficient at the summary judgment stage); *see also Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000) (holding that anecdotal evidence alone is insufficient in the strict scrutiny calculus).

The County argues that Defendants' testimony is sufficient because Defendants do not need "empirical studies." Dkt. 93 (D's Motion) ¶ 10. However, *Lauder, Inc. v. City of Houston*—the very same case cited by Defendants in support of their position—illustrates that judgment as a matter of law in the First Amendment context requires more than broad anecdotal evidence. 751 F. Supp. 2d 920, 930-31 (S.D. Tex. 2010), *aff'd sub nom. Lauder, Inc. v. City of Houston, Tex.*, 670 F.3d 664 (5th Cir. 2012). In *Lauder*, the City of Houston proved it had genuine public safety and aesthetics issues that justified its ordinance by providing the court with residents' testimony about the issues before a committee, photographs documenting the problems, constituent complaints, and letters from businesses and the region's mass transit agency, among other evidence. *Id.*

Here, by contrast, the County has failed to offer any evidence in support of its claimed problems at county polling places. The County provides no evidence of a single incident in which a voter was harassed, intimidated or prevented from accessing a polling place because of electioneering. In fact, Defendants testified that they could not recall such an incident. *See, e.g.* Ex. 3 (Commissioner Alvarez Depo.) Tr. 21:8-14; 24:13-15. The County provides no evidence

of any specific constituent complaint and no documentation or legislative record whatsoever showing the County has experienced any problems related to electioneering on county property. The County has even failed to show these purported issues were considered or discussed by lawmakers or the public at any Commissioners' Court meeting, including the meeting at which the County discussed and adopted the Regulations.[4] By Defendants' own admission, prior to adoption of the Regulations, the Commissioners did not review any documents, records, or materials evidencing the County's asserted concerns. *See, e.g.*, Dkt. 92-13 (Commissioner Peña Depo.) Tr. 104:19-105:6.

Therefore, the County has failed to support its contention that it had a compelling interest that justifies curtailing Plaintiffs' protected speech.

2. Defendants' Justifications are Post-Hoc Rationalizations for the Electioneering Regulations

As more fully set forth in Plaintiffs' motion for summary judgment, Defendants did not adopt the Electioneering Regulations for any compelling purpose. Instead, the County adopted the Electioneering Regulations to limit political activity and benefit incumbents. *See* Dkt. 92-1 (P's Motion) at 10-14, 19-29.

In its motion, the County concedes that it adopted the Electioneering Regulations "after realizing that every race for county office would be contested." *See* Dkt. 93 (D's Motion) ¶¶ 1,

[4] Commissioners Alvarez and Peña testified that they privately discussed electioneering with Commissioner Garza, the County Judge, and District Attorney Escobar. *See* Dkt. 93 (D's Motion) ¶ 11 (collecting testimony). Commissioner Garza contradicted that testimony, and testified that he never heard from other commissioners that they had concerns about electioneering on county property. *See* Ex. 2 (Commissioner Garza Depo.) Tr. 90:6-15. County Judge Vera testified that he could not recall discussing the electioneering regulations with other officials before the issue was presented in a Commissioners' Court meeting. Ex. 1 (County Judge Vera) Tr. 82:17-83:20. County Judge Vera was also unable to recall whether the Commissioners first raised the idea of the electioneering regulations or whether the suggestion was made to them by the District and County attorneys. *Id*. Commissioner Garza's and County Judge Vera's testimony discredits the testimony of Commissioners Alvarez and Pena that policymakers privately shared concerns about electioneering prior to the County's adoption of the Regulations.

9. In contrast to the dearth of evidence that any voter was harmed by electioneering, the record is replete with evidence that the County's policies were politically motivated. Faced with this evidence, the County argues that its "motive" is irrelevant. *Id.* ¶ 9. However, evidence of political motivations bears on whether the County has met its burden of proving a compelling interest.

The evidence in the case shows that: (1) the County adopted the Electioneering Regulations shortly after the close of the candidate filing period when it was clear the upcoming Democratic Primary Election would feature a record number of challenges to incumbents; (2) the authors of the Electioneering Regulations testified that the impetus for the regulations was the record number of challenges to incumbents in the upcoming primary; (3) Defendant Commissioner Garza testified that the Electioneering Regulations were "100 percent" politically motivated; (4) the District Attorney conceived of and authored the regulations when he had never before performed this type of work for the County; and (5) the Electioneering Regulations singled out certain polling places. *See* Dkt. 92-1 (P's Motion) at 10-14, 19-29. This evidence demonstrates that Defendants' expressed rationales for the Electioneering Regulations are "post-hoc rationalizations" for their plainly unconstitutional policy. *See Tucker v. Collier*, 906 F.3d 295, 301 (5th Cir. 2018) (holding that a compelling interest "cannot be broadly formulated . . . grounded on mere speculation, exaggerated fears, or post-hoc rationalizations.") (internal quotation marks and citations omitted).[5]

[5] Indeed, this would not be the first time that the County offered pretextual justifications for its unconstitutional conduct. *See Bosque v. Starr Cty., Tex.*, 630 F. App'x 300, 304-05 (5th Cir. 2015) (reversing district court's grant of summary judgment in favor of Starr County and Commissioner, finding that circumstantial evidence such as temporal proximity of events and Commissioner's awareness of plaintiffs' actions were substantial and powerful evidence of pretext and affirmative evidence undermining Defendants' testimony).

Defendants' position that their motivations must go unchallenged has no basis in law or fact. The case law Defendants cite to support this argument stands for the proposition that the Court must look at the face of the Electioneering Regulations first to evaluate whether the policy is content-based or viewpoint-based. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (holding that district court's finding as to the "predominate" intent is more than adequate to establish city's ordinance is content-neutral and was not adopted "to suppress the expression of unpopular views"); *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013) ("What the plaintiffs are left with, then, is an argument that we should look past the Act's facial neutrality as to viewpoint and union identity, and conclude nonetheless that the Act's real purpose is to suppress speech by teachers' unions. But the law forecloses this kind of adventure."); *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 649–50 (7th Cir. 2013) (rejecting invitation to look past the text of the statute to infer some invidious legislative intention and find the statute "presents a facially neutral façade for invidious viewpoint discrimination"); *N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp. 2d 754, 864 (S.D. Tex. 1998), *aff'd in part, rev'd in part, dismissed in part*, 352 F.3d 162 (5th Cir. 2003), *on reh'g in part*, 372 F.3d 333 (5th Cir. 2004) (holding that "statements by City Council members are *relevant* to, but not *dispositive* of, the issue of the City Council's intent as an entity" when evaluating content neutrality) (emphasis in original); *see also Reed*, 135 S. Ct. at 2228 (courts must first consider "whether a law is content neutral on its face *before* turning to the law's justification or purpose") (emphasis in original).

The County's cases are inapplicable here because the parties agree that the Electioneering Regulations are content-based restrictions of speech, and Plaintiffs do not contend the Regulations are view-point based restrictions of speech. The Electioneering Regulations are

content-based on their face, an issue Defendants do not dispute, because they regulate only electioneering and not other categories of speech. *See* Dkt. 92-1 (P's Motion) at 13; *see also Reed*, 135 S. Ct. at 2228 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.").

There is no legal basis for the County's argument that the Court must ignore Defendants' motivations when examining whether Defendants have a compelling interest in the Electioneering Regulations. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign[] . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."); *Zimmerman*, 881 F.3d at 386 (holding that even when importance of asserted government interests is beyond dispute, invocation of such interest "must be justified with some evidentiary showing"); *see also Slater*, 228 F.3d at 1164-66 (holding that government must present "sufficiently strong" evidence in support of its articulated compelling interest, since the purpose of strict scrutiny is to "smoke out" illegitimate justifications and to ensure the government "is pursuing a goal important enough to warrant the use of a highly suspect tool.").

Finally, Defendants summarily claim that Plaintiffs cannot establish that the Regulations were politically motivated because County Attorney Canales and Commissioner Alvarez were not supporters of County Judge Vera. *See* Dkt. 93 (D's Motion) ¶ 15. However, the political alignments of Mr. Canales and Commissioner Alvarez do not foreclose the possibility that these two defendants believed the County's policies were overall politically beneficial to them. For example, Commissioner Alvarez testified that he did not suggest any changes or revisions because he did not believe the County's policies affected property in his precinct. *See* Dkt. 93-4

(Commissioner Alvarez Depo.) at 71:8-18. Commissioner Alvarez also testified that, as an incumbent, his solution to electioneering would be that he have no political opposition. *See* Dkt. 92-11 (Commissioner Alvarez Depo.) Tr. 33:8-13 ("Q . . . what would you have liked to have seen for voters at the county courthouse in a practical manner? A. I don't want to be funny, but in my mind I wish I would have been the only candidate without [op]position.").[6]

3. The County is not Entitled to Summary Judgment Because the Electioneering Regulations are Overinclusive and Underinclusive

Even if the Court were to assume that the County has a compelling interest in regulating electioneering (it does not), the overinclusive and underinclusive nature and scope of the Electioneering Regulations belie the County's claims that the regulations serve that compelling interest. *See F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 365 (1984) (holding that the statute's "overinclusiveness and underinclusiveness . . . undermines the likelihood of a genuine governmental interest"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."); *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

[6] Defendants also argue that Plaintiffs' deposition testimony is speculative. *See* Dkt. 93 (D's Motion) ¶ 14. However, Plaintiffs have put forward significant evidence, including Defendants' own admissions that the policies were politically motivated, in support of their arguments. *See* Dkt. 92-1 (P's Motion) at 10-14, 19-22. Defendants also claim that Plaintiffs cannot prove the County's political motivation because Mrs. Garza-Galvan, who ran against County Judge Vera, did not file a campaign finance report until after the County adopted the Regulations. *See* Dkt. 93 (D's Motion) ¶ 14. However, Mrs. Garza-Galvan testified county officials were aware of her competitive campaign well before she filed her financial disclosures with the County. *See* Dkt. 92-1 (P's Motion) at 13 (noting Garza-Galvan testified she announced her campaign and personally told Defendants District Attorney Escobar and County Judge Vera that she was running for County Judge in September 2017, well before the County adopted the regulations).

obvious underinclusiveness undermines any argument that [the government] is truly interested in regulating [for that purpose]").

The Regulations' overinclusive and underinclusive nature also show they are not narrowly tailored to serve a compelling interest, and they are unconstitutionally overbroad. *See McCullen v. Coakley*, 573 U.S. 464, 486 (2014) ("Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'"); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 565, (1980) (holding that law that infringes upon protected speech "may extend only as far as the interest it serves.").

i. Underinclusiveness

The Electioneering Regulations are underinclusive because Defendants' articulated "concerns" lack any nexus at all to the County's content-based regulation, which singles out electioneering, and excludes all other types of speech, on county property. For example, Defendants do not explain how the need to secure parking spaces for Courthouse employees, centralize the control of county buildings, ensure traffic safety, or safeguard against barbecue smoke and catcalling at the Courthouse justifies a restriction of only political speech and not other categories of speech. *See also* Dkt. 92-14 (County Judge Vera Depo.) Tr. 81:9-82:16 (agreeing the county already has content-neutral means of controlling disorderly conduct and ensuring traffic safety); Ex. 5 (District Attorney Escobar) Tr. 148:23-149:6 (same).

Similarly, with respect to Defendant District Attorney Escobar's testimony that his campaign signs were burned in 2012, the County fails to: offer any evidence showing that the burning of Defendant District Attorney Escobar's signs was in any way connected to

electioneering on county property; explain why the County cannot regulate this type of conduct through a narrower content-neutral law; and articulate why, if the incident occurred in 2012, the County waited six years to enact a regulation addressing the incident, until it was politically convenient to do so.

The Electioneering Regulations are also underinclusive because they single out only certain polling places. *See* Dkt. 92-3 at 11-14. The underinclusive nature of the Regulations undermines the County's claim that it acted to protect voters and suggests instead that the County targeted polling places with higher levels of political engagement. *See* Dkt. 92-9 (County Attorney Canales Depo.) Tr. 99:20-100:6 (testifying that the reason why the County included maps of certain properties in the Electioneering Regulations is because those properties are where most people vote and which yield the largest number of votes).

ii. Overinclusiveness

At the same time, the Electioneering Regulations are overinclusive because they apply far beyond the rear parking lot of the Starr County Courthouse where the County claims there was a "circus." *See* Dkt. 93 (D's Motion) ¶ 13 ("In their depositions . . . [Defendants] described the 'circus' that electioneering at the Starr County Courthouse had become."). The Electioneering Regulations restrict political activity far beyond this parking lot area; the Regulations prohibit electioneering in a substantial amount of public fora, including sidewalks, parks, and grassy areas, at all county-owned polling places. *See* Dkt. 92-1 at 23-28.

Defendant officials admitted that their concerns about electioneering do not extend to these additional regulated areas on county property. *See, e.g,* Ex. 1 (County Judge Vera Depo.) Tr. 44:20-46:10 (testifying there is no reason to ban electioneering on sidewalks other than "it's just cleaner if people know you can't be anywhere inside the courthouse property rather than I

can be here, I can't be over there, I can't be over there," and testifying the County did not have any issues in the past on the sidewalks; Dkt. 92-13 (Commissioner Peña Depo.) Tr. 37:9-25 (testifying his concerns would be resolved if the 100-foot line had been enforced at the Courthouse and outside the 100-foot line "[e]verything was good."); *id*. Tr. 34:18-35:2 (testifying he had no concerns regarding the Courthouse sidewalks or grassy areas); *id*. Tr. 50:13-17 (testifying he has no problem with people calling out to voters or handing out leaflets on the sidewalks); Dkt. 92-11 (Commissioner Alvarez Depo.) Tr. 29:19-21, 30:14-16, 32:3-6 (agreeing his concerns are limited to parking lots and concerns at the Courthouse could have been be solved by keeping the parking lot clear); Dkt. 92-8 (Commissioner Garza Depo.) Tr. 53:7-14 (agreeing his concerns can be addressed by limiting electioneering at the back parking lot of the Courthouse, and there is no basis to restrict electioneering at other polling locations other than the Courthouse).

In addition to being geographically overinclusive, the Electioneering Regulations prohibit a wide range of expressive conduct protected by the First Amendment, including holding political signs, peaceful leafletting, and wearing political t-shirts on a sidewalk. *See* Dkt. 92-1 at 23-28. However, the County's articulated concerns—to the extent they are not pretextual—are limited to campaign activities such as setting up barbecue pits and campaign tents in parking lots. *See, e.g.,* Dkt. 92-8 (Commissioner Garza Depo.) Tr. 31:17-25 ("Q. And would it be fair to say that most of your concern around the county courthouse and electioneering has to do with trucks parked, tents, chairs, and barbecues? A. That is correct . . . As long as you stay 100 feet from the entrance of the courthouse I don't have a problem with someone passing out flyers or holding up a sign or whatever."); *id*. 30:4-32:16 (testifying he has no problem with people handing out literature, talking to voters, and holding up campaign signs in lawns or sidewalks outside the

100-foot perimeter); Ex. 6 (Commissioner Saenz Depo.) Tr. 16:1-17:24 (testifying incidents he knows of relate to use of barbecue pits at the Courthouse in 2016, which had nothing to do with persons wearing campaign t-shirts, standing on sidewalks, or passing out literature); *id*. Tr. 44:3-12 (testifying he does not have any concerns about people standing on sidewalks verbally advocating for candidates or passing out literature); *id*. Tr. 44:13-15 (agreeing his concerns could be resolved by prohibiting electioneering in the parking lot of the Courthouse); Dkt. 92-14 (County Judge Vera Depo.) Tr. 75:11-78:10 (testifying there is no problem with people carrying 2x2 signs, has never heard of incidents involving people holding such signs, and agreeing ban on 2x2 signs in designated electioneering areas is an arbitrary measure); Dkt. 92-13 (Commissioner Peña Depo.) Tr. 50:13-17 (testifying he has no problem with people calling out to voters or handing out leaflets on sidewalks).

Because the Regulations are overinclusive and underinclusive, they undermine the County's claimed compelling interests, are not narrowly tailored to serve a compelling interest, and violate the First Amendment.

C. The County is not Entitled to Summary Judgment on its Building and Property Use Policy

1. The County has Failed to Show That the Policy Complies With the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution

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 adopted this age requirement "to hold someone of a mature age responsible for losses and damages to County property." Dkt. 93 (D's Motion) ¶ 34. Not only does the County apply the

wrong legal standard, the County's claim that it considered "maturity" is unsupported by any evidence.

The Policy's age restrictions are subject to strict scrutiny because they infringe on the First Amendment rights of persons under the age of 21 to speak and assemble peaceably. *See Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (holding 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); *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."). The County's argument that its age restriction is subject to rational basis review is simply incorrect.

Furthermore, the County presents no evidence to support its contention that the Commissioner's Court adopted the age restriction to protect County property and assets. This statement in Defendants' Motion, *see* Dkt. 93 (D's Motion) ¶ 34, amounts to nothing more than counsel's attempt to provide a justification where none exists and is not evidence the Court may consider. *See* Fed. R. Civ. P. 56(c)(1) (motion must be supported by evidence in the record, including "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials . . . ."); *L.C. Eldridge Sales Co.*, 2013 WL 2285749, at *7 ("Attorney argument is no substitute for evidence.").

In fact, County officials admitted that the age requirement was wholly arbitrary and could not point to any problems associated with use of county property by persons under the age of 21. *See* Dkt. 92-15 (District Attorney Escobar Depo.) Tr. 181:11-182:20; Dkt. 92-9 (County

Attorney Canales Depo.) Tr. 128:20-23; Dkt. 92-14 (County Judge Vera Depo.) Tr. 104:14-24; Dkt. 92-10 (Sheriff Fuentes Depo.) Tr. 77:24-78:2; Dkt. 92-12 (Commissioner Saenz Depo.) Tr. 53:21-24; Dkt. 92-11 (Commissioner Alvarez Depo.) Tr. 82:17-23; Dkt. 92-13 (Commissioner Peña Depo.) Tr. 103:5-8, 103:16-21. In light of this uncontradicted testimony in the record, Defendants fail to meet their burden of establishing the Policy's age classification is narrowly crafted to address a compelling interest.[7]

2. The County has Failed to Show That the Policy Complies With the First Amendment to the U.S. Constitution

In its motion for summary judgment, the County argues that the Property Use Policy is constitutional under the First Amendment because: (1) the Starr County greens and sidewalks are available for public use without a permit under the Policy; (2) the application process to use County property is reasonable, narrowly tailored, and guided by sufficient standards; and (3) the prohibition of posting of signs in public fora is reasonable. Dkt. 93 (D's Motion) ¶¶ 17-33.

Each of these arguments is directly at odds with the plain reading of the Policy and Defendants' interpretation of their own Policy. *See* Dkt. 92-1 (P's Motion) at 30-37.

i. <u>The Policy is not narrowly tailored to address a significant government interest</u>

The County agrees that the plain language of the Policy requires a permit to use county buildings and surrounding areas, including grassy areas and other open spaces such as the Courthouse Annex lawns and the Courthouse steps. County Judge Vera, testifying as the corporate representative of Starr County, agreed that the Policy regulates not just use of six listed buildings but also green areas surrounding those properties. *See* Dkt. 92-14 (County Judge Vera

[7] Defendants also appear to claim the Policy's ban on persons under the age of 21 is constitutional because Plaintiff Mascorro may exercise his First Amendment rights elsewhere or can apply for a permit through "a sponsor." Dkt. 93 (D's Motion) at ¶ 34. However, this is not the legal standard and Defendants do not cite to any controlling case law to support this argument.

Depo.) Tr. 97:19-24. Judge Vera further agreed that use of the Courthouse Annex lawns and Courthouse steps and grassy areas require a permit. *Id.* Tr. 102:23-103:2, and 108:1-18; *see also* Dkt. 92-8 (Commissioner Garza Depo.) Tr. 70:3-8, 72:4-7 (testifying use of Courthouse steps and grassy areas require a permit). As Defendants' motion recognizes, the County's interpretation of its own policy "must be accorded some meaningful weight." Dkt. 93 (D's Motion) ¶ 18.

Because the Policy undisputedly reaches a substantial amount of public fora, the County must demonstrate that the Policy is narrowly tailored to serve a significant governmental interest and leaves ample alternative channels of communication. *See Perry Educ. Ass'n*, 460 U.S. at 45; *see also Justice For All v. Faulkner*, 410 F.3d 760, 769 (5th Cir. 2005).

The County fails to cite to any evidence in support of its laundry list of interests supporting its Policy. *See, e.g.*, Dkt. 93 ¶ 19 ("maintenance and safety concerns," "safeguarding the safety of employees and citizens, and mitigating blight, distraction and nuisance."); *id*. ¶¶ 22, 33 ("eliminate visual clutter"); *id*. ¶ 29 ("preserving property and providing community services"); *id*. ¶ 22 ("protect the lawns and vegetation from destruction"). In fact, none of these interests were asserted by County officials in support of the Policy. Defendants unequivocally testified that the County enacted the Building and Property Use Policy for the limited purposes of ensuring adequate parking space at the Courthouse parking lot and creating uniformity in leasing practices of County Commissioners. *See* Dkt. 92-1 (P's Motion) at 30 (collecting testimony).

In its recent motion, the County adds that it adopted its Building and Property Use Policy also to address electioneering. *See* Dkt. 93 (D's Motion) ¶ 12. This new justification only undermines the County's previous justifications (which were offered in officials' depositions)

and suggests that the Policy was adopted for political purposes. *See also* Dkt. 92-1 (P's Motion) at 30, n. 5.

Even assuming, however, that the County has a genuine interest in regulating use of its buildings and parking lots, the Policy is not narrowly tailored to address these interests. The Policy imposes a one-size-fits-all burdensome permit application requirement to use county property, regardless of the nature and scope of the use, and only imposes this permit requirement on certain buildings and surrounding properties. *See* Dkt. 92-1 (P's Motion) at 31-33. As Defendants admitted in their depositions, the County could have addressed its concerns through a narrower regulation. *Id.* at 33-34. In fact, Commissioner Alvarez disagreed so forcefully with the Policy's ban on using the Courthouse steps on holidays that he claimed he would rather be arrested than comply with the Policy:

> Q. Do you know whether there are certain days where I just can't get a permit at all to use county facilities?
>
> A. I would imagine every day that the county's closed.
>
> Q. So, let's say it's – let's say it's Memorial Day and I'm part of a group of veterans and I want to have a gathering to honor veterans on Memorial Day, and I want to do it at a county facility. I want to do it here on the steps and I want to hold up signs that say remember our veterans. Is that -- does that mean that because the county is closed I won't be able to get a permit to hold up my signs and do that?
>
> A. I am a veteran, ma'am, and nobody's going to stand in our way of holding something like that.
> Q. It's your right isn't it?
>
> A. I know it is. . . That's probably the only time I will disobey any kind of regulation, when it pertains to veterans. And somebody will go put me in jail because I will disobey.

Dkt. 92-11 (Commissioner Alvarez Depo.) Tr. at 87:13-88:20.

ii. The Policy is an unconstitutional prior restraint of speech

Despite the County's unsupported argument that the application process to use County property is "simple," *see* Dkt. 93 (D's Motion) ¶ 26, the County does not deny that the Policy requires a 30-day advance application, fees, a notarized signature, and a release of liability. The County also does not present any evidence discrediting Plaintiffs' showing that the Policy gives Defendant County Judge Vera complete and unfettered discretion to grant or deny an application for a permit. *See* Dkt. 92-1 (P's Motion) at 36-37. Quite the opposite, the County admits that the County Judge has the "discretion to waive fees" based on his own sense of whether "the community at large is receiving a valuable service in return." Dkt. 93 (D's Motion) ¶ 29. Judge Vera testified that he granted a property use permit to the local Catholic school but he did not know whether he had to issue a property use permit to an unpopular group like Nazis. Dkt. 92-14 (County Judge Vera Depo.) Tr. 106:16-107:14. For these and the additional reasons set out in Plaintiffs' motion for summary judgment, the Policy is an unconstitutional prior restraint of speech that enables viewpoint discrimination.

iii. The County's prohibition on signs is unprecedented and unconstitutional

Finally, the County's claim that its ban on signs in public fora is constitutional has no merit. The Building and Property Use Policy prohibits Plaintiffs from posting any signs on public fora such as sidewalks, parks, and grassy areas. *See* Dkt. 92-3 (Ex. 1-B) (Policy) §§ 9(e), 12(c). Defendants claim this ban on signs 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. 93 (D's Motion) ¶ 33. Once again, these justifications are offered without any supporting evidence and are entirely absent from the text of the Policy. *See also* Dkt. 92-8 (Commissioner Garza Depo.) Tr. 56:13-16 ("Q. Okay. So do

you think there's any kind of issue with people placing signs on county property for campaigning? A. No, I don't have a problem.").

Moreover, to the extent these interests exist and constitute significant government interests, 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 Plaintiffs are prohibited from setting the signs with wire legs into the ground. *See* Dkt. 92-3 (Ex. 1-B) (Policy) §§ 9(e), 12(c). The Policy also permits the placing of chairs, tables, tents, and grills in the same areas where it prohibits posting of signs. *Id*. It is evident that the County is not genuinely interested in eliminating visual clutter or preserving green areas, and that, to the extent these interests are actual problems in need of solving, the County has failed to address them in a uniform fashion.

Defendants rely on a single case, *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), to support their broad ban on speech. *See* Dkt. 93 (D's Motion) ¶ 33. However, this case is inapposite. *Taxpayers for Vincent* 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. 466 U.S. at 809. Here, Defendants do not put forth any evidence of a history of signs left unattended on county property. In addition, the Policy prohibits Plaintiffs from posting signs, even temporarily, in traditional public fora such as parks, sidewalks, and grassy areas. There is simply no legal basis for this sweeping prohibition on signs in public fora.

For all these reasons and the reasons set forth in Plaintiffs' motion for summary judgment, the Policy is unconstitutional under the First Amendment. *See* Dkt. 92-1 (P's Motion) at 30-37.

D. The County is not Entitled to Summary Judgment on Plaintiffs' Claims Under the Texas Election Code

Defendants also argue the Electioneering Regulations and Policy are lawful under the Texas Election Code. Dkt. 93 (D's Motion) ¶¶ 37, 49. For the reasons set forth by Plaintiffs in their motion for summary judgment, Defendants' policies are unlawful under state law. Dkt. 92-1 (P's Motion) at 31.

Defendants erroneously claim that Plaintiffs failed to identify either a ministerial act or an exercise of limited discretion that is *ultra vires*. Dkt. 93 (D's Motion) ¶ 50. Defendants are responsible for administering elections in Starr County and enforcing laws related to these elections. Texas law both constrains Defendants' election authority and prescribes specific, ministerial acts for election administration that Defendants must perform. Defendants ignored the requirements of state law when they enacted and enforced the Property Use Policy and Electioneering Regulations, both of which are prohibited by Texas Election Code § 61.003. *See* Dkt. 92-1 (P's Motion) at 31. Defendants' conduct conflicts with their obligations under state law and is therefore *ultra vires*.

E. 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. 93 (D's Motion) ¶ 16. However, it is undisputed that Defendants Escobar, Canales, and Fuentes are responsible for and indeed enforce the Property Use Policy and the Electioneering Regulation. *See* Dkt. 92-14 (County Judge Vera) Tr. 89:4-20; Dkt. 92-10 (Sheriff Fuentes) Tr. 10:20-24; Dkt. 92-9 (County Attorney Canales Depo.) Tr. Tr. 44:22-45:21. Accordingly, Defendants Escobar, Canales, and

Fuentes are proper defendants in this action. *See also 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.").

F. CONCLUSION

For these reasons, Plaintiffs respectfully request that Defendants' motion for summary judgment be denied.

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Respectfully Submitted

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on April 19, 2019, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Alejandra Ávila
Alejandra Ávila