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 TO STRIKE NEW EVIDENCE OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE A SUR-REPLY

Plaintiffs respectfully submit this Motion to Strike or, in the Alternative, for Leave to File a Sur-Reply. Plaintiffs request that the Court strike the new evidence that Starr County impermissibly attempts to introduce in its reply in support of its motion for summary judgment. *See* Dkt. 97-1 (Exhibit O). In the alternative, Plaintiffs request leave to file a sur-reply. *See* Exhibit A.

Courts in this circuit regularly decline to consider new arguments and evidence introduced for the first time in a reply brief. *See, e.g., Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 299 n. 13 (5th Cir. 1999); *Elwakin v. Target Media Partners Operating Co. LLC*, 901 F. Supp. 2d 730, 746 (E.D. La. 2012). Similarly, a sur-reply is warranted "when the movant raises new legal theories or attempts to present new evidence at the reply stage." *ENGlobal U.S. Inc. v. Native Am. Servs. Corp.*, No. CV H-16-02746, 2017 WL 3840262, at *2 (S.D. Tex. Sept. 1, 2017) (internal quotation marks and citations omitted).

In its reply, the County attached new exhibits containing the testimony of three witnesses. *See* Dkt. 97-1 (Exhibit O).[1] The County did not previously provide this testimony to the Court in either its motion for summary judgment or response to Plaintiffs' motion for summary judgment. Generally, the new testimony relates to the County's arguments about a "circus-like" environment at the Courthouse and whether the District Attorney is involved in the prosecution of offenses under the Property Use Policy and Electioneering Regulations and should be dismissed from the case. *See id*. The County addressed these matters in its motion for summary judgment and response to Plaintiffs' motion for summary judgment but failed to attach and rely on this evidence in support of its motion or response. *See* Dkt. 93 ¶¶ 13, 16; Dkt. 94, p. 2-3 ¶ A. This evidence was available to the County at the time it filed its motion and response, and there is no justification for the County's delay in presenting this information in a reply brief.[2] By untimely relying on this new evidence, the County effectively forecloses Plaintiffs' opportunity to rebut or object to this evidence.

Because allowing this evidence in the record would be prejudicial to Plaintiffs, Plaintiffs respectfully request that this new evidence be stricken from the record. In the alternative, Plaintiffs request that they be granted leave to file a sur-reply to address the evidence. *See* Exhibit A.

Dated: May 10, 2019

Respectfully Submitted

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
By: */s/ Nina Perales*
Nina Perales
Attorney-in-Charge

[1] The County also relies, for the first time, on certain testimony by Plaintiff Barrera. *See* Dkt. 97 ¶ 7.
[2] In contrast, Plaintiffs attached to their reply only two pages of testimony from County Judge Vera under the rule of completeness, after the County omitted portions of the Judge's testimony in its response brief. *See* Dkt. 96, n. 6 (noting that the County attached only excerpts of testimony during opposing counsel's questioning during attempted rehabilitation of witness but excluded subsequent questioning from Plaintiffs' counsel where witness contradicted earlier testimony); Dkt. 96-1 (exhibit).

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CERTIFICATE OF CONFERENCE

I, the undersigned, hereby certify that, on May 9, 2019, I e-mailed Ysmael Fonseca, counsel for all Defendants, and requested Defendants' position on the motion. Mr. Fonseca responded: "If the surreply is to respond to the exhibit [attached to Defendants' reply, Defendants] have no objection to it."

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on May 10, 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 A

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PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs respectfully submit this Sur-reply in Opposition to Defendants' Motion for Summary Judgment. *See* Dkt. 94. The County's new arguments and newly-filed evidence do not support summary judgment in its favor because the evidence neither addresses the overinclusive and underinclusive nature of the challenged policies nor does it support dismissal of Defendant District Attorney Omar Escobar. Plaintiffs respectfully request that Defendants' motion for summary judgment be denied and judgment be entered in favor of Plaintiffs as to all their claims.

I. ARGUMENT

In its summary judgment reply, the County introduced new evidence in the form of excerpted testimony from three witnesses: Defendants County Judge Eloy Vera, District Attorney Omar Escobar, and County Attorney Canales. *See* Dkt. 97-1.[1] Generally, this testimony relates to the County's arguments about a "circus-like" environment at the Courthouse and whether the District Attorney is involved in the prosecution of offenses under the Property

[1] The County also relied, for the first time, on certain testimony of Plaintiff Rosbell Barrera. That testimony is discussed in section I.A.iii below.

Use Policy and Electioneering Regulations. *See id*. Even though the County argued these matters in its motion for summary judgment and response to Plaintiffs' motion for summary judgment, and this testimony was available to the County when it filed its motion and response, the County did not present this testimony in support of its motion or response. *See* Dkt. 93 ¶¶ 13, 16; Dkt. 94, p. 2-3 ¶ A. For the reasons set forth below, despite the new evidence, the County fails to show it is entitled to judgment as a matter of law.

A. New evidence of a claimed "circus" at the Courthouse does not justify the County's sweeping restrictions of protected speech

In support of its argument that there is "no question that the County Courthouse became a 'circus' during the voting periods," the County introduces new excerpts from the depositions of County Judge Vera and County Attorney Canales. *See* Dkt. 97 at ¶ 9. Neither of these excerpts supports judgment in favor of the County.

i. Testimony of County Judge Vera

In the new excerpts from Judge Vera's deposition, he testified that, before the County adopted its policies, people would post signs in the grassy areas of the Courthouse, which "took away from the view of the courthouse" and "[b]efore you knew it[, it] looked like a circus around the courthouse." *See* Dkt. 97-1 at 3. However, this testimony is limited to the Judge's concerns about signs on the Courthouse lawns.

The County Judge's purported aesthetic interest in an uninterrupted view of the Courthouse greens cannot justify the Electioneering Regulations because the County's *content-based regulation* is not narrowly tailored to address this issue.[2] Judge Vera's testimony about posting signs on the Courthouse lawns cannot justify the County's broad restrictions on

[2] This post-hoc rationalization is also entirely absent from the text of the Electioneering Regulations or the Property Use Policy, and the County Judge's testimony is contradicted by testimony from other members of the Commissioners' Court who testified they were not concerned about people placing signs on county property. *See, e.g.,* Dkt. 92-8 (Commissioner Garza Depo.) Tr. 56:13-16.

electioneering activities, including peaceful leafletting and holding of signs. *See* Dkt. 92-1 at 25-28 (Electioneering Regulations prohibit a wide range of expressive conduct protected by the First Amendment, including holding political signs, peaceful leafletting, and wearing political t-shirts); Dkt. 92-3 (Ex. 1-A, Regulations §§ 4(f)-(l)).

Judge Vera's testimony about the Courthouse lawns also does not justify the Regulations' restrictions on posting signs on other areas at the Courthouse. *See* Dkt. 95-2 (County Judge Vera Depo.) Tr. 44:20-46:10 (testifying there is no reason to ban electioneering on sidewalks other than "it's just cleaner if people know you can't be anywhere inside the courthouse property rather than I can be here, I can't be over there, I can't be over there," and testifying the County did not have any issues in the past on the sidewalks); Dkt. 95 at 25 (collecting testimony from Defendant officials who "admitted that their concerns about electioneering do not extend to [public fora such as sidewalks parks] on county property); *see also* Dkt. 96 at 5-8 (showing Regulations restrict speech on sidewalks, all grassy areas, public easements, and areas on or surrounding County-owned or –controlled property).

Judge Vera's testimony about aesthetics at the County Courthouse also does not justify the restrictions on political signs on grassy areas at other county polling places.

Finally, this testimony does not explain the Property Use Policy's year-round prohibition on all signs on all county property. The Property Use Policy forbids the posting of signs on all county property every day of the year, even temporarily and even in public fora such as parks and sidewalks. *See* Dkt. 95 at 32. The County Judge's testimony about signs on the Courthouse greens does not justify the overbreadth of the County's Property Use Policy, and confirms that, to the extent that Starr County has an actual problem with signs on grassy areas at the Courthouse, the Policy is not narrowly tailored to address that problem.

ii. Testimony of County Attorney Canales

County Attorney Canales's new deposition excerpts show that he testified that "[t]he parking lot [of the Courthouse] was called a circus environment during elections because of the tents and the toxic environment created by the proximity of the adverse parties . . . ." *See* Dkt. 97-1 at 5. Mr. Canales explained that what he meant by "toxic environment" was that campaigns compete to capture the attention of voters during the voting period and there are "a lot of personal feelings" and "emotions" between campaigns and candidates, which lead the campaigns and candidates to get "upset" and "mad" at each other and "scream[and] yell at each other." *Id.* at 6.

This new testimony similarly fails to justify the overinclusive nature of the Electioneering Regulations because County Attorney Canales's testimony is limited to tents and campaigners in the parking lot of the Courthouse. This evidence does not justify the Electioneering Regulations' restrictions on a broad range of electioneering activities, restrictions in areas of Courthouse property that are not the parking lot, and restrictions on all electioneering activities at all county polling places. In addition, the testimony does not relate to voter intimidation or harassment, traffic safety, or access to the polls, and does not support the County's claims that a compelling interest exists to justify its content-based regulation of protected speech. Therefore, this evidence does not advance the County's arguments in any way.

iii. Testimony of Plaintiff Ross Barrera

The County also argues, for the first time in its reply, that "Plaintiff Barrera himself has explained the intimidation of voters at the County Courthouse." *See* Dkt. 97 ¶ 7 (citing Dkt. 93-9 at 36-37). However, the evidence on which the County relies does not support the County's argument. First, in the portion of testimony cited by the County, Mr. Barrera testified only about

tents and barbecue pits at the County Courthouse parking lot; this testimony does not justify the County's sweeping restrictions on all forms of electioneering at all county polling places. Second, Mr. Barrera testified that tents and barbecues in the Courthouse parking lot did not have a negative impact on voting. Finally, Mr. Barrera testified that for years he had unsuccessfully advocated to keep barbecue pits out of Courthouse parking lot to provide "ease" of voting but not to provide an advantage to one group or another. His view is that the challenged Electioneering Regulations were enacted to provide a "benefit to a certain party." Indeed, this testimony supports Plaintiffs' argument that the Electioneering Regulation was not adopted for any compelling purpose.

B. Testimony from District Attorney Omar Escobar about his enforcement role

Finally, the County argues that "District Attorney Omar Escobar does not have jurisdiction over misdemeanor crimes and is, therefore, an improper party in this case." *See* Dkt. 97 ¶ 15. In support of this argument, the County cites to new excerpts from Defendant Escobar's deposition testimony, where Mr. Escobar states that his office would not be involved in prosecuting offenses under the Property Use Policy and Electioneering Regulations because "it's [his] understanding that [offenses under those policies] would be misdemeanors" and he does not know "if there's felony offenses" involved. *Id.* (citing Dkt. 97-1 at 8).

This testimony does not establish that District Attorney Escobar is an improper defendant because it relies on an incorrect assumption: that the County's policies do not involve prosecution of felony offenses. As more fully set forth in Plaintiffs' motion for summary judgment, the Building and Property Use Policy does not specify a penalty or constrain the prosecution of violations of the Policy to the County Attorney's misdemeanor jurisdiction. *See* Dkt. 92-1 at 34-34. County Attorney Canales explained that the Policy does not create any

particular offense; whether the County Attorney or District Attorney became involved in the prosecution of violations under the Policy would "[d]epend[] on what would happen." Dkt. 92-9 (County Attorney Canales Depo.) at 45:1-18. This testimony is consistent with County Judge Vera's testimony, as the designated representative of Starr County, that the District Attorney's office has jurisdiction to prosecute violations of the challenged policies. *See* Dkt. 92-14 (County Judge Vera Depo.) at 89:9-20.

In addition, District Attorney Escobar testified that he provides guidance to the Sheriff's office, including on the circumstances under which it is appropriate to make an arrest. *See* Ex. 2 (District Attorney Escobar Depo.) Tr. 23:10-23, 24:21-25:6. Mr. Escobar also advises the County Commissioners' Court on the scope and limitations of the County's policies. *Id*. Tr. 25:14-22 ("[I]t is not necessarily uncommon to get a question from an individual commissioner or even the county judge who might have a question about some regulation or want research as to whether they can or cannot do something."). Therefore, even if Defendant Escobar does not have jurisdiction over prosecution of violations of the Electioneering Regulations and Property Use Policy (which he does), he is still a final policymaker for law enforcement and is therefore a proper defendant in this case.

II. CONCLUSION

For all these reasons, Plaintiffs respectfully request that the County's motion for summary judgment be denied and judgment be entered in favor of Plaintiffs on all their claims.

Dated: May 10, 2019

Respectfully Submitted

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ORDER

The Court considered Plaintiffs' Motion to Strike New Evidence or, in the Alternative, for Leave to File a Sur-Reply. Upon consideration of the motion, the motion is GRANTED. It is ORDERED that

___ Exhibit O (Dkt. 97-1) to Defendants' Reply in Support of Their Motion for Summary Judgement be stricken from the record in its entirety.

___ Plaintiffs may file a sur-reply in opposition to Defendants' Motion for Summary Judgment (Dkt. 94). The Clerk is instructed to docket the sur-reply attached as Exhibit A to Plaintiffs' Motion to Strike New Evidence or, in the Alternative, for Leave to File a Sur-Reply.

SO ORDERED this _____ day of _____ 2019.

_____
HON. RANDY CRANE
UNITED STATES DISTRICT JUDGE