

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FABIAN ELIZONDO, CRAMOND	§	
JOHNSON, <i>and</i> CHINEDU E.	§	
NWORISA,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. H-14-1393
	§	Civil Action No. H-14-1901
HARRIS COUNTY, TEXAS, <i>et al.</i> ,	§	
	§	
Defendants.	§	

FINDINGS OF FACT & CONCLUSIONS OF LAW

On August 4, 2014, this Court commenced a non-jury trial in the above-entitled matter. During the course of the one-day proceeding, the Court received evidence and heard sworn testimony. Having considered the evidence, testimony, and oral arguments presented during the trial, along with post-trial submissions and the applicable law, the Court now enters the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a). Any finding of fact that should be construed as a conclusion of law is hereby adopted as such. Any conclusion of law that should be construed as a finding of fact is hereby adopted as such.

I. FINDINGS OF FACT

The following facts have been established by a preponderance of the evidence:

A. The Regulation of Game Rooms

1. On June 14, 2013, the Texas State Legislature adopted Subchapter E of Chapter 234 of the Texas Local Government Code. This statute, specifically Section 234.133, gives the Harris County Commissioners Court the authority to regulate the operation of “game rooms” in order to “promote the public health, safety, and welfare.” Pursuant to this state enabling statute, on December 17, 2013, the Harris County Commissioners Court adopted the Harris County Game Room Regulations (the “Regulations”). On May 20, 2014, the Harris County Commissioners Court adopted revisions to the Regulations.

2. Harris County and the City of Houston have entered into a cooperative agreement specifically related to enforcement of the Regulations. The City of Houston is enforcing the Regulations within the incorporated areas of Houston located in Harris County.

3. The City of Houston provided two forms of notice regarding the Regulations to every permitted game room within the City of Houston. The first form of notice was a certified letter enclosing a full copy of the Regulations. The

second form of notice was a bright orange sticker that Houston Police officers posted on the door of every permitted game room in the City of Houston.

4. The Regulations provide that violation of the Regulations can result in civil penalties as high as \$10,000 per violation per day and a Class A misdemeanor if committed intentionally or knowingly. Law enforcement officers have arrested persons for violation of the Regulations.

B. The Parties

5. Plaintiff Fabian Elizondo (“Elizondo”) is the owner of the Cavalcade Game Room located at 1828 Airline Drive, Suite C, Houston, Texas 77009. The Cavalcade Game Room contains approximately fifty-four amusement redemption machines. Elizondo operates the Cavalcade Game Room for a profit. The Cavalcade Game Room is located in a strip center, which contains at least three other for-profit businesses, including a hair salon and an eye care center. These three other businesses are not related to the Cavalcade Game Room.

6. On June 11, 2014, Plaintiff Cramond Johnson (“Johnson”) was employed by Howard Security and assigned to work as a security guard for the Gold Seven Game Room located at 11228 Veterans Memorial Drive, Houston, Texas 77067. Plaintiff Johnson had been a licensed security guard for twenty-three years, although he had worked for Howard Security for only two months as of June 11, 2014.

7. On June 3, 2014, Plaintiff Chinedu E. Nworisa (“Nworisa”) was employed by Texas Counties Division Patrol and assigned to work as a security guard for the Diamond Game Room located at 12302 John F. Kennedy Boulevard, Houston, Texas 77039. Nworisa had been a licensed security guard for seven years, although he had worked for the Diamond Game Room for only five days as of June 3, 2014.

8. Membership is required to gain admittance into the Cavalcade Game Room, Gold Seven Game Room, and Diamond Game Room.

9. Johnson’s job duty was to ask patrons for membership cards and only allow admittance to members. On June 11, 2014, Johnson was arrested by Harris County Precinct Four Constables for violation of the Regulations. That day, Reserve Captain Jerry Driver with Harris County Precinct Four attempted to enter the Gold Seven Game Room undercover. Johnson asked Captain Driver if he was a member. When Captain Driver replied “no,” Plaintiff Johnson denied him entrance into the Gold Seven Game Room. Later that day, Captain Driver participated in a raid of the Gold Seven Game Room, which led to Johnson’s arrest. Johnson’s misdemeanor criminal case is still pending.

10. Nworisa’s job duty was to watch a surveillance camera that displayed the face of a patron seeking admittance next to the face on the membership card swiped to gain admittance. If the faces did not match, Nworisa was instructed to

call an attendant to talk to the patron. Alternatively, if a patron did not have a membership card, Nworisa was instructed to call an attendant to talk to the patron. Nworisa watched the surveillance camera inside a caged room between the front door and gaming area. On June 3, 2014, Nworisa was arrested for violation of the Regulations. On that day, officers raided the Diamond Game Room. Nworisa's misdemeanor criminal case is still pending.

11. On May 8, 2014, Elizondo, Johnson, and Nworisa (collectively, "Plaintiffs") filed suit against the following defendants: Defendants Harris County, Texas; Devon Anderson, in her official capacity as Harris County Attorney; Vince Ryan, in his official capacity as Harris County District Attorney; Adrian Garcia, in his official capacity as Harris County Sheriff; and Annise D. Parker, in her official capacity as the Mayor of the City of Houston (collectively, "Defendants").¹

12. Defendants claim Johnson and Nworisa are liable for a game room's non-compliance under the Regulations because they acted as a door attendant to regulate entry of customers or other persons into a game room and therefore constitute "operators" of a game room.

¹ Gregory Abbott, in his official capacity as Attorney General for the State of Texas, was also originally sued by Plaintiffs, but Plaintiffs voluntarily dismissed Abbott as a defendant on May 23, 2014.

13. In open court, Defendants agreed not to enforce the Regulations against Elizondo or the Cavalcade Game Room until final disposition of this case by the Court.

C. Plaintiffs' Claims

14. Plaintiffs bring a facial vagueness challenge to the following provisions in the Regulations (the "Challenged Regulations"):

- Count I: Definition of game room—section 1.4(a);
- Count II: Persons authorized to enforce the Regulations—sections 1.2(a), 1.4(h), 3.1(c), 3.1(d), 3.12(c), and 3.14;
- Count III: Violations of state gaming laws—no specific section referenced;
- Count IV: Number of permits required—sections 1.4(c), 1.4(d), 2.1(a), 2.8(a), and 3.11(a);
- Count V: Duties and liabilities when there is more than one owner or operator—sections 3.8(b), 3.8(c), 3.11(b), and 3.12(c);
- Count VI: Geographical scope—section 1.3(a);
- Count VII: Applicability in incorporated areas—section 1.3(b);
- Count VIII: Scope of terms owner and operator—sections 1.4(a), 1.4(c), and 1.4(d);

- Count IX: Vagueness of waiver criteria—sections 3.4(g), 3.5(c), and 3.9(f); and
- No Specific Count: Strict liability—sections 1.4(b), 1.4(c), 2.1, 2.8, 3.2(b), 3.3(e), 3.4(e), 3.5(b), 3.6(b), 3.7(b), 3.8(c), 3.11(b), 3.12(b), and 3.12(c).

15. Johnson and Nworisa also bring an as-applied vagueness challenge regarding the definition of operator in section 1.4(d)(4) of the Regulations.

16. Plaintiffs also bring a substantive due process claim alleging that the Regulations violate their right to make a living.

17. In Count X, Johnson and Nworisa also bring a First Amendment claim alleging that the membership provisions of the Regulations violate their right to freedom of association.

18. In Counts XI and XII, Johnson and Nworisa also bring a false arrest and false imprisonment claim.

19. In Count XIII, Johnson and Nworisa also bring a 42 U.S.C. § 1983 claim alleging they were wrongfully arrested, wrongfully imprisoned, and maliciously prosecuted in violation of their constitutional rights guaranteed under the Fourth, Fifth, and Fourteenth Amendments of the Constitution.

20. For all claims, Plaintiffs request permanent injunctive relief that declares the Regulations void and enjoins enforcement of the Regulations in their entirety.

II. CONCLUSIONS OF LAW

21. The elements of a permanent injunction are essentially the same as those for a preliminary injunction with the exception that the plaintiff must show actual success on the merits rather than a likelihood of success. *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987). In order to prevail on a motion for permanent injunction, a party must establish: (1) actual success on the merits; (2) a substantial threat of irreparable injury if injunctive relief is denied; (3) the threatened injury outweighs the potential injury that the injunction may cause the non-moving party; and (4) granting the preliminary injunction will not disserve the public interest. *See id.*; *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 464 (5th Cir. 2003).

22. The Court finds Plaintiffs have not established actual success on the merits for any of their claims. The merits of each claim are addressed in turn. Because Plaintiffs have failed to establish actual success on the merits, the Court declines to address the remaining three requirements for a permanent injunction.

A. Vagueness

23. When a law is challenged on facial vagueness grounds, “a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct,” such as the right of free speech or association. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 499 (1982). Plaintiffs did not clearly assert in their complaint or any briefing in this case whether they are alleging the Regulations reach a substantial amount of constitutionally protected conduct in the context of a vagueness analysis. To clarify, the Court asked Plaintiffs’ counsel at trial whether Plaintiffs are making such allegation, to which counsel answered yes, because allegedly Plaintiffs did not receive fair notice or warning of the Regulations, which affect their livelihood. However, Plaintiffs have not provided any support for their proposition that fair notice or warning of laws that affect a person’s livelihood constitute constitutionally protected conduct in the context of vagueness analysis. Even assuming they do, the Court finds Defendants provided fair notice and warning of the Regulations because of the facts found in paragraph 3. Accordingly, the Court finds the Challenged Regulations do not reach a substantial amount of constitutionally protected conduct.

24. If an enactment does not implicate a substantial amount of constitutionally protected conduct, as in this case, the court “should uphold the

challenge only if the enactment is impermissibly vague *in all of its applications.*” *Id.* at 49495, 497 (emphasis added); *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546, 548 (5th Cir. 2008). Rather than presenting evidence and argument regarding all applications of the Challenged Regulations, Plaintiffs only addressed some applications. This does not suffice.

25. Although to ultimately succeed on a facial vagueness challenge the complainant has to demonstrate an enactment is vague in all of its applications, a court “should ‘examine the complainant’s conduct *before* analyzing other hypothetical applications of law’ because ‘[a] plaintiff who engages in some conduct that is *clearly* proscribed cannot complain of the vagueness of the law as applied to the conduct of others.’” *Roark*, 522 F.3d at 546 (quoting *Vill. of Hoffman Estates*, 455 U.S. at 495). Here, Elizondo asserts the Challenged Regulations are vague as applied to some hypothetical situations, but he never asserts the Challenged Regulations are vague as applied to himself. This does not suffice. Johnson and Nworisa only assert the definition of operator in section 1.4(d)(4) of the Regulations is vague as applied to themselves; they do not assert any of the other provisions of the Regulations are vague as applied to themselves or the game rooms for which they worked.

26. Further, “[t]he degree of vagueness that the Constitution tolerates” depends on whether the enactment is criminal, civil, or quasi-criminal, and on the

nature of the enactment, such as whether the enactment is economic regulation. *Vill. of Hoffman Estates*, 455 U.S. at 498-99. Enactments with criminal penalties are subject to a stricter vagueness test than enactments with civil penalties. *Id.* Economic regulation is subject to a less strict standard. *Id.* at 498. While the Regulations are economic regulation of the gaming industry, violation can result in a misdemeanor and arrest; therefore, for purposes of this Order, the Court analyzes the Challenged Regulations under the more stringent criminal law standard.²

27. “Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.” *Ford Motor Co. v. Tex. Dep’t of Transp.*, 264 F.3d 493, 507 (5th Cir. 2001). For reasons explained *infra*, the Court finds, even applying the more stringent criminal standard, the Challenged Regulations are not facially vague. First, the Challenged Regulations provide notice sufficient to enable ordinary people to understand what conduct they prohibit. Second, the Challenged Regulations neither authorize nor encourage arbitrary and discriminatory enforcement.

² When asked in open court, Defendants represented that the Regulations should be deemed at least quasi-criminal, which warrants a more stringent standard.

28. The Court further finds that the definition of operator in section 1.4(d)(4) of the Regulations is not unconstitutionally vague as applied to Johnson and Nworisa.

29. Plaintiffs never raised—either at trial or in their complaints—an overbreadth claim under the First Amendment. Rather, Plaintiffs only raised a vagueness claim under the Fifth Amendment. Overbreadth claims are not recognized in Fifth Amendment jurisprudence; they are exclusively applicable to First Amendment claims. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Stites v. I.R.S.*, 793 F.2d 618, 620 (5th Cir. 1986). Therefore, overbreadth doctrine is not applicable in this case.

30. Plaintiffs' complaints in this case—especially as stated in their testimony at trial—are more akin to a complaint that the Regulations are poor policy rather than vague. However, it is not the role of the courts to enjoin enforcement of statute validly enacted by the legislature for policy reasons.

a. Plaintiffs' Count I: Vagueness/Definition of Game Room

31. Section 1.4(a) of the Regulations defines “game room” as “a for-profit business located in a building or place that contains six or more amusement redemption machines.”

32. At trial, Elizondo did not dispute his Cavalcade Game Room, with approximately fifty-four amusement redemption machines, constitutes a game

room under the Regulations. Indeed, Elizondo specifically stated he understands the Regulations apply to the Cavalcade Game Room. Rather, Elizondo contended the Regulations' use of the word "place" in the definition of "game room" is vague. Elizondo testified that if his business had three amusement redemption machines and another business in the same shopping center as his business had four amusement redemption machines, it would be unclear whether his business would constitute a "game room" under the Regulations.

33. At trial, neither Johnson's nor Nworisa's testimony addressed a vagueness claim in regards to the definition of game room.

34. Because Elizondo understands his game room meets the definition of game room under the Regulations, he cannot complain of the vagueness of the law as applied to others. In other words, because his conduct is clearly proscribed, the Court should not consider hypothetical applications of law, such as the one he testified about. Hypothetical situations do not render the Regulations unconstitutionally vague in this case.

35. Nevertheless, the definition of "game room" is not made vague by the use of the word "place" because "place" is given context in the sentence in which it is contained. The definition enables ordinary people to understand whether their business constitutes a game room.

36. Accordingly, the Challenged Regulations are not unconstitutionally vague under Count I.

b. Plaintiffs' Count II: Vagueness/Persons Authorized to the Enforce Regulations

37. Section 1.2(a) of the Regulations states:

The Harris County Commissioners Court hereby designates and directs any law enforcement agency to investigate for violation of these regulations. Any peace officer certified by the State of Texas may enforce these regulations.

38. Section 3.1(c) of the Regulations states:

A peace officer or county employee may inspect a permitted game room located within his agency's jurisdiction to determine whether the game room, amusement redemption machines, or records required to be kept under Recordkeeping subsection 3.7, comply with these regulations.

39. Section 3.1(d) of the Regulations states:

Any owner or operator of a game room or other person who does not allow a law enforcement officer to inspect a game room, an amusement redemption machine, or records mandated to be kept under subsection 3.7 of these regulations as required under the Texas Local Government Code Section 234.136 commits an offense.

40. At trial, Elizondo testified these sections are vague because he does not understand who constitutes a "law enforcement agency" and "peace officer;" therefore, he does not know who he has to let into his game room, particularly whether he must let in government officials from geographical areas outside of Harris County.

41. However, section 1.4(h) of the Regulations defines “peace officer” as “an individual as described in Article 2.12 of the Texas Code of Criminal Procedure.” Article 2.12 of the Texas Code of Criminal Procedure specifically enumerates a list of thirty-six persons who are peace officers. Further, a peace officer only has authority while in his or her own geographic jurisdiction. TEX. CRIM. PROC. CODE art. 2.13; *Halili v. State*, 430 S.W.3d 549, 552 (Tex. App.—Houston [14th Dist.] 2014, no pet.). A peace officer outside his or her jurisdiction may only make an arrest if a person commits a felony within the officer’s presence or view, violates Chapter 42 or 49 of the Penal Code, or breaches the peace. TEX. CRIM. PROC. CODE art. 14.03(d). For these reasons, ordinary people can understand who constitutes a “law enforcement agency” and “peace officer,” and the Challenged Regulations do not authorize or encourage arbitrary or discriminatory enforcement.

42. Moreover, Plaintiffs did not offer any evidence of a time or situation when persons from foreign jurisdictions attempted or were ordered to travel to Harris County to enforce Harris County regulations. Likewise, Plaintiffs did not offer any evidence of a time when persons attempted to enter their game rooms and they did not know whether to let them in pursuant to the Challenged Regulations. For these reasons, hypothetical situations regarding whether government officials

from geographical areas outside of Harris County can enforce the Regulations do not render the Challenged Regulations vague.

43. Accordingly, the Challenged Regulations are not unconstitutionally vague under Count II.

c. Plaintiffs' Count III: Vagueness/Violations of State Gaming Laws

44. In their complaints, Plaintiffs do not refer to a specific section of the Regulations they contend is vague under Count III. Rather, in their complaints under Count III, Plaintiffs seem to raise the same argument raised in Count II. Moreover, at trial, neither Plaintiffs nor their counsel raised any vagueness argument related to “violations of state gaming laws.”

45. Accordingly, Plaintiffs have not met their burden to prove the Regulations are unconstitutionally vague under Count III.

d. Plaintiffs' Count IV: Vagueness/Number of Permits Required

46. Section 2.1(a) of the Regulations state:

It shall be unlawful for an owner or operator of a game room to operate, use or maintain any game room in Harris County that has not been issued a permit pursuant to these regulations.

(emphasis added).

47. At trial, Elizondo testified he understands that he will need to obtain a Harris County permit pursuant to the Regulations for his Cavalcade Game Room when his current City of Houston game room permit expires. Elizondo did not

testify he does not understand the number of permits he must obtain under the Regulations or allege he thinks he must obtain more than one permit.

48. Accordingly, the Regulations are not unconstitutionally vague under Count IV.

e. Plaintiffs' Count V: Vagueness/Duties and Liabilities When There is More Than One Owner or Operator, and Count VIII: Vagueness/Scope of Terms Owner and Operator

49. Section 1.4(c) defines "game room owner" as a person who:

- (1) has an ownership interest in, or receives the profits from, a game room or an amusement redemption machine located in a game room;
- (2) is a partner, director, or officer of a business, company, or corporation that has an ownership interest in a game room or in an amusement redemption machine located in a game room;
- (3) is a shareholder that holds more than ten (10) percent of the outstanding shares of a business, company, or corporation that has an ownership interest in a game room or in an amusement redemption machine located in a game room;
- (4) has been issued by the county clerk an assumed name certificate for a business that owns a game room or an amusement redemption machine located in a game room;
- (5) signs a lease for a game room;
- (6) opens an account for utilities for a game room;
- (7) receives a certificate of occupancy or certificate of compliance for a game room;
- (8) pays for advertising for a game room; or
- (9) signs an alarm permit for a game room.

50. Section 1.4(d) defines "operator" as an individual who:

- (1) operates a cash register, cash drawer, or other depository on the premises of a game room or of a business where the money earned or the records of credit card transactions or other credit transactions

generated in any manner by the operation of a game room or activities conducted in a game room are kept;

(2) displays, delivers, or provides to a customer of a game room; merchandise, goods, entertainment, or other services offered on the premises of a game room;

(3) takes orders from a customer of a game room for merchandise, goods, entertainment, or other services offered on the premises of a game room;

(4) acts as a door attendant to regulate entry of customers or other persons into a game room; or

(5) supervises or manages other persons at a game room in the performance of an activity listed in this subsection.

51. Section 3.8 of the Regulations state:

(b) It is the responsibility of the owner or operator to conduct a criminal background check on each potential employee.

(c) Failure to comply with any requirements of this section shall result in a violation and be punishable by a civil penalty assessed against an owner or operator not to exceed \$10,000 per prohibited employee working at the game room and/or per employee working at the game room without being subject to a criminal background check.

52. Section 3.11(b) of the Regulations states:

Harris County may assess an owner or operator of a game room a civil penalty not to exceed \$10,000 if any amusement redemption machine does not display a current registration decal on it. Furthermore, Harris County shall be able to assess a civil penalty not to exceed \$10,000 on the owner or operator for each machine that is not registered with a valid current year video tax stamp decal prominently displayed on each machine.

53. Section 3.12(c) of the Regulations states:

If a law enforcement agency determines through investigation that a game room was in operation violating the Texas Penal Code Chapter 47, GAMBLING, then every machine or gambling device in the game room will be considered in violation. A civil penalty not to exceed

\$10,000 per machine may be assessed upon an owner or operator of the game room.

54. At trial, Elizondo testified these sections of the Regulations are vague because numerous persons, such as anyone who signs a game room lease, signs utility contracts for a game, or gives change at a game room, could be deemed an owner or operator and thus liable under the Regulations. Elizondo understands he meets the definition of “owner” under the Regulations. Because Elizondo understands he meets the definition of owner and is thus liable under the Regulations, he cannot complain of the vagueness of these definitions as applied to others.

55. At trial, Johnson and Nworisa testified these sections of the Regulations are vague because security guards of game rooms, such as themselves, could be liable under the Regulations. They complained they did not know about these sections of the Regulations before they were arrested and did not know they could be liable under the Regulations as security guards.

56. The definitions of “owner” and “operator” in the Regulations set forth a specific list of persons deemed to be owners or operators. These definitions provide notice sufficient to enable ordinary people to understand what conduct falls under the definition of “owner” or “operator.” In addition, these definitions are sufficiently specific so as to not encourage arbitrary and discriminatory conduct.

57. Likewise, the Regulations clearly set forth the liabilities and possible penalties associated with being an “owner” or “operator” of a non-compliant game room.

58. Plaintiffs’ complaints with regard to the definitions of “owner” and “operator” are more akin to a complaint that those terms are overbroad or poor policy, rather than a complaint that those terms are vague. The propriety of holding the various types of persons listed in the Regulations under “owner” and “operator” liable for non-compliant game rooms, such as Johnson and Nworisa who were security guards assigned to work at the game rooms by separate security companies, was an issue decided by the legislature.

59. Accordingly, the Challenged Regulations are not unconstitutionally vague under Counts V and VIII either on their face or as-applied to Johnson and Nworisa.

f. Plaintiffs’ Count VI: Vagueness/Geographical Scope, and Count VII: Applicability in Incorporated Areas

60. Section 1.3 of the Regulations state:

- (a) These regulations apply to enterprises located in the unincorporated area of Harris County; and those within.
- (b) Incorporated cities or towns in Harris County that execute cooperative agreements with Harris County.

61. Harris County and the City of Houston have entered into a cooperative agreement regarding the enforcement of the Regulations.

62. The City of Houston is enforcing the Regulations in the areas of the City of Houston located within Harris County.

63. Reading these sections together, an ordinary person would understand the Regulations apply (1) in unincorporated areas of Harris County and (2) in incorporated cities and towns in Harris County that execute a cooperative agreement.

64. Indeed, at trial, Elizondo testified he understands the Regulations apply to his Cavalcade Game Room. He did not express any confusion whatsoever as to whether the Regulations apply to his Cavalcade Game Room. Similarly, at trial, Johnson and Nworisa did not claim it is unclear whether the Regulations apply to the Gold Seven Game Room or Diamond Game Room where they worked, respectively. Because the Regulations in this case clearly apply to the game rooms at issue in this case, any hypotheticals about other game rooms should not be considered.

65. Accordingly, the Challenged Regulations are not unconstitutionally vague under Counts VI or VII.

g. Plaintiffs' Count IX: Vagueness/Waiver Criteria

66. Sections 3.4(g) (transparent windows requirement), 3.5(d) (hours requirement), and 3.9(f) (distance requirements) allow for waiver of these requirements for the “game rooms who have this requirement waived in writing by

the Sheriff or his designee upon a showing that [noncompliance] would not affect public health or safety.”

67. At trial, Elizondo testified he does not understand the meaning of “public health or safety” in the waiver provisions of the Regulations. However, Elizondo has neither sought a waiver of any requirements in the Regulations nor decided to seek a waiver of any requirements in the Regulations.

68. At trial, neither Johnson’s nor Nworisa’s testimony addressed a vagueness claim in regards to the waiver provisions of the Regulations.

69. Because Elizondo has not sought a waiver and thus does not know whether his game room would or would not be granted a waiver, his complaint of the waiver provision in an impressible hypothetical complaint of the application of these provisions.

70. Nevertheless, the Court finds the waiver provisions, including the term “public health and safety,” are not vague. Ordinary people can understand the provisions, including the meaning of “public health and safety,” and the provisions do not authorize or encourage arbitrary or discriminatory waivers.

71. Accordingly, the Challenged Regulations are not unconstitutionally vague under Count IX.

h. Plaintiffs' Claim (No Specific Count): Vagueness/Strict Liability

72. Although not a separate count of the complaints, in the complaints, Plaintiffs complain that the lack of any scienter requirement in the Regulations exposes owners and operators to strict liability with accompanying severe penalties. At trial, the only mention of strict liability was when counsel for Plaintiffs argued during closing statement that the Regulations are too vague to impose strict liability. However, neither Plaintiffs nor their counsel have argued any strict liability provisions are vague.

73. Accordingly, any strict liability provision—if any—of the Regulations are not unconstitutionally vague.

B. Declaratory Judgment Pursuant to 42 U.S.C. § 1983 for Unconstitutional Vagueness

74. Because the Challenged Regulations are not unconstitutionally vague, Plaintiffs are not entitled to their requested declaratory relief pursuant to 42 U.S.C. § 1983.

C. Plaintiffs' Substantive Due Process Claim³

75. “Analyzing a case under substantive due process, a court will apply one of two levels of scrutiny. If the challenged law infringes upon a fundamental

³ Plaintiffs do not clearly bring a substantive due process claim in their complaint, but construing the complaint liberally, Plaintiffs may be attempting to allege violation of their right to make a living under substantive due process doctrine. To clarify, at trial, the Court asked Plaintiffs whether they are alleging a substantive due process violation, to which counsel for Plaintiffs answered affirmatively.

right, a court applies strict scrutiny. If the challenged law infringes some other non-fundamental liberty interest, a court applies rational basis review.” *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 358 (5th Cir. 2008).

76. “The right to ‘make a living’ is not a ‘fundamental right,’ for . . . substantive due process purposes.” *Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir. 2005) (citing *N.Y. State Trawlers Ass’n v. Jorling*, 16 F.3d 1303, 1309–12 (2d Cir. 1994)); *cf. Ford Motor Co.*, 264 F.3d at 506 (“Typically, when an individual or corporation challenges an economic regulation under the Due Process or Equal Protection Clause, a State has the minimal burden of showing that the law has a rational basis.”). Accordingly, the Court finds that rational basis review applies to Plaintiffs’ substantive due process claim.

77. Under rational basis review, the only question is whether a rational relationship exists between the Regulations and a conceivable legitimate governmental objective. *See FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 174–75 (5th Cir. 1996). “If the question is at least debatable, there is no substantive due process violation.” *Id.* at 175. The Court’s “decision may be made by examining the stated purposes of the ordinance.” *See Hallco Tex., Inc. v. McMullen Cnty., Tex.*, 934 F. Supp. 238, 241 (S.D. Tex. 1996) (Kazen, J.).

78. The preamble of the Regulations states that Harris County’s rationale for the Regulations is “to reduce the adverse secondary effects of illicit game

rooms, ...including, but not limited to, personal and property crimes, gambling offenses, weapons offenses, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, and litter.”

79. In addition, the Court heard testimony from Harris County peace officers that adverse secondary effects are associated with game rooms in Harris County.

80. The Court finds that a rational relationship exists between the Regulations and a conceivable legitimate governmental objective.

81. Accordingly, Johnson and Nworisa do not prevail on their substantive due process claim.

D. Johnson and Nworisa’s Count X: Freedom of Association

82. “Freedom of association” exists for two types of associations: intimate and expressive. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

83. Intimate, or private, associations are a “fundamental element of liberty protected by the Bill of Rights.” *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). Freedom of association protects relationships that “presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.’” *Id.* (quoting *Roberts*, 468 U.S. at 619–20).

84. The right of expressive association stems from the First Amendment's protection of speech, the ability to petition the government for the redress of grievances, and the exercise of religion. *Roberts*, 468 U.S. at 622. "[L]ong understood as implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, education, religious, and cultural ends." *Id.* Protection for expressive association is not limited to advocacy groups, "[b]ut to come within its ambit, a group must engage in some form of expression, whether it be public or private." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

85. Johnson and Nworisa claim the Regulations' membership provisions violate their freedom of association. Section 3.10(a) of the Regulations states, "A game room owner or operator shall not restrict entry to a game room or prohibit use of an amusement redemption machine by a patron through the requirement of a game room membership."

86. Despite the Regulations, the Gold Seven Game Room and Diamond Game Room required membership for entrance.

87. The Court finds that the patrons and employees of the Gold Seven Game Room on June 11, 2014, and the Diamond Game Room on June 3, 2014, were not engaging in intimate or expressive association subject to Constitutional protection under the First Amendment.

88. Accordingly, Johnson and Nworisa do not prevail on their freedom of association claim.

E. Johnson and Nworisa's Counts XI and XII: False Arrest and False Imprisonment

89. In Texas, “[t]he elements of false arrest and false imprisonment are similar enough to be indistinguishable.” *Villegas v. Griffin Indus.*, 975 S.W.2d 745, 754 (Tex. App.—Corpus Christi 1998, pet. denied); *Camacho v. Cannella*, No. EP-12-CV-40-KC, 2012 WL 3719749, at *4 (W.D. Tex. Aug. 27, 2012).

90. For the intentional tort of false arrest or imprisonment, a plaintiff must prove “(1) a willful detention of the person; (2) against the consent of the party detained; and (3) a detention without authority of law.” *Montgomery Ward & Co. v. Garza*, 660 S.W.2d 619, 621 (Tex. App.—Corpus Christi 1983, no writ). Under the third element, the plaintiff must show that there was no legal authority for the arrest or detention. *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375–76 (Tex. 1985).

91. Johnson and Nworisa have not met their burden to prove they were detained without authority of law.

92. Tort claims of false arrest and false imprisonment “require a showing of no probable cause.” *Brown v. Lyford*, 243 F.3d 185, 189 (5th Cir. 2001). Probable cause to arrest exists when there is a fair probability that an offense occurred. *Piazza v. Mayne*, 217 F.3d 239, 246 (5th Cir. 2000).

93. The Court finds probable cause existed for Johnson's and Nworisa's arrests under the Regulations. Under section 1.4(d)(4) of the Regulations, "operator" includes an individual who "acts as a door attendant to regulate entry of customers or other persons into a game room." Section 3.10(a) provides, "A game room owner or operator shall not restrict entry to a game room or prohibit the use of an amusement redemption machine by a patron through the requirement of a game room membership." Section 3.10(c) provides that a violation of this section is a Class A misdemeanor.

94. The preponderance of the credible evidence adduced at trial shows Johnson and Nworisa acted as door attendants to regulate the entry of customers or other persons into a game room, the game rooms where they worked restricted entry to persons with game room memberships, and they helped restrict entry to the game rooms on the basis of membership. Therefore, there was sufficient probable cause to arrest Johnson and Nworisa for violation of the Regulations as operators.

95. Accordingly, Johnson and Nworisa do not prevail on their false arrest and false imprisonment claims.

F. Johnson and Nworisa's Count XIII: 42 U.S.C. § 1983—False Arrest/False Imprisonment/Malicious Prosecution

96. A freestanding 42 U.S.C. § 1983 claim based solely on malicious prosecution is not viable. *Castellano v. Fragozo*, 352 F.3d 939, 942, 945 (5th Cir.

2003) (en banc). “Rather, the claimant must allege that officials violated specific constitutional rights in connection with a malicious prosecution.” *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 812 (5th Cir. 2010).

97. Accordingly, the Court finds Johnson and Nworisa do not have an independently recognizable claim for malicious prosecution under § 1983. To the extent Johnson and Nworisa assert a violation of specific constitutional rights in connection with a malicious prosecution, those alleged violations are false arrest and false imprisonment.

98. To ultimately prevail on their § 1983 false arrest and false imprisonment claims, Johnson and Nworisa must show the arresting officials had no probable cause to arrest. *Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 655–56 (5th Cir. 2004). As explained *supra* in paragraphs 9394, there was sufficient probable cause to arrest Johnson and Nworisa for violation of the Regulations.

99. Accordingly, Johnson and Nworisa do not prevail on their § 1983 claim.

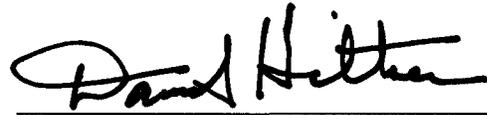
III. CONCLUSION

Based on the foregoing, the Court hereby

ORDERS that Plaintiffs Fabian Elizondo, Cramond Johnson, and Chinedu E. Noworisa are denied all relief requested.

The Court will issue a separate Final Judgment.

SIGNED at Houston, Texas, on this 9 day of September, 2014.

A handwritten signature in black ink, appearing to read "David Hittner". The signature is written in a cursive style with a large initial "D".

DAVID HITTNER
United States District Judge