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' MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Plaintiffs Hilda Gonzalez Garza, *et al.* ("Plaintiffs") respectfully move for summary judgment on all their claims against all named Defendants.

In support of this Motion, Plaintiffs rely upon and incorporate herein their Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, including attached declarations and exhibits, and Plaintiffs' proposed order granting the requested relief, which Plaintiffs contemporaneously filed with the Court today. Plaintiffs also incorporate herein their previously filed Emergency Applications for Temporary Restraining Order, *see* Dkt. Nos. 4 and 36, including attached declarations and exhibits, and all other exhibits and declarations already filed by the parties with the Court.

Dated: March 29, 2019

Respectfully Submitted

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on March 29, 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

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs Hilda Gonzalez Garza, Rosbell Barrera, and Mario Mascorro Jr. ("Plaintiffs") respectfully submit this Memorandum of Law in Support of Their Motion for Summary Judgment and request that the Court grant summary judgment in their favor.

Summary judgment in favor of Plaintiffs is warranted because there is no genuine issue of material fact that:

- The Starr County Electioneering Regulations, which regulate only political speech, are a content-based regulation of protected political speech and violate the First Amendment to the U.S. Constitution.
- The number of impermissible applications of the Electioneering Regulations is substantial when judged in relation to its plainly legitimate sweep and, therefore, the Electioneering Regulations are unconstitutionally overbroad in violation of the First Amendment to the U.S. Constitution.
- The Starr County Building and Property Use Policy's restrictions on speech of persons under the age of 21 violate the Equal Protection Clause of the Fourteenth Amendment.
- The Property Use Policy is facially overbroad and not narrowly tailored to serve the County's purported interests in regulating parking lots and social halls; therefore, it violates the First Amendment to the U.S. Constitution.
- The Property Use Policy is a prior restraint on speech that encourages viewpoint discrimination in violation of the First Amendment to the U.S. Constitution.
- Neither the Electioneering Regulations nor the Property Use Policy provides Plaintiffs sufficient notice of what conduct is punishable, and they encourage arbitrary enforcement; therefore, they are unconstitutionally vague under the First Amendment to the U.S. Constitution.
- The Electioneering Regulations and Property Use Policy violate the Texas Election Code because they prohibit electioneering outside the 100-foot buffer zone established by state law and are not reasonable time, place and manner restrictions of speech.

For these reasons and the reasons more fully set forth below, Plaintiffs respectfully request that the Court grant their motion and find that (1) the Electioneering Regulations and Property Use Policy are unconstitutional under the First Amendment to the U.S. Constitution, (2) the Property Use Policy violates the Equal Protection Clause of the Fourteenth Amendment to

the U.S. Constitution, and (3) the Electioneering Regulations and Property Use Policy violate Section 61.003(a-1) of the Texas Election Code.

FACTUAL BACKGROUND

Two months before the March 2018 primary elections, the Starr County Commissioners' Court enacted a sweeping ban on electioneering on Starr County property. *See* Dkt. 4-2. Subsequently, in February 2018, the County adopted a Building and Property Use Policy and incorporated the electioneering ban into that new policy. *See* Dkt. 4-3 at 7, § 12. Since that time, and as a result of this litigation, the County has made piecemeal revisions to its policies. *See* Dkt. 36-2 (Exs. A-1, A-2, A-8). The Starr County Commissioners' Court adopted the latest versions of the Property Use Policy and Electioneering Regulations on June 25, 2018. Ex. 1-A; Ex. 1-B. Despite the revisions, the County's policies remain unconstitutional.

I. The Electioneering Regulations, a Content-Specific Restriction of Speech

A. The Electioneering Regulations Significantly Limit Electioneering on County Property

The current version of the Electioneering Regulations prohibits Plaintiffs from electioneering in a substantial number of public fora, including county lawns, parks, and sidewalks.

The Electioneering Regulations apply to all county property "used as polling locations during a voting period." Ex. 1-A (Electioneering Regulations) § 1(b); *see* Ex. 12 (County Judge Vera Depo.) Tr. 50:23-52:1 (testifying Electioneering Regulations apply to all polling locations designated as such by the County); Ex. 13 (District Attorney Escobar Depo.) Tr. 114:6-11 ("The Electioneering Regulations apply to all county properties that are being used for polling locations.").

The Electioneering Regulations create "Designated Areas for Electioneering" where Plaintiffs and other members of the public may electioneer. Ex. 1-A (Electioneering Regulations) § 2(b). Those "Designated Areas for Electioneering" are shown in green highlighting in maps attached to the Electioneering Regulations. *Id*., Ex. A

Electioneering is prohibited in all other areas of county-owned polling places. At the Commissioners Court meeting in which the County adopted the Electioneering Regulations, County Attorney Victor Canales explained that the Regulations prohibit electioneering "everywhere you do not see the green" highlighting in the maps attached to the Electioneering Regulations. *See* Ex. 12 (County Judge Vera Depo.) Tr. 68:6-70:21 ("[I]f you look at the exhibits that are attached, the photographs, we have provided areas in which electioneering will be permitted . . . The green areas that you see there are where electioneering is permitted . . . It is prohibited everywhere you do not see the green."). When testifying on behalf of the County, County Judge Vera 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 . . . ."); *id*. 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.").

Only four county polling places (El Cenizo, La Rosita, the County Courthouse, and La Victoria) contain Designated Areas for Electioneering. *See* Ex. 1-A (Electioneering Regulations), Ex. A. The County did not designate any areas for electioneering in the remaining county-owned properties that are used as polling places, such as the Salineno community center and the Abel Gonzalez community center. *Compare id*. *with* Dkt. 4-4 (Ex. C-1) (3-6-18 notice of election) *and* Ex. 2-A (11-6-18 notice of election); *see also* Ex. 12 (County Judge Vera Depo.)

Tr. 54:6-10 (testifying Electioneering Regulations do not provide any designated electioneering areas in those polling places that are not listed in Exhibit A to the Electioneering Regulations); Ex. 7 (County Attorney Canales Depo.) Tr. 100:15-24 (same).

Even as to the four county polling places that do have Designated Areas for Electioneering, electioneering is either very limited or prohibited. For example, the County designates only two sidewalks at the Starr County Courthouse as areas for electioneering. *See* Ex. 1-A (Electioneering Regulations), Ex. A. La Victoria does not include any Designated Areas for Electioneering. *Id.* At El Cenizo, the County did not designate any County-owned property for electioneering and only designated sidewalks it does not own as Designated Areas for Electioneering. *Id.*; Ex. 1-E (Starr County property list) (showing Starr County does not own sidewalks at El Cenizo); Ex. 6 (Commissioner Garza Depo.) Tr. 47:3-6 (testifying land designated by County is owned by the State of Texas).

It is also unlawful, in Designated Areas for Electioneering, for persons to hold up signs that measure more than 2ft. x 2ft. Ex. 1-A (Electioneering Regulations) § 4(g). The Electioneering Regulations also make it unlawful to "loiter," including while electioneering, on county sidewalks or to engage in electioneering activities in county property that "distract" drivers. *See id.* §§ 4(f), (l). Neither of these terms is defined in the Electioneering Regulations.

B. Defendants Adopted the Electioneering Regulations in Response to Increased Political Opposition in Starr County

1. Defendants admitted they enacted the Electioneering Regulations due to the unprecedented number of contested races

Defendants admitted during their depositions that the County's Electioneering Regulations were politically motivated. Commissioner Eloy Garza testified that he had "no doubt" that the County's Electioneering Regulations were "100 percent" politically motivated.

See Ex. 6 (Commissioner Garza Depo.) Tr. 77:18-25. Defendant District Attorney Escobar, who conceived of and authored the Electioneering Regulations, unequivocally admitted that he pushed for the policy because he anticipated a number of contested races in the March 2018 Democratic Primary election, and he intended the resolution to be an enforceable regulation. *See* Ex. 13 (District Attorney Escobar Depo.) Tr. 96:23-98:10 ("[I]t was becoming clear that there was going to be a lot of contested races, probably more contested races than in the past 20, 30 years . . . I wasn't sure as to how we would go about enforcing, like, getting people, like, who's going to enforce it . . . ."); *see also* Ex. 7 (County Attorney Canales Depo.) Tr. 54:8-57:10 (testifying that policies were born out of conversations between County Attorney and District Attorney "because of the unprecedented election cycle we were about to go through.").[1]

Defendant County Attorney Canales similarly admitted that the County cherry-picked polling places with high voter turnout to be included in the Electioneering Regulations. Ex. 7 (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 yield the largest amount of votes).

Prior to presenting the electioneering policy to the Starr County Commissioners' Court, Defendant District Attorney Escobar had never before presented a resolution or policy to that body. *See* Ex. 13 (District Attorney Escobar Depo.) Tr. 101:25-102:6. Similarly, in his more than 14 years of service as County Attorney, Mr. Canales has not proposed a new regulation to

[1] Defendant District Attorney Escobar testified that the County's policies were his idea, and he presented the policies to Commissioners' Court. *See* Ex. 13 (District Attorney Escobar Depo.) Tr. 96:12-22 ("Q: Would it be correct to say, then, that you came up with the electioneering resolution and brought it to Mr. Canales? A: Right. It would be fair to say that . . . I'm the one that had the idea about it."); *see also* Ex. 7 (County Attorney Canales Depo.) Tr. 54:8-57:10 (testifying that Defendant Escobar initiated the conversation); *id*. Tr. 95:3-6 (testifying Defendant Canales made mostly stylistic changes).

Commissioners' Court on his own initiative, except for a law related to dog leashes. Ex. 7 (County Attorney Canales Depo.) Tr. 52:12-25.

The Electioneering Regulations and Policy accompanied additional measures adopted by Starr County to limit interaction between voters and candidates in the March 2018 primary election. For example, the County limited Saturday voting to the Courthouse only for the 2018 primary election. Ex. 3 (L. Garza-Galvan Decl.) ¶ 17. Many registered voters in Starr County are only able to vote on Saturdays, because that is the day they do not have to work. *Id.* By limiting Saturday voting exclusively to the Courthouse polling location, located in Rio Grande City, Starr County officials made it much more difficult for people from more rural areas of the County to vote. *Id.* The County also chose not to use certain voting locations for early voting, such as La Victoria Community Center, which had traditionally been used as polling locations in the past. *Id.* ¶ 18.

2. <u>There was an unprecedented number of contested races in Starr County in 2018</u>

Most of the individual Defendants are elected officials in Starr County who have held their positions for many years or even decades. *See* Ex. 6 (Commissioner Garza Depo.) Tr. 12:3-19 (County Commissioner since 1984); Ex. 12 (County Judge Vera Depo.) Tr. 17:5-17 (County Judge since 1999); Ex. 7 (County Attorney Canales Depo.) Tr. 12:8-14 (County Attorney since 2005); Ex. 13 (District Attorney Escobar Depo.) Tr. 5:18-20 (District Attorney since 2013); Ex. 8 (Sheriff Fuentes Depo.) Tr. 4:24-5:1, 9:18-21 (Sheriff since 2008); Ex. 9 (Commissioner Alvarez Depo) Tr. 9:13-10:14 (in elected office since 1990).

Prior to 2018, the individual Defendants often ran in uncontested races in both March and November elections. *See* Ex. 1-C (2008-2018 election results); Ex. 3 (L. Garza-Galvan Decl.) ¶ 4.[2] When some of them occasionally faced an opponent, they safely won their elections. *Id.*

The March 2018 primary elections were different. After safely holding his seat since 1999, Defendant County Judge Eloy Vera faced a well-funded and competitive challenger, Leticia Garza-Galvan, a speech pathologist and school board member. Ex. 3 (L. Garza-Galvan Decl.) ¶¶ 2-8. Ms. Garza-Galvan publicly announced her campaign in September 2017 and gathered significant support in the Starr County community. *Id.* ¶ 6. She registered as a candidate in December of that year. *Id.* ¶ 3. By the time Defendants adopted the Policy and Electioneering Regulations, in January 2018, Ms. Garza-Galvan had been actively campaigning for months. Her campaign had posted dozens of political signs across the County, and she had enlisted tens of volunteers, ran advertisements in local newspapers, and had blockwalked throughout the County. *Id.* ¶ 6. Ms. Garza-Galvan personally told Defendant County Attorney Escobar that she was running for County Judge on or about September 2017. *Id.* Similarly, County Judge Vera saw and shook hands with Ms. Garza-Galvan while she wore her campaign shirt for County Judge on or about September 2017, well before the County adopted its Electioneering Regulations and Property Use Policy. *Id.* Ultimately, Ms. Garza-Galvan lost her primary race by less than 1% of the vote. *Id.* ¶ 8. This close race resulted in an election contest in which Defendant County Judge Vera ultimately prevailed. *Id.*

[2] The exception to this general rule is County Commissioner Javier Alvarez, who in the 2016 March primary secured 48% of the vote but nonetheless faced a primary runoff as a result of multiple people running in that race. *See* Ex. 1-C (2008-2018 election results). Ultimately, Commissioner Alvarez won the primary runoff by a landslide with 61.75% of the vote, and he did not face a challenger in the November election. *Id.*

In addition, the 2018 Democratic primary race for 229th District Judge between Baldemar Garza and Martie Garcia Vela was an extremely close one; after a recount, it was determined that Martie Garcia Vela lost by 106 votes in a race in which more than 12,000 people voted. *Id*. ¶ 10; Ex. 1-C (2008-2018 election results). This race, too, resulted in an election contest, in which Mr. Garza ultimately prevailed. Ex. 3 (L. Garza-Galvan Decl.) ¶ 10.

Defendant District Attorney Escobar was an outspoken supporter of Defendant County Judge Vera and Baldemar Garza, while Leticia Garza-Galvan and Martie Garcia Vela joined forces in their campaign efforts. *Id*. ¶ 9; Ex. 2 (H. Garza Decl.) ¶ 8; Ex. 5 (R. Barrera Decl.) ¶ 6.

II. The Building and Property Use Policy

A. The Property Use Policy Limits Plaintiffs from Using County Property for Free Speech Activities and Imposes Burdensome Requirements

The Property Use Policy prohibits all persons from speaking or assembling on county property on holidays, including Election Day and Memorial Day, at six identified county properties: the County Courthouse, the Starr County Fairgrounds, El Cenizo Park Community Center, La Rosita Library, the Starr County Annex Conference Room, and La Victoria-Zarate Park Community Center. Ex. 1-B (Policy) § 3(e); *see* Dkt. 36-2 (Ex. A-3) (listing county holidays). In addition, the Policy does not allow individuals under the age of 21, including Plaintiff Mascorro, to use these six county properties any day of the year for speech or assembly activities. Ex. 1-B (Policy) § 6(d).

For individuals over the age of 21, the Property Use Policy allows use of those six county properties on any day of the year that is not a county holiday; however, the Policy requires these individuals to undergo a burdensome permit application process: individuals must submit their applications to Defendant County Judge Eloy Vera no less than 30 days before the intended use, state the purpose for which the county property will be used, sign a release of liability, have the

applicant's signature notarized by a Texas notary public, and pay after-hour fees of $25.00 per hour and a $50.00 deposit, which "may" be refunded at the discretion of the County. *Id*. §§ 6(b)-(c), 8(a)-(b); Ex. 2-A (Request Form for Use of Starr County Facilities). To use the County Courthouse or its lawns, Plaintiffs must pay a deposit of up to $1,000.00 at the discretion of Defendant County Judge Eloy Vera. Ex. 1-B (Policy) § 8(b).

The Policy's ban on speech on county holidays and permit application requirements apply not just to the buildings on those six properties, but also to "surrounding property" and "grounds" adjacent to those buildings, including grassy areas such as the lawns of the County Courthouse and Courthouse Annex and the steps of the County Courthouse. *See id*. §§ 3(a)-(b) (specifying Policy's restrictions on the six county properties apply to "structures *and surrounding property* belonging to Starr County") (emphasis added); *id*., Attach. B § (xii) ("[I]ndividuals who desire authorization to use the courthouse *or grounds* shall complete [a permit application].") (emphasis added); *see also id*. § 12 (carving out exceptions to the permit application requirements only as to county "parks," "sidewalks," "cemeteries," and "memorials").

Defendant County officials testified that individuals would have to secure a permit to speak or assemble on the County Courthouse steps. *See, e.g.*, Ex. 6 (Commissioner Garza Depo.) Tr. 70:3-8 (agreeing use of Courthouse steps require a permit); Ex. 12 (County Judge Vera Depo.) Tr. 108:8-11 (same). Similarly, County officials testified that Plaintiffs and members of the public need to secure a permit to speak in grassy areas on county property, such as the lawns of the Courthouse and Courthouse Annex. *See, e.g.*, Ex. 12 (County Judge Vera Depo.) Tr. 102:23-103:2, 108:12-18 (agreeing use of Courthouse Annex lawns and Courthouse

grassy areas require a permit); Ex. 6 (Commissioner Garza Depo.) Tr. 72:4-7 (agreeing use of Courthouse lawns require a permit).

Whether or not Starr County grants a permit to an individual is left to the unfettered discretion of the County Commissioners' Court and Defendant County Judge Eloy Vera. *See* Ex. 1-B (Policy) § 6(a). The Property Use Policy contains no procedures or standards that guide: when the County refunds a deposit; how the County assesses the deposit amount for use of the Courthouse grounds; when the County waives fees or how an applicant can even apply for such a waiver; under what circumstances the County will require an applicant to pay for a peace officer; and under what circumstances the County will exercise its discretion to waive or modify the Property Use Policy requirements. The Property Use Policy does not provide any criteria to guide or constrain the County Judge's discretion in deciding whether to approve an application, how much to charge for a deposit, when to waive a fee, when to refund a deposit, or when to waive any of the policy requirements. Ex. 12 (County Judge Vera Depo.) Tr. 107:8-14, 112:23-25, 113:7-10, 115:2-9.

Although the Policy prescribes that violators of the Policy will be "prosecute[d] . . . to the fullest extent of the law," it does not create any specific offense for violating the policy. Ex. 1-B (Policy) § 9(a); Ex. 13 (District Attorney Escobar Depo.) Tr. 185:11-15.

B. The County's Property Use Policy is not Narrowly Tailored to the County's Expressed Purposes

Despite the broad scope of the Policy, Defendant District Attorney Escobar testified that the Policy came to fruition to serve a much narrower purpose: to regulate the use of parking lots. Ex. 13 (District Attorney Escobar Depo.) Tr. 162:12-163:16 (testifying that the Policy was his idea, and the Policy came to fruition after he looked outside his office window at the County Courthouse, saw a cattle trailer parked at the parking lot of the Courthouse, and wondered:

"what keeps a person from parking a cattle trailer in our parking lot . . . what keeps me from doing that?"). Defendant Escobar also claimed that he became concerned upon hearing that a County Commissioner had rented out a community center in his precinct to the Rio Grande City school district. *Id*. Tr. 163:17-23; *see also* Ex. 12 (County Judge Vera Depo.) Tr. 93:2-10 (testifying that Policy came into existence because previously "buildings owned by the county were pretty much used at the discretion of each commissioner."); Ex. 9 (Commissioner Alvarez Depo.) Tr. 76:6-22 (testifying concerns were over the ways in which county officials granted permission to use county buildings for private events like quinceañeras, weddings, and birthday parties). According to Defendant Escobar, in an effort to address these concerns, he drafted and presented the Policy to Commissioners' Court. Ex. 13 (District Attorney Escobar Depo.) Tr. 159:18-160:11. The original version of the Policy expressly incorporated the electioneering ban on all county property. *See* Dkt. 4-3 at 7, § 12.

III. The County has Arbitrarily Enforced the Electioneering and Property Use Policy

It is undisputed that the County has not provided any training or guidance to law enforcement on the Electioneering Regulations or Property Use Policy since the policies were originally adopted over a year ago in January 2018. *See* Ex. 12 (County Judge Vera Depo.) Tr. 116:4-11; Ex. 8 (Sheriff Fuentes Depo.) Tr. 52:8-17, 57:17-21; *see also* Dkt. 76-2 at 7 ("There have been no 'trainings' but the policies are readily available to law enforcement."). In fact, Defendant Sheriff Fuentes testified that, prior to his deposition in January 2019, he had never even seen the Property Use Policy. Ex. 8 (Sheriff Fuentes Depo.) Tr. 69:22-70:7, 71:24-72:4, 81:7-16. County officials also did not inform Defendant Sheriff Fuentes of the Court's March 2018 order enjoining certain provisions of the Property Use Policy. *Id*. Tr. 75:3-14. Defendants District Attorney Escobar and County Attorney Canales testified that the County has not

provided any training or guidance because there is no "final judgment" from this Court on the legality of the County's policies. Ex. 13 (District Attorney Escobar Depo.) Tr. 152:7-153:21; Ex. 7 (County Attorney Canales Depo.) Tr. 105:19-106:2.

Throughout the 15 months law enforcement has operated without any guidance, the County has arbitrarily enforced the Electioneering Regulations and Policy and chilled a substantial amount of constitutionally protected speech. For example, on Election Day in March 2018, a Starr County Sheriff's Deputy told residents electioneering on the grassy areas and sidewalks of the El Cenizo polling place to leave the property, despite this Court's temporary restraining order. Dkt. 36-2 at 7 ¶ 26. Starr County Sheriff Sergeant Armando Treviño advised the Sheriff's Deputy that no one was permitted to electioneer at El Cenizo, no one informed the Sheriff's Deputy of the Court's order restraining the County from prohibiting electioneering in grassy areas. *Id*. Most recently, during the 2018 November elections, the County arbitrarily enforced its policies by allowing some candidates but not others to place campaign signs in grassy areas of county property. Ex. 2 (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 candidate running in Rio Grande City CISD School Board election to remove her signs from the same grassy area at the Courthouse).

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he mere existence of some factual dispute will not defeat a motion for summary judgment; Rule 56 requires that the

fact dispute be genuine and material." *Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313, 315 (5th Cir. 1995).

"If the party moving for summary judgment demonstrates the absence of a genuine issue of material fact 'the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.'" *Barousse v. Paper Allied-Indus., Chem. & Energy Workers Int'l Union*, 265 F.3d 1059 (5th Cir. 2001) (internal quotation marks and citations omitted). "[A] dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (internal citations omitted). "The burden of demonstrating the existence of a genuine issue is not met by 'metaphysical doubt' or 'unsubstantiated assertions.'" *Id.* (citations omitted). Instead, the Court resolves factual disputes in favor of the nonmoving party "only when there is an actual controversy, that is, when both parties have submitted evidence of contrary facts." *Id.*

ARGUMENT

I. The Electioneering Regulations are Content-Based Restrictions of Protected Speech That Were not Adopted to Further a Compelling Government Interest

Defendants do not dispute that the Electioneering Regulations are a content-based regulation of protected speech. *See, e.g.*, Ex. 12 (County Judge Vera Depo.) Tr. 48:15-50:13 (testifying regulations apply to electioneering but do not apply to other types of speech, such as artistic and religious expressions, charitable fundraising for veterans, and commercial speech); Ex. 13 (District Attorney Escobar Depo.) Tr. 112:2-114:5 (same); Ex. 6 (Commissioner Garza Depo.) Tr. 34:22-35:1, 35:10-37:11 (same); Ex. 10 (Commissioner Saenz Depo.) Tr. 21:15-23:24 (same); Ex. 7 (County Attorney Canales Depo.) Tr. 96:23-99:22 (same); Ex. 9 (Commissioner Alvarez Depo.) Tr. 51:22-53:25 (same). Content-based regulations are presumptively unconstitutional and subject to strict scrutiny. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct.

2218, 2226 (2015). The County bears the burden of showing that the regulation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Defendants admit the Electioneering Regulations were motivated by a desire to limit political activity during voting. As a result, Defendants cannot demonstrate a genuine nexus between the Electioneering Regulations and a compelling interest. *See* Ex. 13 (District Attorney Escobar Depo.) Tr. 96:23-98:10 (testifying the Electioneering Regulations were adopted because "it was becoming clear that there was going to be a lot of contested races, probably more contested races than in the past 20, 30 years . . . ."); Ex. 7 (County Attorney Canales Depo.) Tr. 54:8-57:10 (testifying that Electioneering Regulations were born out of conversations between County Attorney and District Attorney "because of the unprecedented election cycle we were about to go through."); *id*. 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 is where most people vote and which yield the largest amount of votes); *see also* Ex. 9 (Commissioner Alvarez Depo.) Tr. 33:2-13 ("Q . . . what would have been your solution to your concerns at the county courthouse? . . . A . . . I wish I would have been the only candidate without [opposition]."); Ex. 6 (Commissioner Garza Depo.) Tr. 77:18-25 (testifying there is "no doubt" the electioneering policies were "100 percent" politically motivated).[3]

[3] Defendant District Attorney Escobar, who authored and pushed for the Electioneering Regulations, was an outspoken supporter of County Judge Vera and Baldemar Garza. Ex. 3 (L. Garza-Galvan Decl.) ¶ 9; Ex. 2 (H. Garza Decl.) ¶ 8; Ex. 5 (R. Barrera Decl.) ¶ 6. Mr. Escobar's involvement is particularly suspect given he (1) is the District Attorney for three counties but only pushed for the regulation in Starr County, (2) is not a policymaker in Starr County, and (3) had never presented a resolution or policy to the Starr County Commissioners' Court before. *See* Ex. 13 (District Attorney Escobar Depo.) Tr. 101:25-102:6.

Defendants further testified that their goal in enacting the Electioneering Regulations was to limit the ability of candidates and their supporters to communicate with voters entering the polling place. *See, e.g.*, Ex. 13 (District Attorney Escobar Depo.) Tr. 199:6-9 ("[T]the 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."). Because the Electioneering Regulations were not adopted to serve any compelling interest, they are unconstitutional and fail strict scrutiny review.

Even if Defendants could articulate a compelling interest (that was not pretextual), such as preventing campaigners from being struck by cars in the parking lot of the County Courthouse, the Electioneering Regulations do not serve that interest because they single out political speech, and exclude all other types of speech, for regulation. As a result, the Electioneering Regulations permit a high school marching band to perform in the Starr County Courthouse parking lot during the voting period (as long as the band does not perform in support of a candidate or ballot measure). The underbreadth of the Electioneering Regulations means that they do not serve a compelling interest such as maintaining public safety; therefore, the Electioneering Regulations cannot survive strict scrutiny. *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"); *Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 440 (5th Cir. 2014) ("Such obvious underinclusiveness undermines any argument that [the government] is truly interested in regulating [for that purpose]"). Finally, the Electioneering Regulations go far beyond regulating political activity in the Starr County Courthouse parking lot. As demonstrated below, the overbreadth of the Electioneering Regulations means that they are not narrowly

tailored to any compelling governmental interest and the Electioneering Regulations fail the strict scrutiny analysis.

II. The Electioneering Regulations are Unconstitutionally Overbroad and Vague

The Electioneering Regulations are also facially unconstitutional because they are overbroad and vague.

A law is unconstitutionally overbroad "if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (internal quotation marks and citations omitted); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 458-59 (1987) (holding that policies that "make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application."). The overbreadth doctrine responds to "the threat [that] enforcement of an overbroad law may deter or 'chill' constitutionally protected speech." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Because the Electioneering Regulations impose a criminal penalty, *see* Ex. 1-A (Electioneering Regulations) § 5(a), they "must be scrutinized with particular care." *City of Houston*, 482 U.S. at 459.

In addition to being unconstitutionally overbroad, the Electioneering Regulations are unconstitutionally vague. "[E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague [if] it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago*, 527 U.S. at 52. A regulation is void for vagueness unless it defines the unlawful conduct "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). As the Supreme Court recently underscored in *Minnesota Voters All. v. Mansky*, the discretion exercised by government officials

when enforcing a regulation governing free speech "must be guided by objective, workable standards." 138 S. Ct. 1876, 1881 (2018). Otherwise, the government official's "own politics may shape his views on what counts" as permissible under the regulation. *Id.* The void-for-vagueness doctrine is most rigorously applied in the context of criminal penalties or when the regulation touches on conduct protected by the First Amendment. *See Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. 1981); *see also Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 620 (1976) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.") (internal quotation marks and citations omitted). Because the Electioneering Regulations infringe on Plaintiffs' First Amendment rights and impose criminal penalties to those who violate them, the strictest standard of permissible vagueness applies.

A. The Electioneering Regulations Prohibit Electioneering in a Substantial Amount of Public Fora

The Electioneering Regulations are overbroad because they prohibit Plaintiffs from engaging in any electioneering activities in a substantial amount of public fora, and the Electioneering Regulations' impermissible applications are substantial when judged in relation to their plainly legitimate sweep. The County designated only a handful of areas at County-owned polling places where Plaintiffs can electioneer. *See* Ex. 1-A (Electioneering Regulations), Ex. A. Specifically, at all County-owned polling places, the only areas where Plaintiffs can electioneer are the east and west sidewalks of the Courthouse and a small strip of the parking lot at La Rosita. *Id.*[4] These designated areas are shown in light green highlighting in maps the County

[4] The County also designated a small grassy area at La Rosita as a Designated Area for Electioneering; however, that area sits next to the fire department, and the Electioneering

attached to the Electioneering Regulations as Exhibit A. *Id.* Under the Electioneering Regulations, electioneering is prohibited in all other areas of county property—including parks, sidewalks, and grassy areas. *See* Ex. 12 (County Judge Vera Depo.) Tr. 11:2-8, 68:6-70:21 (testifying as 30(b)(6) representative that electioneering "is prohibited everywhere you do not see the green"); *id.* 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.").

The Electioneering Regulations apply to all "[c]ounty property used as polling locations during a voting period." Ex. 1-A (Electioneering Regulations) § 1(b); *see* Ex. 12 (County Judge Vera Depo.) Tr. 50:23-52:1 (testifying Electioneering Regulations apply to all polling locations designated as such by the County); Ex. 13 (District Attorney Escobar Depo.) Tr. 114:6-11 ("The Electioneering Regulations apply to all county properties that are being used for polling locations."). However, the County designated no areas for electioneering at some polling places, such as the Salineno community center and the Abel Gonzalez community center. *See* Dkt. 4-4 (Ex. C-1) (3-6-18 notice of election); Ex. 2-B (11-6-18 notice of election); Ex. 12 (County Judge Vera Depo.) Tr. 54:6-10 (testifying Electioneering Regulations do not provide any designated electioneering areas in those polling places that are not listed in Exhibit A to the Electioneering Regulations); Ex. 7 (County Attorney Canales Depo.) Tr. 100:15-24 (same). As a result of the restrictions imposed by the Electioneering Regulations, there are many public areas at County polling places where Plaintiffs could, but are not allowed, to electioneer, including sidewalks at the County Courthouse and grassy areas at all the County properties.

Regulations do not permit Plaintiffs to electioneer "within fifteen (15) feet from the curb of any County fire station drive . . . ." *See* Ex. 1-A (Electioneering Regulations) § 4(i). The County also designated some areas at El Cenizo as areas for electioneering; however, these areas are not owned by the County. *See id.*, Ex. A; Ex. 1-E (Starr County property list) (showing Starr County does not own sidewalks at El Cenizo); Ex. 6 (Commissioner Garza Depo.) Tr. 47:3-6 (testifying land designated by the County is owned by the state of Texas).

Similarly, the Electioneering Regulations prohibit Plaintiffs from electioneering on some county properties even when they are not used as polling locations. For example, when the community centers at La Victoria and El Cenizo are not being used by the County as polling places, the County still bans electioneering there during the voting period. *See* Ex. 1-A (Electioneering Regulations) § 1(b) (stating the Electioneering Regulations apply to polling places identified in Exhibit A to the Regulations); *id*., Ex. A (showing maps of La Victoria and El Cenizo); Dkt. 4-4 (Ex. A-3) (showing La Victoria was not a polling place during March 2018 early voting period); Dkt. 36-2 (Ex. A-9) (showing neither La Victoria nor El Cenizo were polling places during May 2018 primary runoff election); Ex. 2-B (11-6-18 notice of election) (showing La Victoria was not a polling place during November 2018 early voting period); Ex. 9 (Commissioner Alvarez Depo.) Tr. 59:21-60:11 (testifying electioneering is prohibited at La Victoria even when no election is taking place there). Therefore, the Electioneering Regulations are overbroad because they ban Plaintiffs from engaging in campaign activities on those county properties even when those properties are not used as polling places.

The County's ban on electioneering in all these areas of county property lacks any nexus to a compelling interest, is plainly unconstitutional, and renders the Electioneering Regulations facially overbroad.

B. The Electioneering Regulations Prohibit "Distracting" Electioneering Activities and, Therefore, Sweep in a Large Amount of Protected Speech and do not Prescribe Objective, Workable Standards

Even where the Electioneering Regulations permit Plaintiffs to electioneer, the Electioneering Regulations make it unlawful to engage in electioneering activities that "distract" the attention of drivers. Ex. 1-A (Electioneering Regulations) § 4(l) ("It shall be unlawful for electioneering activities to distract the attention or obstruct the vision of drivers, ..."). The

Electioneering Regulations do not define what constitutes a distracting electioneering activity. Defendants testified that activities such as standing on a sidewalk and holding up a big political sign or holding up a sign asking drivers to honk if they voted for a particular candidate are prohibited by the Electioneering Regulations. *See* Ex. 7 (County Attorney Canales Depo.) Tr. 101:-21-102:14; Ex. 8 (Sheriff Fuentes Depo.) Tr. 53:14-54:3. This provision further renders the Electioneering Regulations facially overbroad because it reaches expressive activities that fall squarely within the protections of the First Amendment. Therefore, the Electioneering Regulations are overbroad even if they have some legitimate application.

In addition, the Electioneering Regulations allow law enforcement to engage in arbitrary and selective enforcement, and they subject Plaintiffs' right to speak and assemble peacefully to an unascertainable standard. Indeed, Defendants admit the provision on its face does not prescribe an objective, workable test. *See*, *e.g.*, Ex. 13 (District Attorney Escobar Depo.) Tr. 147:8-148:22 ("Q: How do we know under the Electioneering Regulations when something is distracting? A: Again, that's going to be Potter Stewart. Q: You know it when you see it? A: We're going to go back to Potter Steward 'I know it when I see it.' . . . ."); Ex. 7 (County Attorney Canales Depo.) Tr. 101:-21-102:14 (testifying that whether an electioneering activity is distracting is a "subjective" determination to be made by officers responding to a complaint); Ex. 12 (County Judge Vera Depo.) Tr. 78:21-79:16 (testifying that distracting electioneering activities are those that are "outside the norm around here" or "uncalled for."); Ex. 8 (Sheriff Fuentes Depo.) Tr. 54:11-24 (testifying Sheriff's office has no guidance on what constitutes "distracting" and officers have to use discretion on the ground to make that determination). The County has also not provided any written guidance or training to law enforcement on the Electioneering Regulations, either broadly or more specifically on Section 4(l). *See* Ex. 8

(Sheriff Fuentes Depo.) Tr. 54:11-13, 57:17-21. Therefore, the Electioneering Regulations are unconstitutionally vague. *See Coates v. City of Cincinnati*, 402 U.S. 611, 612-15 (1971) (striking down ordinance prohibiting conduct "annoying to persons passing by" as unconstitutionally vague, noting that "[t]he First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people.").

C. The Electioneering Regulations Prohibit "Loitering" in Public Fora and are Therefore Overbroad and Vague

The Electioneering Regulations also make it unlawful for any person to "loiter" on county sidewalks at County-owned polling places during voting. Ex. 1-A (Electioneering Regulations) § 4(f). Under the County's own interpretation of the Electioneering Regulations, this provision prohibits a substantial amount of conduct protected by the First Amendment, including peaceful leafletting and wearing campaign t-shirts. *See* Ex. 12 (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."); Ex. 13 (District Attorney Escobar Depo.) Tr. 201:22-202:11 (testifying that standing on a sidewalk with a political t-shirt constitutes loitering and is prohibited under the Electioneering Regulations). In addition, the Supreme Court has recognized that "the freedom to loiter for innocent purposes" is a liberty interest protected by the U.S. Constitution. *City of Chicago*, 527 U.S. at 53 (holding that the "right to remove from one place to another according to inclination," including standing on sidewalks, is "an attribute of personal liberty protected by the Constitution") (internal quotation marks and citations omitted); *id*. at 54 ("[I]t is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement

inside frontiers that is a part of our heritage"). Therefore, the Electioneering Regulations sweep in a substantial amount of constitutionally-protected conduct and are facially overbroad.

The loitering provision is also unconstitutionally vague. First, the Electioneering Regulations do not define the word "loiter." Second, Defendants' interpretations of the Electioneering Regulations do not provide sufficient parameters to the public or to law enforcement. *See, e.g.,* Ex. 7 (County Attorney Canales Depo.) Tr. 104:16-23 ("Q: What does the word 'loiter' mean to you? A: Hanging around without any rhyme or reason. Q: Okay. How long do you have to be hanging around before it turns into loitering as opposed to just enjoying the good weather on nice day? A: That's a great question. I don't have an answer."); Ex. 8 (Sheriff Fuentes Depo.) Tr. 52:8-13 (testifying that what constitutes loitering depends on the subjective judgment of law enforcement officers). Third, the County has not provided the Sheriff's office with any guidance or training on what constitutes "loitering" under the Electioneering Regulations. Ex. 8 (Sheriff Fuentes Depo.) Tr. 52:14-17; *see also id*. 57:17-21 (testifying Sheriff's office does not have any guidelines about how to enforce the Electioneering Regulations broadly speaking). Because the Electioneering Regulations are too vague for ordinary people to understand what conduct is prohibited, and because they encourage arbitrary and discriminatory enforcement, the Electioneering Regulations are also unconstitutionally vague.

III. The Property Use Policy Violates the Equal Protection Clause Because it Arbitrarily Infringes the Fundamental Right of Persons Under the age of 21 to Speak and Assemble Peaceably

It is undisputed that the Property Use Policy prohibits persons under the age of 21 from applying for a permit to use county property, *see* Ex. 1-B (Policy) § 6(d), and that this prevents Plaintiff Mascorro, who is under the age of 21, from using County property to speak and assemble peacefully, *see* Ex. 4 (M. Mascorro Decl.) ¶ 4. It is also undisputed that similarly

situated persons who are 21 years of age or older can apply for a permit to use county property. *Id*.

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

Defendants unequivocally testified that there is no justification, let alone a compelling interest, for the County's ban on the right to speak and assemble peacefully of persons under the age of 21. Defendant District Attorney Escobar admitted that the Policy's prohibition of use of county property by persons under the age of 21 was "arbitrary" and could easily have been a different age restriction. Ex. 13 (District Attorney Escobar Depo.) Tr. 181:20-182:20. Defendants also could not explain the inclusion of an age requirement in the Property Use Policy or identify a single problem or incident in Starr County associated with use of county property by people under the age of 21. *See* Ex. 7 (County Attorney Canales Depo.) Tr. 128:20-23; Ex. 13 (District Attorney Escobar Depo.) Tr. 181:11-19; Ex. 12 (County Judge Vera Depo.) Tr. 104:14-24; Ex. 8 (Sheriff Fuentes Depo.) Tr. 77:24-78:2; Ex. 10 (Commissioner Saenz Depo.) Tr. 53:21-24; Ex. 9 (Commissioner Alvarez Depo.) Tr. 82:17-23; Ex. 11 (Commissioner Peña Depo.) Tr. 103:5-8, 103:16-21. Therefore, there is no genuine issue of material fact that the Policy violates the Equal Protection Clause of the Fourteenth Amendment.

IV. The Property Use Policy Violates the First Amendment Because it is not Narrowly Tailored to Serve any Significant Government Interest and is Facially Overbroad

The Property Use Policy is also unconstitutional because it restricts Plaintiffs' First Amendment rights in traditional public fora in a manner that is overboard and not narrowly tailored to serve any significant government interest. When the government regulates First Amendment-protected speech and assembly in traditional public fora, even content-neutral restrictions must be narrowly drawn to achieve a significant government interest and the regulation must leave ample alternative channels of communication. *Perry Educ. Ass'n*, 460 U.S. at 45; *see also Justice For All v. Faulkner*, 410 F.3d 760, 769 (5th Cir. 2005). Similarly, a policy is facially overbroad "if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chicago*, 527 U.S. at 52.

The County adopted the Policy to address Defendant District Attorney Escobar's purported concerns about parked cattle trailers at the County Courthouse parking lot and variations in leasing practices of County Commissioners. Ex. 13 (District Attorney Escobar Depo.) Tr. 162:12-163:23; Ex. 12 (County Judge Vera Depo.) Tr. 93:2-10; Ex. 9 (Commissioner Alvarez Depo.) Tr. 76:6-22. To the extent these purported interests are genuine and significant,[5] the Property Use Policy is not narrowly tailored to serve them and is therefore unconstitutionally overbroad.

[5] Despite Defendant Escobar's testimony that these were the reasons why he pushed for the Policy, the timing of the Policy and the fact that the County expressly incorporated the electioneering ban into the original Policy belie Defendant Escobar's testimony and suggest the Policy was also adopted for political purposes and in an effort to silence political activity during the March 2018 primary elections. *See* Dkt. 4-3 at 7, § 12 ("The Starr County Electioneering policy . . . is hereby incorporated in this STARR COUNTY BUILDING AND PROPERTY USE POLICY for all purposes.").

First, the Policy goes well beyond the regulation of parking lots and county buildings, instead reaching a substantial amount of speech in additional public fora. On its face, the Property Use Policy requires individuals to apply for a permit to use County buildings and their "surrounding property" and "grounds," which include lawns and other grassy areas and open spaces such as the County Courthouse steps. *See* Ex. 1-B (Policy) §§ 3(a)-(b) (specifying Policy's restrictions on the six county properties apply to "structures *and surrounding property* belonging to Starr County") (emphasis added); *id*., Attach. B § (xii) ("[I]ndividuals who desire authorization to use the courthouse *or grounds* shall complete [a permit application].") (emphasis added); Ex. 6 (Commissioner Garza Depo.) Tr. 70:3-8, 72:4-7 (agreeing use of Courthouse steps and grassy areas require a permit); Ex. 12 (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 Courthouse Annex lawns and Courthouse steps and grassy areas require a permit); *see also* Ex. 1-B (Policy) § 12 (carving out exceptions to the permit application requirements only as to county "parks," "sidewalks," "cemeteries," and "memorials").

Second, the Policy imposes a burdensome application process with one-size-fits-all requirements that are applicable to all activities in six county properties listed in Attachment A to the Property Use Policy. For example, to speak or assemble at any of these properties, Plaintiffs must:

- pay a $50.00 deposit (or in the case of the Courthouse, a deposit of up to $1,000.00) that the County may or may not refund;
- state the purpose for which the county property will be used;
- sign a release of liability;
- have the signature notarized by a Texas notary public; and

- submit the permit application to Defendant County Judge Eloy Vera no less than 30 days before the intended use.

Ex. 1-B (Policy) §§ 6(b)-(c), 8(a)-(b); Ex. 2-A (Request Form for Use of Starr County Facilities). These requirements, in particular the required deposit and 30-day advance application, are significant and burdensome for the average Starr County resident and have a chilling effect on speech. *See* Ex. 12 (County Judge Vera Depo.) Tr. 17:20-18:3 (testifying that most people in Starr County are "humble people, low to moderate income, not highly educated."); Ex. 1-D (U.S. Census Quick Facts) (showing the Starr County median household income is $27,133); Ex. 2 (H. Garza Decl.) ¶ 10. Yet the County imposes these burdens regardless of the scope or nature of the regulated activity; for example, the requirements apply with equal force to a family wishing to rent a county building for a large quinceañera and to a single individual wishing to stand on the lawns of the County Courthouse Annex to hand out literature on preventing teen suicide.

The lack of nexus between the County's purported interests and the scope of the Policy is further highlighted by the fact that the County only chose to require a permit for use of six county properties: the County Courthouse, the Starr County Fairgrounds, El Cenizo Park Community Center, La Rosita Library, the County Courthouse Annex, and La Victoria-Zarate Park Community Center. *See* Ex. 1-B (Policy), Attach. A. The County owns other structures and facilities, including, for example, the Salineno Community Center and the Abel Gonzalez Community Center; however, it did not include those properties on its list of facilities available for reservation and for which a permit is required. *See* Ex. 1-E (Starr County property list); Ex. 1-B (Policy) § 3(b) ("Building and facilities that are excluded from Attachment A are not available for use by private citizens unless otherwise allowed under this Policy."); *see also* Ex. 6 (Commissioner Garza Depo.) Tr. 68:16-18 (testifying that the County targeted properties in one commissioner's precinct). The County also does not own one of the facilities for which it

requires a permit to use: the Starr County Fairgrounds. Ex. 12 (County Judge Vera Depo.) Tr. 95:1-4; Ex. 6 (Commissioner Garza Depo.) Tr. 67:11-13. When testifying on behalf of the County, Defendant County Judge Vera explained that for any building the County did not list, Plaintiffs would just need to follow "prior practice" and ask individual county commissioners for permission to use the property. Ex. 12 (County Judge Vera Depo.) Tr. 10:23-11:8, 100:24-101:7. The underinclusive and overinclusive scope of the Policy undermines the argument that the County has a genuine governmental interest in the regulation and demonstrates the Property Use Policy is not narrowly tailored to serve that interest.

Finally, the Policy is also not narrowly tailored and is overbroad because it prohibits all persons from speaking or assembling on county property on all county holidays, including Election Day and Memorial Day, and, as noted above, it bans individuals under the age of 21, including Plaintiff Mascorro, from speaking or assembling peaceably on six county properties any day of the year. Ex. 1-B (Policy) §§ 3(e), 6(d); *see* Dkt. 36-2 (Ex. A-3) (noting Election Day and Memorial Day are county holidays). Therefore, the Policy sweeps in a substantial amount of protected speech with no nexus whatsoever to the County's interests. *See* Ex. 9 (Commissioner Alvarez Depo.) Tr. 87:18-88:20 (testifying that people should be able to get a permit to use the Courthouse grounds on Memorial Day and hold up signs or a flag honoring veterans); *id*. Tr. 88:1-8 ("I am a veteran, ma'am, and nobody's going to stand in our way of holding something like that . . . somebody will go put me in jail because I will disobey [my own Policy].").

As Defendants admitted in their depositions, the County's concerns could have been addressed through a narrower regulation of county buildings and parking lots. *See, e.g.*, *id*. Tr. 32:3-6 ("[W]ould your concerns at the courthouse be addressed by keeping the parking lot of the courthouse clear? A. Yes."); Ex. 6 (Commissioner Garza Depo.) Tr. 53:7-11 (testifying that his

concerns can be addressed by limiting electioneering at the back of the Courthouse parking lot); Ex. 10 (Commissioner Saenz Depo.) Tr. 44:13-15 (same); *see also* Ex. 7 (County Attorney Canales Depo.) Tr. 79:5-10 (testifying that Starr County has never adopted any rules that set a time limit for how long people can park on county property); *id.* Tr. 79:13-17 (agreeing County could adopt a rule that prescribes the maximum amount of time anybody can be parked at the County Courthouse is 8 hours).

However, the County chose to adopt an overbroad law that is not closely connected to the issues it was purportedly meant to address. *See 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."). For that reason, the Policy violates Plaintiffs' First Amendment rights and is facially unconstitutional.

V. The Property Use Policy is Unconstitutionally Vague

A. The Policy Does not Prescribe a Specific Penalty and is Therefore Void for Vagueness and Facially Unconstitutional

Although the Policy potentially criminalizes a wide range of conduct, it does not create or refer to a specific offense for the conduct it prohibits. *See* Ex. 1-B (Policy) § 9(a) (stating only that the County may "prosecute any and all violators to the fullest extent of the law."); Ex. 13 (District Attorney Escobar Depo.) Tr. 185:11-15 ("Q: Would it be correct to say, though, that the property use policy doesn't create a specific offense for [unauthorized use of county property]?

A: No, it doesn't. It could be trespass. It does not define an individual offense."). Laws that do not prescribe the type of punishment that could result from violating them are unconstitutional. *See U.S. v. Evans*, 333 U.S. 483, 486–91 (1948) (striking down statute with no penalty provision, holding that to construe it otherwise "would be to proceed in an essentially legislative manner" because "fixing penalties are legislative, not judicial, functions."); *Holmes v. U.S.*, 267 F. 529, 531 (5th Cir. 1920) ("It is undoubtedly the law that a valid criminal statute should be certain in its terms, and not leave uncertain the acts intended to be prohibited or the punishment to be inflicted thereunder. The punishment in the event of conviction must be as certain as any other provision of the statute."). Because the Policy leaves the public uncertain as to the penalty imposed for conduct it deems unlawful, it is facially unconstitutional.

B. The Policy is Vague Because it Does not Inform Plaintiffs of What Conduct is Prohibited on Some County Properties

Because the Policy only prescribes that a permit is required to use the six county properties listed in Attachment A of the Policy, Plaintiffs are left to guess what conduct is permitted or prohibited in all other structures and facilities the County owns. When testifying on behalf of the County, Defendant County Judge Vera agreed that a private citizen cannot discern from the text of the Policy whether he or she would need a permit to use facilities the County did not specifically include in Attachment A of the Policy. Ex. 12 (County Judge Vera Depo.) Tr. 100:24-101:7. As noted above, Defendant Vera also explained that for any building the County did not include in Attachment A, Plaintiffs would just need to ask individual county commissioners for permission to use the property, *see id*., effectively conceding that the Policy encourages arbitrary enforcement as to those properties. Therefore, the Policy is unconstitutionally vague.

VI. The Policy is an Unconstitutional Prior Restraint on Speech

The Property Use Policy is unconstitutional because its permitting scheme is a prior restraint of speech that enables viewpoint discrimination. Prior restraints on speech are those that give "public officials the power to deny use of a forum in advance of actual expression" and are therefore "the most serious and the least tolerable infringement on First Amendment rights." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). There is a "heavy presumption" against their constitutionality. *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (internal quotation marks and citation omitted); *see also Conrad*, 420 U.S. at 553 ("Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law."). To pass constitutional muster, a permitting scheme must "not delegate overly broad licensing discretion to a government official." *Forsyth Cty., Ga.*, 505 U.S. at 130-31.

The Policy on its face grants Defendant County Judge Eloy Vera unfettered discretion to grant or deny an application for a permit. *See* Ex. 1-B (Policy) §§ 3(a), 6(a); *see also* Dkt. 76-11 at 5 (failing to identify any guidance provided to or devised for the County Judge to determine whether to grant or deny an application, other than the Policy itself); Ex. 12 (County Judge Vera Depo.) Tr. 107:8-14 (testifying that in determining whether he would grant a permit to a widely unpopular group who applies for a permit to stand at a county-owned pavilion, he would just "call the county attorney or the district attorney and see if [he] had to give them a permit."). The Policy only provides that county property may be made available "for events that support a public purpose, benefit, service, training or interest to Starr County residents," but it does not define any of these terms or set out when a permit may be denied for not articulating a "public purpose, benefit, service, training or interest." *See* Ex. 1-B (Policy) § 3(a).

The Policy also provides no guidance to the County Judge on: when a deposit is to be refunded; how the County Judge is to assess the deposit amount for use of the Courthouse grounds; when fees are to be waived or how an applicant can even apply for such a waiver; under what circumstances the County will require an applicant to pay for a peace officer; and under what circumstances are any of the Property Use Policy requirements modified or waived. *See* Ex. 12 (County Judge Vera Depo.) Tr. 107:8-14, 112:23-25, 113:7-10, 115:2-9. Because the Policy does not sufficiently confine Defendant County Judge Vera's discretion to allow or deny Plaintiffs permission to speak and assemble peaceably, the Policy is unconstitutional.

VII. The Property Use Policy and Electioneering Regulations Violate the Texas Election Code

Both the Electioneering Regulations and Property Use Policy are also preempted by state law. Section 61.003(a-1) of the Texas Election Code prohibits counties from adopting an outright ban on electioneering outside the 100-foot zone at a polling location, but allows the enactment of "reasonable regulations concerning the time, place, and manner of electioneering." Time, place, and manner restrictions outside the 100-foot zone (1) should be content-neutral and (2) must not be blanket prohibitions. *See* Ex. 1-F (Texas Secretary of State Election Division Advisory No. 2017-14).

As noted above, the Electioneering Regulations are content-based prohibitions of speech and are thus not a reasonable regulation. *See supra* Section I-II. In addition, the Electioneering Regulations fully prohibit electioneering at some polling locations, such as La Victoria, Salineno Community Center, and Abel Gonzalez Community Center, where the County has not designated any areas for electioneering. *Id*. Similarly, the Building and Property Use Policy is not a reasonable time, place, and manner regulation. *See supra* Section IV-VI. Therefore, the County's policies violate state law.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion be granted and the Court enter summary judgment on all claims in favor of Plaintiffs.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on March 29, 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
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