Case No. 24-10432

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Palo Pinto County Conservatives, Grass Roots Mineral Wells PAC, and Johanna Miller,
Plaintiffs – Appellants
v.
Shane Long, in his official capacity as Palo Pinto County Judge, and Gary Glover, Mike Reed, Jim Pollock, and Jeff Fryer, in their official capacities as Palo Pinto County commissioners,
Defendants – Appellees

On Appeal from the United States District Court
for the Northern District of Texas
Civil Action No. 4:24-cv-328-Y

Appellants' Emergency Motion for Injunction Pending Appeal

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs–Appellants	Palo Pinto County Conservatives Grass Roots Mineral Wells PAC Johanna Miller
Counsel	Tony K. McDonald Connor L. Ellington
Defendants–Appellees	Shane Long Gary Glover Mike Reed Jim Pollock Jeff Fryer
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/s/ Tony K McDonald
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Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

Request for Expedited Consideration

Time is of the essence. Just over a month ago, Palo Pinto County adopted electioneering regulations for the grounds surrounding the County's main polling location. *See* Ex. 1. Supplanting the state's rules, the County's regulations criminalize political speech in vast swaths of the property beyond the state's traditional 100-foot boundary. The regulations impose content-based restrictions, including a cap of "six signs per candidate," even in the County's "designated electioneering areas." The imposition of these content-based, nonsense regulations is *presumptively unconstitutional* and yet the County has been permitted to impose them upon citizens for the May 4th municipal elections and will proceed to impose them against citizens for the May 28th primary runoff election, which includes early voting from May 20-24th. Plaintiffs–Appellants will suffer irreparable harm each voting day the unconstitutional regulations are wielded against them.

Plaintiffs–Appellants request this Court's intervention on or before May 20, 2024, and if that is not possible, during early voting or before Election Day on May 28, 2024.

Motion for an Injunction Pending Appeal

Plaintiffs–Appellants Palo Pinto County Conservatives, Grass Roots Mineral Wells PAC, and Johanna Miller (hereinafter referred to as "Miller" except when necessary to distinguish between Miller and her groups) move for an injunction pending appeal against Defendants–Appellees (hereinafter "Palo Pinto County"). *See* Fed. R. App. P. 8(a).

This Court should enjoin Palo Pinto County from enforcing its April 8th Electioneering Regulations Order against Miller and her groups during this appeal. While the Court considers this Motion, Miller requests the Court issue an administrative injunction or an administrative stay of the April 8th Order to restore the *status quo ante* for the May 28th primary runoff election, including early voting May 20-24th. Palo Pinto County opposes this motion.[1]

Pursuant to Fed. R. App. P. 8(a)(2)(A)(ii), Miller first presented this motion to the district court which was denied in an order dated May 14, 2024. Ex. 5. The district court stated the injunction was denied for the reasons stated in the court's opinion/order denying a preliminary injunction. Ex. 5, pg 1.

[1] Plaintiffs-Appellants do not believe expedited briefing is necessary in this appeal. However, they ask the Court to be mindful of the November 5, 2024 election.

Additionally, the court concluded the State of Texas's prohibition against property owners disallowing them from prohibiting electioneering beyond the state's traditional 100-foot zone had not created a designated public forum on the grounds. Ex. 5, pg 1-2; *see* TEX. ELEC. CODE § 61.003(a-1) ("The entity that owns or controls a public building being used as a polling place may not . . . prohibit electioneering on the building's premises . . . ."). The district court also concluded the Regulations did not apply to the public sidewalks surrounding the County's property but only from the "curb to the confines of the law." Ex. 5, pg 2; *but see* Ex. 7, Tr. Prelim. Inj. Hr., at 75:20-23 (Palo Pinto County Judge admitting the regulations apply to the sidewalk).

The district court did not address why the park-like, grassy areas beside the County annex were not a traditional public forum despite the Court's recognition those areas were off-limits. Likewise, the district court did not address why the County's "designated electioneering areas" were not considered a designated public forum.

Figure 1: Map of Designated Electioneering Areas at County Annex

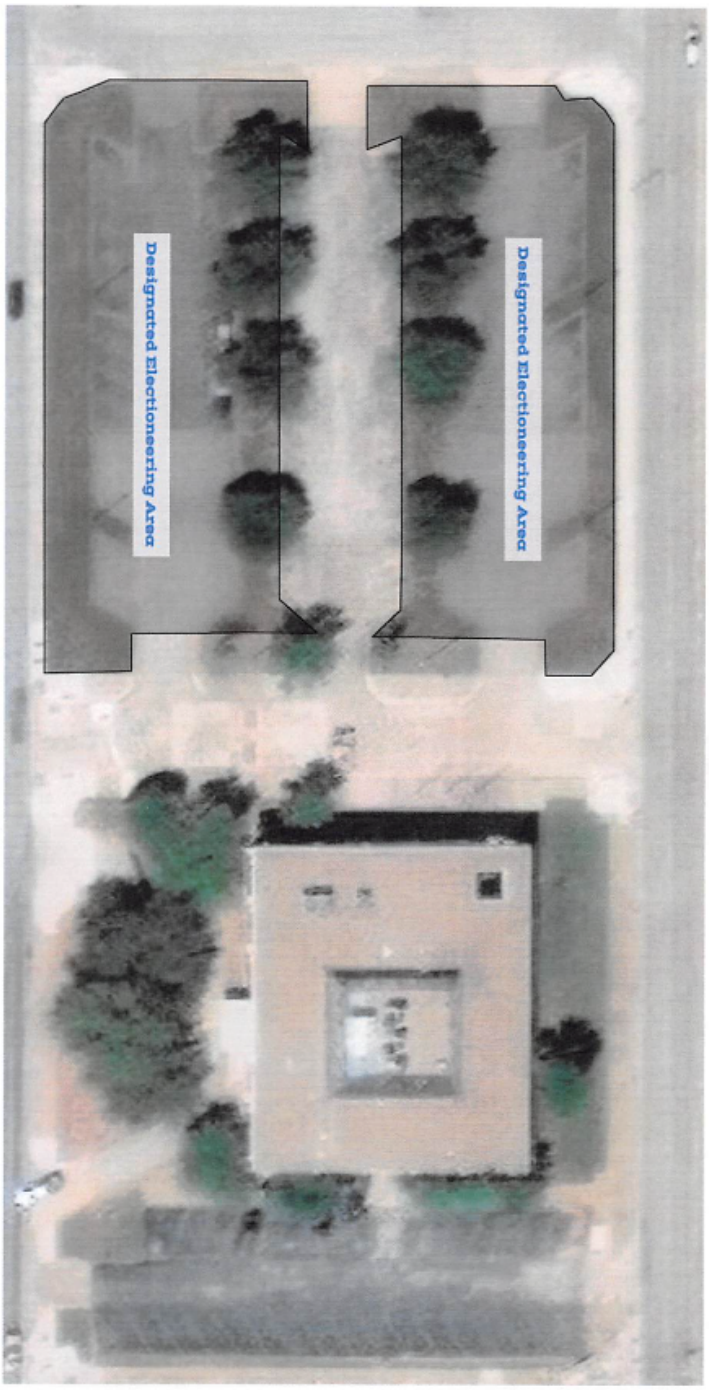

Figure 1 is a map of the Palo Pinto County Annex included at page four of the County's April 8th Electioneering Regulations Order. The map is incorporated into the Order. Ex. 1.

Introduction

As the rest of North Texas was focused on a rare total solar eclipse on the afternoon of April 8th, the Palo Pinto County Commissioners Court was busy rushing to adopt rules to restrict electioneering around the County Annex—the county's key polling location. Ex. 2, ¶¶4,9. Palo Pinto County had a problem: too many people had shown up at the polls during the March 5th primary election, and grassroots candidates had unseated establishment incumbents. Ex. 2, ¶¶5-6. Indeed, the race for county commissioner precinct 1 had been pushed into a runoff. Ex. 2, ¶7. With an eye on the May 28th runoff and the May 4th municipal elections, in which several city councilmen were subject to recall elections, the County took the drastic step of criminalizing electioneering activity on vast swaths of the County Annex grounds, adopting the order just after 2:00 pm that day. Ex 1; Ex. 2, ¶ 9.

Under the County's swiftly adopted rules, adapted from two counties on opposite ends of the state (Ex. 7, Tr. Prelim. Inj. Hr., at 46:1-12), citizens wishing to advocate for their candidates of choice are herded into two boxes, called "designated electioneering areas." Fig. 1; Ex. 1, Pg 4. Even in those boxes, citizens are limited to a total of "six signs per candidate." Ex. 1, pg. 2, ¶ 2(f). Citizens are prohibited from putting signs in the ground, purportedly to

protect water lines. Ex. 1, pg. 2, ¶ 2(b). The new rules, unveiled to the public just moments before the April 8th meeting, Ex. 1, ¶ 9, criminalize electioneering on the sidewalks, on the lawns on the side of the annex, and in the middle parking lot. Ex. 1, pg. 2, ¶ 3(b).

At a preliminary injunction hearing, County Judge Shane Long confirmed it is a crime for any citizen to step out of the two designated areas to talk to one of their neighbors parked in the middle lot. Ex. 7, Tr. Prelim. Inj. Hr., at 80:6-13. Long couldn't explain what "electioneering" even meant (Ex. 7, Tr. Prelim. Inj. Hr., at 75:24-76:3), but he affirmed the policy would prohibit the distribution of non-partisan voter guides in the areas outside the designated zones, even if the person was asked to enter the center lot by a voter. Ex. 7, Tr. Prelim. Inj. Hr., at 77:3-22, 80:6-13.

As for the rule about placing signs in the ground, Long confessed there aren't actually any irrigation lines on the property. Ex. 7, Tr. Prelim. Inj. Hr., at 73:16-74:4. Nonetheless, he suggests that citizens aren't harmed because they can put their signs on an easel. Ex. 7, Tr. Prelim. Inj. Hr., at 64:10-25.

Despite this evidence, the district court denied a preliminary injunction on the grounds the Annex sidewalks, lawns, and parking area are not a "traditional public forum." Ex. 4, pg. 6. Paradoxically, the court also concluded Palo Pinto County had not created a "designated public forum" despite establishing two speech corrals labeled "*designated* electioneering area." Ex. 4, pg 6. ; Fig. 1; Ex. 1, pg 4. Misapplying *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018), which pertained solely to the inside of a polling place, the district court erred in applying rational basis review instead of strict scrutiny.

Miller and the members of her groups will suffer immediate, irreparable harm to their First Amendment rights if Palo Pinto County is permitted to enforce its April 8th Electioneering Regulations Order for the May 28, 2024, runoff election, which includes early voting May 20-24th. Miller asks this Court to intervene and restore the *status quo ante* (reversion to the same State of Texas electioneering laws that apply in every other Texas County) by issuing an injunction pending appeal and pending issuance of such an injunction, an administrative injunction or an administrative stay of the April 8th Electioneering Regulations Order.

Background Facts

Plaintiff Palo Pinto County Conservatives is an unincorporated association of grassroots conservative citizens in Palo Pinto County. Ex. 2, ¶ 3. Plaintiff Grass Roots Mineral Wells PAC is a special purpose PAC organized to support candidates in the City of Mineral Wells. Ex. 2, ¶ 3. Plaintiff Johanna Miller is an individual Palo Pinto County voter, leader of the Palo Pinto County Conservatives, and the PAC's treasurer. Ex. 2, ¶¶ 2-3.

The Palo Pinto County is the main early voting and Election Day polling location for Palo Pinto County. Ex. 2, ¶ 4. The Annex is a square building with a small parking lot on its back side, grassy areas on each side, and a large parking lot partitioned into thirds on its front side (towards 4th street). Ex. 2, ¶ 4. Voters typically park in the large parking lot and enter the Annex through its West door. Ex. 2, ¶ 4.

During the March 5th primary, there was a contentious race between incumbent State Rep. Glenn Rogers and challenger Mike Olcott. Ex. 2, ¶ 5. Despite heavy support from Palo Pinto County officials, Rogers was defeated in the primary election. Ex. 2, ¶ 5.

Olcott's grassroots supporters were highly organized. Ex. 2, ¶ 6. They were in heavy attendance at the Annex on March 5th, waving signs and approaching voters to encourage them to vote for Olcott. Ex. 2, ¶ 6. These supporters complied with the State of Texas' regulations regarding electioneering too close to the polling place. Ex. 2, ¶ 6.

The State of Texas has a comprehensive scheme regulating electioneering in the vicinity of polling places that was recently upheld in this Court. *See Ostrewich v. Tatum*, 72 F.4th 94, 106 (5th Cir. 2023).[2] The State of Texas has chosen a distance 100 feet from the door of a polling place as the appropriate amount of space in which to prohibit electioneering. TEX. ELEC. CODE §§ 61.003, 85.036. Under the State of Texas' election regulations, the presiding judge of each polling place has the authority to enforce the state's electioneering regulation in the 100-foot zone and in the polling place. TEX. ELEC. CODE § 32.075(e). State law also specifically prohibits enforcement of electioneering regulations by these officials outside the 100-foot zone. *Id.* To inform Texans of this regulation, the State requires the placement of a 100-

[2] Miller does not challenge Texas' 100-foot regulation in her suit or this appeal.

foot distance marker informing voters that electioneering is prohibited. TEX. ELEC. CODE § 62.010. The sign must contain the following language in larger letters: "Distance Marker. No electioneering or loitering between this point and the entrance to the polling place." *Id.*

In accordance with state regulations, distance markers were placed 100 feet from the front door of the annex, creating a zone that was effectively a semicircle in front of the West side of the Annex. Ex. 7, Tr. Prelim. Inj. Hr., at 18:18-20:9.

Texas has made clear that even the owners of property used for a polling place "may not, at any time during the voting period, prohibit electioneering" outside the 100-foot zone. TEX. ELEC. CODE § 61.003. The state acknowledges the building owner may however "enact reasonable regulations concerning the time, place, and manner of electioneering." *Id.*[3]

Despite campaigners complying with the appropriate state regulations, Palo Pinto County met on April 8, 2024, to impose new restrictions targeted

[3] A "reasonable time, place, and manner restriction" is not, however, any regulation the owner thinks is reasonable. To be reasonable, a regulation must be content-neutral and narrowly tailored. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

at political speech on the Annex grounds. Ex. 2, ¶ 9. The County kept its draft rules secret until just before the meeting on April 8th, which took place as most residents of North Texas were focused on that day's rare total solar eclipse. Ex. 2, ¶ 9. The County approved its new Order just after 2:00 p.m. Ex. 2, ¶ 6. When Plaintiff Johanna Miller requested a copy of the draft order prior to the meeting, she was denied access, and only learned of the precise details of the order at the April 8th meeting. Ex. 2, ¶ 6.

The April 8th Order, attached to and incorporated herein as Exhibit 1 contains various provisions relating to County-owned property used as polling locations, including the Annex. The Order makes it a class "C" misdemeanor to violate its provisions. Ex. 1, pg. 3, ¶ 4.

The Order creates a "designated area for electioneering" identified as two boxes in the parking lot between the Annex and 4th Street. Fig. 1; Ex. 1, pg. 4. By limiting electioneering to the two identified boxes, the Order criminalizes any electioneering activity along the sides of the Annex, or in the back parking lot at the Annex, or along the sidewalks surrounding the Annex. Ex. 1, pg. 2, ¶ 3(b).

Section 3(b) of the Electioneering Regulations specifies that "No one shall … electioneer on sidewalks or driveways" but excludes "passive expressions of speech such as bumper stickers or wearing clothing, hats or pins which may be considered electioneering." Ex. 1, pg. 2, ¶ 3(b). In addition to "sidewalks and driveways," the Order prohibits post[ing] or plac[ing] political signs in public easements or rights-of-way." Ex. 1, pg. 2, ¶ 3(c).

Each of the April 8th Order's provisions are limited to "political signs," a term which is not defined by the Order. Ex. 1. Nonetheless, the Order imposes rules restricting the number, size, height, placement, and hours of display of such "political signs." Ex. 1, pg. 1-2, ¶¶2(a), 2(b), 2(c), 2(f).

These regulations were applied during the May 4th Mineral Wells municipal election. Ex. 2, ¶ 13. Miller was forced to canvass door-to-door because the regulations rendered her activities at the polling location ineffective. Ex. 2, ¶ 14. According to Miller, the regulations made her feel like a "leper" and a "pariah" and diminished her ability to approach voters in a natural and friendly way that would yield results. Ex. 2, ¶ 14.

In addition to her own burden, Palo Pinto County Conservatives have lost out on the participation of volunteers who fear arrest if they electioneer

at the Annex. Ex. 2, ¶ 15. Specifically, certain licensed professionals are reluctant to volunteer for fear that an arrest or prosecution could interfere with their livelihoods. Ex. 2, ¶ 15.

Absent this Court's intervention, the Electioneering Regulations Order will be again imposed upon citizens in Palo Pinto County for the May 28th runoff election, including early voting from May 20th-24th. Ex. 2, ¶ 12.

Summary of the Argument

The Palo Pinto County Electioneering Regulations Order imposes content-based, nonsense criminal prohibitions on political speech in areas that are both traditional public forums and areas the State of Texas and Palo Pinto County itself has designated for electioneering.

The State of Texas has a comprehensive policy regulating electioneering in and around polling locations. It empowers election judges to enforce a ban on electioneering up to the boundaries of a clearly demarcated 100-foot zone surrounding the entryway to the polling place. Then the state prohibits property owners from adopting regulations which ban electioneering on the grounds beyond the 100-foot zone. In other words, the state has designated that area for electioneering, and ordered that only *reasonable* time, place, and

manner regulations may be imposed. This rule of "reasonableness" doesn't just mean anything that sounds good to the property owner. It means the regulations must content-neutral and narrowly tailored.

Beyond this, the County itself has created a designated public forum. The district court erred in ignoring this simple argument. Indeed, the County calls its two boxes "*designated* electioneering areas." But despite the designation of two corrals for campaigning, the County imposes content-based, nonsense regulations in those areas too, including a cap of "six signs per candidate." The lack of clear meaning in a "per candidate" limitation creates the potential for absurd applications that demonstrate the rule's faultiness.

Finally, while the county and district court have remained focused only on the County Annex parking lot, they have been seemingly blinded to the Order's impact on the grassy, tree-covered areas on each side of the building. It is not clear how these areas, or the sidewalks around the annex, do not fit the definition of quintessential traditional public forums.

Accordingly, the County's Electioneering Regulations Order is unconstitutional and its enforcement should be enjoined in time for citizens to

exercise their First Amendment rights during the May 28th primary runoff, including early voting from May 20th-24th.

Argument

To obtain an injunction pending appeal, Appellants must satisfy each of the injunction elements. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). The four elements are: (1) the likelihood that the moving party will ultimately prevail on the merits of the appeal; (2) the extent to which the moving party would be irreparably harmed by denial of the injunction; (3) the potential harm to opposing parties if the injunction is issued; and (4) the public interest. *Perez v. City of San Antonio*, 98 F.4th 586 (5th Cir. 2024). The last two factors merge when the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The first factor (likelihood of success on the merits) is "arguably the most important." *Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005).

I. Miller is Likely to Succeed on the Merits

A. *Palo Pinto County's Order is Content-Based and Presumptively Unconstitutional.*

Palo Pinto County April 8th Electioneering Regulations Order imposes a content-based restriction on speech in traditional and/or designated public

forums and accordingly strict scrutiny applies. A law is "content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2014).

"Laws subject to strict scrutiny are presumptively unconstitutional," *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016), and the state must demonstrate its speech prohibition is narrowly tailored to advancing a compelling state interest, and there is no less restrictive alternative. *See McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (requiring restrictions be "the least restrictive means of achieving a compelling state interest"); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000) (requiring restrictions "be narrowly tailored to promote a compelling Government interest").

Throughout the Electioneering Regulations, its rules apply exclusively to "electioneering" and "political signs." Ex. 1.

For its cap of six signs in the designated electioneering area, the rules apply to "six (6) signs per candidate." It's not clear what this even means, but under the plain language of the rule, if someone placed six signs in the saying,

"We Hate Joe Biden," a person would seemingly be a criminal if he placed his own sign saying, "I support the President."

Likewise, while the rules prohibit the placement of political signs using "posts,"[4] or political signs larger than 36 square feet (notably this is smaller than a regular campaign 4x8), there is nothing that would prohibit a person from using t-posts to put up a tremendously large sign on the Annex lawn saying "Go Astros"—no matter how controversial that sentiment might be in North Texas. Ex. 7, Tr. Prelim. Inj. Hr., at 50:2-25.

Accordingly, these regulations are content-based regulations subject to strict scrutiny. Indeed, when the Supreme Court upheld Tennessee's 100-foot electioneering ban in 1992, the plurality called the regulation a "facially content-based restriction on political speech in a public forum" and applied what we now call strict scrutiny. *Burson v. Freeman*, 504 U.S. 191, 198 (1992) ("The State must show the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."). Accordingly Palo Pinto County's local regulations are content-based, subject to strict scrutiny,

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[4] County Judge Long confirmed this "posts" provision included the wire stakes regularly used for political signs. (Tr. Prelim. Inj. Hr., at 63:24-64:7)

and presumptively unconstitutional. Instead, the district court erred by applying rational basis review, misplacing its reliance on *Mansky*, 138 S. Ct. at 1885, which addressed only the inside of polling places. Ex. 4, pg. 12.

B. *The Electioneering Regulations Are Far From Narrowly Tailored.*

"To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816-17 (2000); see also *Reno v. American Civil Liberties Union*, 521 U.S. 844, 879 (1997) ("The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . ."). The testimony of County Judge Shane Long confirmed the County did not consider several less restrictive options, and instead chose to regulate electioneering activity at the County Annex on the basis of its content without regard to constitutional restrictions. Ex. 7, Tr. Prelim. Inj. Hr., at 69:23-71:1, 71:17-72:16.

The hours of display rule states that a person may not "post political signs or literature" on the grounds of the Annex during periods more than 30 minutes before or 30 minutes after the "voting period." Ex. 1, pg. 1-2, ¶2(b). This means, during early voting, some political signs and literature are allowed during each voting day, but they must be removed overnight in order to avoid a criminal penalty. Why a political sign left on the property overnight merits criminal sanction is not apparent.

Likewise, all "political signs" must comply with state and federal requirements, appearing to mean the County has imposed a criminal penalty on requirements, such as the disclaimer requirement found at TEX. ELEC. CODE § 255.001, which is enforced by the state only through a civil penalty. Ex. 1, pg. 1-2, ¶¶2(a); s*ee* TEX. ELEC. CODE § 255.001(e) ("A person who violates this section is liable to the state for a *civil penalty* in an amount determined by the commission not to exceed $4,000. (emphasis added)). Why it was necessary to criminalize state provisions that are otherwise civilly enforced remains a mystery.

The "posts" provision of the order prohibits the use of wooden stakes, rebar, PVC posts, metal posts, and "T-posts" to post "political signs" that

may "damage subterranean water and electrical lines." Ex. 1, pg. 2, ¶2(b). County Judge Long explained this prohibited any placement of signs in the ground, even using regular wire stakes, and even though he confessed there were no irrigation lines on the property. Ex. 7, Tr. Prelim. Inj. Hr., at 73:16-74:4.

Most perniciously, the Order sets an absolute cap on the number of "signs per candidate" that may be "placed or erected" even in the "designated area for electioneering." Ex. 1, pg. 2, ¶2(f). The April 8th Order sets a cap of "six (6) signs per candidate," exempting only those signs which are "personally held by individuals." Ex. 1, pg. 2, ¶2(f). By this expansive scope, the Order prohibits not just signs placed in the ground, but those attached to vehicles, or placed on the ground by a citizen, or even placed on an "easel" per Long's instruction. Ex. 7, Tr. Prelim. Inj. Hr., at 64:10-25.

It is also unclear what "signs per candidate" even means. Is it six signs supporting a candidate, and six signs opposing a candidate, or six signs with a mix of messages mentioning a candidate's name? What about a purely informational sign? None of this is clear.

The Order's provisions restrict all "political signs" to the "designated area for electioneering." Ex. 1, pg. 2, ¶2(f). Coupled with the Order's provision allowing political "clothing" outside the two electioneering boxes, this shows the absurdity of the County's regulations. The County has acknowledged a person might be allowed to walk between the two "designated areas for electioneering" wearing a hat related to a candidate, but if they walk between the two zones holding a sign, that would be a violation. Ex. 2, ¶ 11.

The County largely complains that voters on May 5th allegedly couldn't find adequate parking. Ex. 7, Tr. Prelim. Inj. Hr., at 13:8-9, 14:9-14. But instead of imposing content-neutral parking rules, *they criminalized*.

Judge Long confirmed he did not have a working definition of "electioneering" and the regulations would apply to anyone who stepped into the center parking lot area to talk about the elections. Ex. 7, Tr. Prelim. Inj. Hr., at 75:24-76:3, 77:3-22. This would be the case, even if the person was asked to enter the center lot by the voter, and even if the person intended to offer non-partisan voting guide information, like that circulated by the League of Women Voters. Ex. 7, Tr. Prelim. Inj. Hr., at 77:3-22, 80:6-13.

These hastily adopted regulations do not survive strict scrutiny.

C. *The County Annex Grounds Are a Traditional Public Forum.*

In his testimony, Judge Long confirmed the Electioneering Regulations Order applies to the grassy areas on the sides of the County Annex and to the sidewalks ringing the Annex. Ex. 7, Tr. Prelim. Inj. Hr., at 75:1-23. These sidewalks and park-type areas fit the standard definition of a "traditional public forum." The Supreme Court has most recently described "three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums." *Mansky*, 138 S. Ct. at 1885. Traditional public forums are "parks, streets, sidewalks, and the like" and in such forums content-based restrictions must satisfy strict scrutiny. *Id.*

Here, the regulations explicitly apply to "sidewalks or driveways" and "public easements or rights-of-way." Ex. 1, pg. 2, ¶ 3(c).

D. *The State of Texas Has Designated Polling Place Grounds Beyond The 100-Foot Zone For Electioneering*

There are two distinct ways that the State and County have created designated public forums for electioneering. "Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009). Accordingly, to the extent the areas covered by

the Electioneering Regulations Order are designated public forums, they are subject to the same rule from *Reed*, 576 U.S. 155, mandating content-neutrality lest they be considered "presumptively unconstitutional."

The State of Texas has by statute designated the area on property hosting a polling place and beyond the 100-foot marker as a designated forum for electioneering. Indeed, state law specifically prohibits enforcement of electioneering regulations by election judges outside the 100-foot zone. TEX. ELEC. CODE § 32.075(e).

Even owners of private property (such as churches) used for a polling place "may not, at any time during the voting period, prohibit electioneering" outside the 100-foot zone. TEX. ELEC. CODE § 61.003. While the statute acknowledges the building owner may "enact reasonable regulations concerning the time, place, and manner of electioneering" these "reasonable time, place, and manner restriction" must be content-neutral and narrowly tailored. *Id.*; *Ward*, 491 U.S. at 791 .

Accordingly, the State of Texas has designated the area on the grounds beyond the 100-foot zone for electioneering and has guaranteed that those who want to influence their fellow citizens as the approach the polling place

will only be subject to content-neutral regulations. Palo Pinto County's Order thwarts this statutory program.

E. *The Regulations Apply in Designated Public Forums Created By the County Itself.*

Moreover, the County itself calls its two speech corrals the "*designated* electioneering area." It's nonsense to suggest the County has not created a *designated* public forum at least with regard to those two areas. And yet the County's content-based regulations apply in those areas, controlling the number, size, height, placement, and hours of display of "political signs" even in the "designated areas." Even if the Court turns a blind eye to the Order's other implications, the imposition of content-based speech regulations in these designated areas renders the regulations presumptively unconstitutional. *Pleasant Grove City*, 555 U.S. at 469-70.

II. Miller Will Suffer Irreparable Injury If She Is Stopped From Electioneering At the County Annex During the Pending Election.

Miller's claims of constitutional injury plainly present "a substantial threat that irreparable injury would result if the preliminary injunction [does] not issue." *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 623 (5th Cir. 1985). As both the Supreme Court and the Fifth Circuit

have held, the "[l]oss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury." *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "[I]t is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction." *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985) (citing *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).

Because the Electioneering Regulations burden Miller's constitutional rights under the First Amendment, "there are no legal remedies available that would adequately compensate [her]." There is no way to calculate the value of such a constitutional deprivation." *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir.1998). Therefore, the only adequate remedy available to Miller is an injunction. *See Ne. Fla. Chapter of the Assoc. of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) ("chilled free speech . . . could not be compensated by monetary damages"), *rev'd on other grounds*, 508 U.S. 656 (1993).

Miller has stated she is currently abstaining from electioneering at the County Annex because the Regulations make that activity ineffective. Ex. 2,

¶ 13. Miller has been forced to canvass door-to-door instead. Ex. 2, ¶ 14. The Regulations make her feel like a "leper" and a "pariah" and diminish her ability to approach voters in a natural and friendly way that would yield results. Ex. 2, ¶ 14.

Other volunteers are uncomfortably campaigning at the Annex because of the Regulation. Palo Pinto County Conservatives has lost out on the participation of volunteers who fear arrest if they electioneer at the Annex. Ex. 2, ¶ 15. For example, certain licensed professionals are reluctant to volunteer for fear that an arrest or prosecution could interfere with their livelihoods. Ex. 2, ¶ 15. This diminished participation in political speech is an irreparable injury that warrants this Court's swift intervention.

III. The Balancing Factors Also Weigh in Favor of Injunctive Relief.

The remaining balancing factors also support granting the injunction pending appeal. Factors three and four merge when the government is the opposing party. *Nken* 556 U.S. at 435. "[I]njunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013). Likewise, prohibiting a governmental body from violating citizens' rights is "no harm at

all." *McDonald v. Longley*, 4 F.4th 229, 255 (5th Cir. 2021) (citing *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006)). Accordingly, the public interest in issuance of injunctive relief is clear, and the balance of equities is entirely in Miller's favor.

Conclusion and Prayer for Relief

Palo Pinto County Conservatives, Grass Roots Mineral Wells PAC, and Johanna Miller request this Court grant an injunction pending appeal prohibiting Palo Pinto County from enforcing its April 8th Electioneering Regulations Order against them during the pendency of this appeal. Until the Court can fully consider issuance of an injunction pending appeal, Miller and the groups pray for issuance of an administrative injunction or an administrative stay of the Electioneering Regulations Order through May 28, 2024. They also request such further and other relief to which they may show themselves justly entitled.

Respectfully submitted,

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Certificate of Service

In compliance with Fed. R. App. P. 31, 5th Cir. R. 31, and ECF Filing Standards, I certify that a PDF copy was served electronically on counsel of record when this brief was filed through the ECF system on all counsel of record on May 16, 2024.

/s/ Tony K McDonald
Tony K McDonald
Counsel for Plaintiffs-Appellants

Certificate of Compliance

This motion complies with Rule 27 because it contains 5,179 words, excluding the parts that can be excluded. It has been prepared in a proportionally spaced typeface (14-point Century Supra) using Microsoft Word for Mac.

Per 5th Cir. R. 27.3, I certify the facts supporting emergency consideration are true and correct.

/s/ Tony K McDonald
Tony K McDonald
Counsel for Plaintiffs-Appellants

Certificate of Conference

On May 14, 2024 I conferred with Counsel for Defendants/Appellees. He confirmed Defendants oppose this Motion.

/s/ Tony K McDonald
Tony K McDonald
Counsel for Plaintiffs-Appellants