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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs Hilda Gonzalez Garza, Rosbell Barrera, and Mario Mascorro Jr. ("Plaintiffs") respectfully submit this reply in support of their Motion for Summary Judgment (Dkt. 92).

Judgment in favor of Plaintiffs is warranted because the County fails to present any evidence that creates a genuine issue of material fact as to any of Plaintiffs' claims. Starr County also does not show it is entitled to judgment as a matter of law. Plaintiffs respectfully request that their motion be granted.

I. ARGUMENT

A. The County Does not Dispute that the Building and Property Use Policy's Age Restriction is Arbitrary and Violates the Equal Protection Clause, and that the Policy is a Prior Restraint of Protected Speech in Violation of the First Amendment

In their motion, Plaintiffs provide conclusive testimony from Defendants showing (1) the Property Use Policy's restriction of speech on the basis of age is entirely arbitrary and therefore violates the Equal Protection Clause, and (2) the Policy does not provide sufficient standards to guide the County Judge's discretion to grant or deny a permit in violation of the First

Amendment. *See* Dkt. 92-1 at 28-29, 36-37. In its response to Plaintiffs' motion, the County does not address these arguments and provides no responsive evidence. *See* L.R. 7.4 ("Failure to respond to a motion will be taken as a representation of no opposition."). Although Defendants generally incorporate their own motion for summary judgment to their response to Plaintiffs' motion, the County's motion for summary judgment also fails to offer any evidence relevant to these two claims. *See* Dkt. 95 at 27-29, 32. Therefore, there is no genuine issue of material fact.

Because, as explained in Plaintiffs' response to the County's motion for summary judgment, the County's legal analysis is flawed and the County presents no evidence in support of its position, the Policy amounts to a prior restraint on speech in violation of the First Amendment, and the age restriction violates the Equal Protection Clause of the Fourteenth Amendment. *Id*.

B. The County Does not Dispute that the Electioneering Regulations Prohibit Electioneering and no Other Category of Speech on Sidewalks

The County does not dispute that the Electioneering Regulations prohibit electioneering on county-owned sidewalks. *See* Dkt. 94 ¶¶ D, F. As the Supreme Court recognized in *U.S. v. Grace*, "the government's ability to permissibly restrict expressive conduct [on sidewalks] is very limited." 461 U.S. 171, 177 (1983). In these public spaces, regulations of protected speech "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Id*. The value placed on speech on these fora is so significant that even content-neutral regulations must be narrowly tailored. *Id*.; *see also* Dkt. 18 (granting Plaintiffs' application for TRO in part and enjoining the County from enforcing content-neutral Property Use Policy on sidewalks).

In its response, the County fails to show how its *content-based* regulation of protected speech on sidewalks advances any compelling interest. The County merely argues that the Regulations' prohibition of electioneering on sidewalks excludes "passive expressions of

speech." Dkt. 94 ¶ D. But this does not prove the Regulations are narrowly tailored to any of the County's purported interests, such as ensuring access to the polls. The Electioneering Regulations provide that their prohibition of electioneering on sidewalks "does not apply to passive expressions of speech such as wearing clothing, hats or pins which may be considered electioneering." Dkt. 92-3 (Ex. 1-A) Regulations § 4(f). However, this provision does not apply to non-electioneering activities. Therefore, a person may not stand on a sidewalk peacefully handing out sample ballots and advocating for a candidate, but a large group of people may stand on that same sidewalk loudly signing a religious song or advertising a new high school play. Because the County does not even attempt to justify the content-based nature of its Regulations, they are unconstitutional under the First Amendment.

C. The Electioneering Regulations' Prohibition on Distracting Electioneering Activities is Unconstitutional

The County does not dispute that the Electioneering Regulations prohibit electioneering activities that "distract" the attention of drivers. *See* Dkt. 92-3 (Ex. 1-A) Regulations § 4(l). However, it argues that this provision is not vague because the term "distract" is "a common term that does not have to be defined by the County's Regulations, especially in the context of driving." Dkt. 94 at ¶ H. Defendants' position is directly at odds with controlling case law in the Fifth Circuit and has no merit. *See Guyot v. Pierce*, 372 F.2d 658, 662-63 (5th Cir. 1967) (where ordinance prescribed "no definitions or standards as to what constitutes 'distracting activity,' ordinance was unconstitutional.").[1]

[1] The County cites to a number of federal regulations that define the term "driver distraction," presumably to show this term is defined somewhere and can be commonly understood. However, this string cite only proves Plaintiffs' point that the Regulations impermissibly lack a definition in violation of the Constitution. The County also cites to 23 C.F.R. § 1200.24, a provision that does not include a specific definition of driver distraction. However, the constitutionality of 23 C.F.R. § 1200.24 is not at issue in this case, and a regulation that establishes criteria for awarding grants to states that prohibit texting while driving is wholly irrelevant.

The County also claims its prohibition against "distracting" electioneering activities passes constitutional muster because the County has "an interest in maintaining roadways safe." Dkt. 94 at ¶ H. This argument fails because (1) the County does not present any evidence that the County indeed is interested in regulating electioneering for that purpose, and (2) the content-based nature of the Electioneering Regulations shows that traffic safety is not a genuine compelling interest of the County and that, to the extent such interest exists, the Regulations are not narrowly tailored to address it. The Electioneering Regulations only restrict political speech, but not other categories of speech, that may distract drivers; in other words, under the Regulations, Starr County residents may still distract drivers so long as they do not engage in electioneering activities. *See* Dkt. 92-15 (District Attorney Escobar Depo.) Tr. 145:1-146:7 (testifying that a person holding a political sign on the corner of a parking lot by the Courthouse would be distracting to a driver and therefore prohibited by the regulations, but a similarly sized nonpolitical sign that said "Prepare Yourselves, Jesus is coming" is allowed, even though it is equally distracting); Dkt. 92-14 (County Judge Vera Depo.) Tr. 80:10-82:16 (testifying that Electioneering Regulations do not prohibit holding a distracting sign that says "Go to church or go to __" but do prohibit a distracting sign that says "Honk if you voted for Judge Vera"). Therefore, the County's content-based law is not narrowly tailored to address any purported traffic safety concerns and is unconstitutional.

D. The Electioneering Regulations are Underinclusive and Overinclusive

Defendants further argue Plaintiffs cannot show the Electioneering Regulations are underinclusive because the Regulations, when read in conjunction with the Building and Property Use Policy, prohibit both non-electioneering and electioneering activities *in parking lots*. *See* Dkt. 94 ¶ C. However, this case is not limited to parking lots. For example, it is

undisputed that the County prohibits electioneering on sidewalks at the front and back of the County Courthouse. *See id*. ¶ F; Dkt. 92-3 (Ex. 1-A) Regulations § 4(f). At the same time, the Electioneering Regulations and the Building Use Policy allow residents to engage in other expressive activity on those same sidewalks, including singing by the high school glee club, a prayer meeting for peace, an assembly to read the U.S. constitution, soliciting donations 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. Thus, Plaintiffs prevail on their underinclusiveness argument even when the analysis is limited to sidewalks.

But the Electioneering Regulations apply to far more than sidewalks; the Electioneering Regulations restrict electioneering in grassy areas, public easements, areas near firehouse curbs and all the areas "on or surrounding County-owned or –controlled property." *See* Dkt. 92-3 (Ex. 1-A) Regulations §§ 4(i)-(m); *id*., Ex. A at 11 (showing grassy area within 15 feet of fire station at La Rosita).

The County is simply wrong when it contends that the Electioneering Regulations are limited to sidewalks, parking lots, and rights of way. And this argument is directly at odds with the County's broad reading of the Regulations during deposition testimony. *See* Dkt. 92-1 at 8-9. Testifying as the County's representative, County Judge Vera explained that the Regulations prohibit electioneering on county property, but the Designated Areas for Electioneering indicate where Plaintiffs may electioneering. *See* Dkt 92-14 (County Judge Vera Depo.) Tr. 72:24-73:3

("Q: [S]o what you're saying [is] on the property electioneering is prohibited but the green areas tell us where you can electioneer . . . A: Yes.").

Defendants accuse Plaintiffs of "cherry picking" portions of Judge Vera's testimony, and incorrectly note that "Plaintiffs make much of an exchange between Judge Eloy Vera and County Attorney Victor Canales at a Commissioners Court [m]eeting." Dkt. 94 ¶ E. First, despite Defendants' protestations, Plaintiffs did not misleadingly select quotes from Judge Vera's testimony; Plaintiffs cited (and attached) the entire portion of Judge Vera's deposition transcript where he testified on this issue. Second, the exchange to which Defendants refer was actually an exchange between Commissioner Garza and County Attorney Canales during a Commissioners' Court meeting. In that meeting, Mr. Canales explained that, under the Regulations, electioneering is prohibited everywhere on county property not highlighted in green in the maps attached to the Regulations:

> Q. And this is an excerpt from the meeting and Mr. Canales is going to be offering some remarks on the electioneering information.
>
> (Video streaming)
>
> (Mr. Canales): Commissioners, what you have before is the package that is the proposed electioneering policy drafted by counsel by the county. What this is and if you're able to look at page three the prohibited activity section, people will not be allowed to electioneer. They can't put up signs as far as close to the grounds of property we're looking at things that are not allowed on county property; however, ***if you will look at the exhibits that are attached, the photographs. We have provided areas in which electioneering will be permitted. These are areas of the different locations [such as] the courthouse***. The circles that you see commissioners for example in the courthouse that's the 100-foot radius that has been drawn by statutes right outside of that is the sidewalk area includes in the buffer zone. ***The green areas that you see there are where electioneering is permitted***. People may electioneer in whatever manner they may so choose. On the sidewalks the sidewalks themselves where electioneering is prohibited individuals would be allowed to actually wear non-vocal electioneering like if they're wearing a shirt that's permissible they can walk around in their shirt. They cannot; however, hand out voting cards sample ballots.

> COMMISSIONER [GARZA]: That would be on the sidewalks?
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> MR. CANALES: That would be on the sidewalks.
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> COMMISSIONER [GARZA]: It is prohibited?
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> MR. CANALES: ***It is prohibited everywhere you do not see the green***. The green part is allowed. By statute it has those little circles is where it is permitted.
>
> COMMISSIONER [GARZA]: Inside the circle?
> COMMISSIONER: Outside the circle.
>
> MR. CANALES: I'm sorry, ***I apologize. Inside the circle it is not permitted, outside is permitted; however, with the regulations that we're proposing is not permitted as well on county property***.
>
> (Video ended).

See Dkt. 92-14 (County Judge Vera Depo.) Tr. 68:6-69:23 (emphasis added). County Judge Vera, after hearing the recording from that meeting, agreed with County Attorney Canales's interpretation of the Regulations. *Id*. Tr. 11:2-8, 68:6-70:21 ("Q: Do you agree with the county attorney's characterization of the electioneering regulation? A. Yeah . . . .").

The County further erroneously argues that the County Attorney's interpretation of the Electioneering Regulations does not show the Regulations prohibit electioneering in public fora beyond sidewalks, because the County Attorney's discussion "was centered on activities on sidewalks" and not other areas on county property. Dkt. 94 ¶ E. The transcript speaks for itself. The County Attorney referred to all areas of county property illustrated in the various maps attached to the Electioneering Regulations, and stated "the green areas . . . are where electioneering is permitted." *See* Dkt. 92-14 (County Judge Vera Depo.) Tr. 68:17-69:2. The County Attorney then more specifically explained, in response to a question by Commissioner Garza about sidewalks, that "on sidewalks []themselves," electioneering "is prohibited everywhere you do not see the green." *Id*.

In any event, even if the County Attorney meant electioneering is only prohibited on sidewalks (which is not what he actually said), that is not how the County's designated Rule 30(b)(6) representative interpreted the Electioneering Regulations. Later in his testimony, the County Judge again explained, over the objection of Mr. Fonseca, that the green highlighted areas on the maps are the only areas at polling places where people may electioneer:

> Q. Do you know whether under this policy under section – let's go on the second part of -- the second part of the county attorney's statement that I just wanted to cover with you is where he states it is prohibited everywhere you don't see the green and so you generally you understand that the electioneering regulation generally does prohibit electioneering except where you see the green, where it is permitted?
>
> MR. FONSECA: Objection. Mischaracterizes his testimony.
>
> A. Again, I think the green is in areas that you can politic or electioneer, but those green areas designated areas inside areas that are prohibited; however, they're overruled by the green and you can't.
>
> Q. (Ms. Perales) Got it. ***So what you're saying on the property electioneering is prohibited but the green areas tell us where you can electioneer.***
>
> MR. FONSECA: Object. Misstates the testimony.
>
> A. ***Yes***.

Id. Tr. 72:9-73:3 (emphasis added).[2] Therefore, it is clear the Regulations prohibit electioneering in all areas of polling places but designate areas with green highlighting where people can electioneer.

[2] Defendants also cite to District Attorney Escobar's testimony to attempt to show that, when one reads the Regulations together with the Building and Property Use Policy, "[a]ll parks surrounding polling locations are available for electioneering." *See* Dkt. 94 ¶ F. However, as noted above, this reading contradicts the plain text of the Regulations, which prohibit electioneering activities in all areas surrounding polling locations, including parks. *See* Dkt. 92-3 (Ex. 1-A) Regulations §§ 4(h)-(m). In addition, County Judge Vera speaks for the County, not Mr. Escobar. At best, Mr. Escobar's testimony offers a contrary reading than the County Attorney's and Judge Vera's reading, and demonstrates that the Regulations are unconstitutionally vague. Mr. Escobar's reading is also at odds with how the County enforces the Regulations. *See, e.g.*, Dkt. 92-4 (H. Garza Decl.) ¶ 13 (testifying County authorized then-candidate for U.S. Senate Beto O'Rourke to place signs into the Courthouse greens but instructed

In sum, even when read with the Building Use Policy, the Electioneering Regulations are underinclusive. Whether or not the Building Use Policy restricts certain activities, the Electioneering Regulations place greater and more specific restrictions on electioneering. For these same reasons, the County cannot prevail on its argument that the Regulations are narrowly tailored because they only prohibit electioneering on sidewalks and rights of way that the County has not designated as areas for electioneering. Dkt. 94 ¶¶ D, F. Because the County's designated areas for electioneering are highly restrictive, the Regulations are overbroad and not narrowly tailored to any compelling interest.

E. The County Lacks a Compelling Interest for its Electioneering Regulations

The County accuses Plaintiffs of "mischaracterizing" testimony in support of its argument that there is no nexus between the Electioneering Regulations and a compelling interest. Dkt. 94 at ¶¶ 2, A-B. Specifically, the County does not dispute that District Attorney Escobar and County Attorney Canales admitted that the County adopted the Regulations in anticipation of a highly contested primary election cycle; however, it claims this testimony does not prove lack of a compelling interest because the witnesses "specifically stated that they considered the regulations to keep order and maintain voter access to the polls" during that contested election cycle. *Id*. ¶ A. First, "keeping order" is not a compelling interest that can justify a *content-based* restriction of speech. Second, although Mr. Escobar summarily states the purpose of the Regulations was to maintain access to the polls, the County offers no evidence that such a problem exists in Starr County. *See* Dkt. 95 at 5-9.

The County also argues that when District Attorney Escobar testified that "the crux" of the Electioneering Regulations was that people could not electioneer and try to engage voters,

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candidate running in Rio Grande City CISD School Board election to remove her signs from the same grassy area at the Courthouse).

Mr. Escobar was only describing activities allowed on the Courthouse grounds and "was not testifying as to the underlying purpose for drafting the Electioneering Regulations." Dkt. 94 at ¶ B. However, Mr. Escobar spoke about the scope and goal of the Regulations, even if he referred by way of example to the Courthouse grounds. 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."). County Judge Vera and the Commissioners also testified that the County's concern with electioneering was that campaigns and candidates were "calling out" to voters outside the 100-foot buffer zone. *See, e.g.*, Dkt. 95-2 (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. 95-5 (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."). This testimony shows the County's purpose was to target political speech at the core of First Amendment protection.

Second, Plaintiffs provided a substantial amount of evidence that shows a lack of a compelling interest aside from the testimony from Mr. Escobar and Mr. Canales above, including, among other things: (1) Commissioner Garza's unequivocal testimony that the

Regulations were "100 percent" politically motivated, (2) the timing of the County's adoption of the Regulations;[3] (3) the fact that the District Attorney conceived of and authored the regulations when he had never before performed this type of work for the County, nor do his responsibilities as the criminal District Attorney for three counties include drafting ordinances for one of the counties; and (4) the fact that the Electioneering Regulations singled out certain polling places that yield the largest amount of votes. *See* Dkt. 92-1 at 10-14, 19-29. Defendants do not dispute or address this evidence in any way.

F. The Electioneering Regulations' Prohibition on Loitering is Unconstitutionally Overbroad and Vague

1. Overbreadth

The County states summarily that the Electioneering Regulations' prohibition of "loitering" is not overbroad and is narrowly tailored because "the prohibition applies only to polling locations during voting periods" and "is restricted to sidewalks leading up to polling locations." Dkt. 94 at ¶ I. However, the fact that the loitering provision may be constrained to some county locations or areas of county property during the voting period does not demonstrate narrow tailoring or lack of overbreadth. Under the County's own interpretation of the Electioneering Regulations, the loitering provision prohibits a substantial amount of conduct protected by the First Amendment, including peaceful leafletting and wearing campaign t-shirts, in public fora. *See* Dkt. 92-14 (County Judge Vera Depo.) Tr. 78:11-17 (testifying that "loitering" includes "someone that is handing out stuff, selling stuff. Things like that . . . Including handing out campaign literature."); Dkt. 92-15 (District Attorney Escobar Depo.) Tr.

[3] Defendants appear to argue that the County's timing simply shows the County wished to regulate county property during a busy election cycle. However, the County does not explain why it adopted the Regulations during the 2018 election cycle, other than to note there were a number of contested primary races. The County does not explain why, if a "circus" had indeed been happening for so many years, it did not adopt the Regulations in anticipation of the 2016 presidential election cycle or in other busy election cycles in the past.

201:22-202:11 (testifying that standing on a sidewalk with a political t-shirt constitutes loitering and is prohibited under the Electioneering Regulations).[4]

The County also argues the Regulations' loitering provision cannot be deemed unconstitutional because then the section of the Texas Election Code that prohibits loitering within the 100-foot buffer zone would also be unconstitutional. Dkt. 94 at ¶ I. The County's argument misses the mark. Plaintiffs do not challenge the constitutionality of the loitering provision in the Election Code (or all the other laws that may or may not exist that do not define "loitering") in this case. The argument advanced by the County merely shows the Electioneering Regulations are preempted by state law, since they prohibit loitering and electioneering in areas of county property inside the 100-foot buffer zone where the Election Code already prohibits loitering and electioneering. *See* Dkt. 92-3 (Ex. 1-A) Regulations § 4(f); *id*., Ex. A (showing Courthouse sidewalks where loitering and electioneering is prohibited are inside the 100-ft. buffer zone).

2. Vagueness

Defendants claim that the loitering provision is not vague because it "contain[s] a second element—an 'overt act'—which is the prohibition against 'interfere[nce] with citizen access to polling locations.'" *See* Dkt. 94 ¶ J. In support of this argument, Defendants argue *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) does not support a finding that the Regulations are unconstitutional. The opposite is true. The ordinance at issue in *Morales*, unlike the Regulations, actually defined the term "loiter" but the Supreme Court nonetheless declared it unconstitutionally vague.[5] In addition, Defendants' argument that the loitering provision only

[4] The County has also offered no evidence that loitering is a problem in Starr County and that it has a genuine interest in regulating loitering on county property.

[5] And in sharp contrast with Starr County's process leading up to the enactment of the Regulations, in *Morales* the City "conducted hearings to explore the problems created by the city's street gangs, and more

prohibits loitering if the person also "interfere[s] with citizen access to polling locations" is contrary to the plain language of the Regulations and law enforcement's interpretation of the Regulations. The Electioneering Regulations state:

> It shall be unlawful for any person to loiter or electioneer on sidewalks and interfere with citizen access to polling locations unless the sidewalks are a specifically Designated Area for Electioneering.

Dkt. 92-3 (Ex. 1-A) Regulations § 4(f). Under principles of statutory construction, this provision makes it unlawful (1) *either* to loiter *or* electioneer on sidewalks, unless the sidewalks are a specifically Designated Area for Electioneering (2) *and* to interfere with pedestrian access to polling locations, unless the sidewalks are a specifically Designated Area for Electioneering. Indeed, District Attorney Escobar testified that the loitering provision prohibits people from standing on a sidewalk even when they are not obstructing passage to a polling place in any way. *See* Dkt. 92-15 (District Attorney Omar Escobar Depo.) Tr. 202:21-203:3. Mr. Escobar belies Defendants' argument that the loitering provision requires a second "overt act" that saves it from its unconstitutionality.

G. The Property Use Policy is Overbroad and not Narrowly Tailored to a Significant Interest and, Therefore, Violates the First Amendment

1. The County incorrectly argues that the only public fora where a permit is required under the Policy are the Courthouse steps

The County argues the Property Use Policy is narrowly tailored by incorrectly stating that "[t]he only arguable public space which is subject to the permitting process [under the Property Use Policy] is the Courthouse steps." Dkt. 94 ¶ K. To support this claim, the County argues sidewalks, cemeteries, and parks are excluded from the permitting process, and no permits are required for use of the Courthouse lawns, citing Section (i)(d) of Attachment B to the Policy.

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importantly, the consequences of public loitering by gang members … Based on that evidence, the council made a series of findings that are included in the text of the ordinance and explain the reasons for its enactment." *Id.* at 46. Starr County did no such thing before enacting the Policy or the Regulations.

Dkt. 92-3 (Ex. 1-B) Policy, Attach. B §(i)(d) ("The Courthouse greens are available at all times for public use . . . ."). However, Defendants conveniently ignore that the Policy also states that areas "surrounding" county buildings require a permit for public use, and even though the Policy states Courthouse grounds are available for public use, it further states that "[g]roups or individuals who desire authorization to use the courthouse or grounds shall complete a Starr County Courthouse Public Use Request form" and pay a deposit. *Id*. § §§ 3(a)-(b); *id*., Attach. B § (xii); Dkt. 92-14 (County Judge Vera Depo.) Tr. 102:23-103:4 (testifying for Starr County that grassy areas at the Courthouse are part of the Courthouse grounds).[6]

Moreover, the County's argument does not address other "surrounding" areas of county buildings which are subject to the permitting process and that do not fall under the definition of "Public Spaces" under the Policy, such as the grassy areas of the Courthouse Annex. *See* Dkt. 92-3 (Ex. 1-B) (Policy) §§ 3(a)-(b) (specifying Policy's permitting process apply to "structures *and surrounding property* belonging to Starr County") (emphasis added); Dkt. 92-14 (County Judge Vera Depo.) Tr. 97:19-24 (agreeing Policy regulates not just use of six listed buildings but also green areas surrounding those properties); *id*. Tr. 102:23-103:2, 108:1-18 (agreeing use of grassy areas such as Courthouse Annex lawns require a permit).

Finally, the County argues it can restrict use of the Courthouse steps because of "safety concerns," since this area "is used for ingress or egress." Dkt. 94 ¶ K. However, the County

[6] The County also points to brief testimony from County Judge Vera during Mr. Fonseca's examination. *See* Dkt. 94 ¶ M; Dkt. 94-1 (Ex. 1) p. 119. After Judge Vera had testified that permits are required to use the Courthouse lawns, the parties took a break, and Mr. Fonseca proceeded to examine the County Judge after the break. During Mr. Fonseca's examination, Mr. Fonseca pointed County Judge Vera to Section (i)(d) of Attachment B of the Policy and asked Mr. Vera if permits are required to use the courthouse greens. Dkt. 94-1 (Ex. 1) p. 119. County Judge Vera said "[a]pparently not." *Id*. Defendants conveniently exclude Plaintiffs' subsequent questioning of County Judge Vera, where Judge Vera agreed that a different provision in the Policy states that if people want to use the Courthouse greens for a particular purpose, they have to request a permit. *See* Ex. 1 (County Judge Vera Depo.) Tr. 122:21-123:14.

offers no evidence that there have been any safety issues related to use of the Courthouse steps. Even if such problem existed, the hefty permit application requirements are not narrowly tailored because they apply equally to all uses—e.g., they apply to a single individual who wishes to use the steps to recite the Constitution in the same manner as they apply to a large group of people who seek to assemble on the steps for a gun control rally. The Policy is also overbroad because it applies on every day of the year and at all times, and requires a permit to use the steps on county holidays and after business hours, when the courthouse is closed and presumably no ingress or egress occurs.

2. Defendants incorrectly argue the Policy is narrowly tailored, even when they admit that the County could have adopted a narrowed policy to achieve the same purported government interest

Defendants suggest that Plaintiffs incorrectly argue that some Commissioners were targeted in the Policy's adoption because the Commissioners' Court excluded some properties—such as the Salineño Community Center and Abel Gonzalez Community Center—from the Policy's permit application requirement. *See* Dkt. 94 ¶ N. At the same time, however, Defendants continue to fail to explain why the Commissioners' Court excluded properties such as these if the County's aim was truly to ensure that the County leased buildings in a uniform fashion, as Defendants claim. *See* Dkt. 92-1 at 30. In their response, Defendants now assert—without any evidence supporting such assertion—that they excluded the Salineño Community Center and Abel Gonzalez Community Center from the Policy because the County regularly uses these spaces for senior citizens. *See* Dkt. 94, p. 10 ¶ N. Because Defendants fail to cite to any evidence in support of this statement, the Court should disregard this unsupported claim.

Without citing any legal authority, Defendants claim as irrelevant the fact that the Commissioners admitted they could have drafted and adopted a narrower Policy. *See* Dkt. 94 ¶

Q. Contrary to Defendants' claim, however, case law dictates that this fact is highly relevant to the narrow tailoring prong of a First Amendment analysis. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."); *Schirmer v. Edwards*, 2 F.3d 117, 120 (5th Cir. 1993) (electioneering restriction of 600-feet was narrowly tailored to serve government's interest in protecting citizens' right to vote freely but only where government had tried less restrictive alternative that was unsuccessful); *Reeves v. McConn*, 631 F.2d 377, 388 (5th Cir. 1980) ("When First Amendment freedoms are involved, the city may protect its legitimate interests only with precision."). Accordingly, the County's Policy is not narrowly tailored and is therefore unconstitutional.

H. The Property Use Policy is Unconstitutionally Vague

Defendants insist that the Policy's lack of a penalty provision does not render the Policy unconstitutional because the Policy is not a criminal statute. *See* Dkt. 94 ¶ R. The void for vagueness doctrine, however, applies to civil statutes as well. *See, e.g.*, *Sessions v. Dimaya*, 138 S.Ct. 1204, 1213 (2018) (applying the void for vagueness doctrine in the context of the Immigration and Nationality Act, a civil statute); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) (applying the void for vagueness doctrine in the context of a civil city ordinance, explaining the doctrine applies if the statute in question reaches constitutionally-protected conduct).

Moreover, the Policy implicates a criminal penalty but fails to define the actual penalty. *See* Dkt. 92-3 (Ex. 1-B) Policy § 9(a) (stating only that the County may "prosecute any and all violators to the fullest extent of the law."); Dkt. 92-9 (County Attorney Canales Depo.) Tr. 45:10-18 (testifying violation of the Policy could constitute trespass).

Defendants try to dodge the issue of defining a specific penalty at all, claiming that violators may "simply be denied access to County property." *See* Dkt. 94 ¶ R. The County's argument is contradicted by the plain text of the Policy, which states the County "has the right to have persons violating any provisions removed from the premises *and* to prosecute any and all violators to the fullest extent of the law." *See* Dkt. 92-3 (Ex. 1-B) (Policy) § 9(a). In addition, by making this argument, Defendants merely acknowledge that the Policy leaves enforcement of its unspecified punishment to the unfettered discretion of government authorities, including Defendant County Attorney Canales. *See* Dkt. 92-9 (County Attorney Canales Depo.) Tr. 104:1-3 ("I'm the one who has a discretion as to what I'm going to do with the case as representative of the state."). The fact remains, however, that the Policy reserves the right for the County to prosecute violators "to the fullest extent of the law," which includes criminal penalties. *See* Dkt. 92-3 (Ex. 1-B) (Policy) § 9(a).

Indeed, the phrase that the County may "prosecute any and all violators to the fullest extent of the law" is itself vague, as the Policy neglects to define it. *See generally id*. For this reason, too, the Policy is unconstitutionally vague.

Finally, Defendants claim that the Policy is clear as to what conduct is permitted and prohibited on county properties beyond the six properties listed in Attachment A to the Policy. *See* Dkt. 94 ¶ S. The portion of the Policy that Defendants cite, however, references only the regulations for property use on the six listed properties, and *not* rules regarding use on all other county properties. *See* Dkt. 92-3 (Ex. 1-B) (Policy) § 3(c), 9. This statement fails to address the argument Plaintiffs put forth, *see* Dkt. 92-1 at 28, and is therefore irrelevant.

II. CONCLUSION

For all these reasons, Plaintiffs respectfully request that their motion for summary judgment be granted, and Defendants' motion for summary judgment be denied in its entirety.

Dated: April 26, 2019

Respectfully Submitted

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on April 26, 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

Exhibit 1

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going back over the Provision of Policy?

A. Yes.

Q. I'm going to ask you a couple of questions about the policy. I'll work in reverse order. Mr. Fonseca asked you a moment ago about the Starr County courthouse grounds, okay? With respect to permitting I'd like you to turn to page 11 with me if you would?

A. Okay.

Q. All right. There is a paragraph with little Roman Numerals XII and it has a title public use request.

A. Yes, ma'am.

Q. Do you see that there?

A. Yes, ma'am.

Q. Tell me if I'm reading this correctly, quote, groups or individuals who desire authorization to use the courthouse or grounds shall complete a Starr County courthouse public use request form, unquote?

A. Uh-huh.

Q. Did I read that correctly?

A. Yes, ma'am.

Q. Do you understand from that provision that if folks wanted to use the courthouse grounds for a particular purpose that they would have to fill out a public use request form?

A. Yes, ma'am.

Q. And so in fact if people wanted to use the courthouse grounds the they would have to fill out a permit wouldn't they?

A. Well, I think this is contradictory to the other one, to the green so I don't know if they would require or not. I would have to get legal advice.

Q. But it's not obvious to you from the face of the policy which rule applies?

A. No, because they're the same policy, you know, if one supercedes the other one it'd be a different story, but they're in the same policy so...

Q. Okay. So sitting here today, you're not able to tell me whether one needs to get a permit to use the courthouse grounds?

A. Sitting here today if you were to in and say, hey can I use the courthouse grounds I would have to tell you let me get in legal advice.

Q. Another question I have for you is you talked to Mr. Fonseca at the very beginning about the language in the policy about public spaces. Let me find out.

MR. FONSECA: Page 7.

MS. PERALES: Thank you. All right. Turn to page 7, if you would, with where you were discussing with Mr. Fonseca --

A. Uh-huh.