

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

David Rubin,)	
)	
PLAINTIFF,)	Judge
)	
v.)	Civil No.
)	
Edmond Theobald, Town of Manlius)	
Supervisor; John R. Loeffler, Town of)	
Manlius Councilor and Deputy)	
Supervisor; Town of Manlius Councilors)	
Vincent Giordano, David M. Marnell, Sr.,)	
Karen Green, Nicholas J. Marzola, and)	
Jason Cassalia; Town of Manlius Code)	
Enforcement Officers Michael Jones,)	
David Weber, and Mike Wildrick;)	
all in their official capacities,)	
)	
DEFENDANTS.)	

PLAINTIFF’S VERIFIED COMPLAINT

NATURE OF ACTION

1. This case challenges the Town of Manlius Code (“Code”) Art. IV § 155-26(E)(4), which prohibits the posting of political lawn signs more than 30 days before and 7 days after an election (“the Ban”).
2. This case also challenges Code Art. IV § 155-26(E)(5), which requires an individual to obtain a permit from the Town of Manlius before posting a political lawn sign (“the Permit Requirement”).

3. Plaintiff Dr. David Rubin is a private individual and resident of the Town of Manlius, New York, (“Town”) who wishes to exercise his First Amendment right to speak in support of political candidates, a right incorporated against the state of New York and its municipalities by the Fourteenth Amendment.
4. Dr. Rubin wishes to engage in speech by posting political lawn signs on his private property whenever he chooses. He wishes to engage in this speech without first obtaining permission from the Town.
5. Dr. Rubin reasonably fears that, if he engages in this political speech, the Town will—either directly or by enlisting the help of other authorities—enforce § 155-26(E)(4) and (5) against him. This fear has chilled his constitutionally protected speech, based solely on the content of the messages he wishes to convey.
6. Town Code § 155-26(A) provides generally for the posting of temporary signs, including, “commercial and residential real estate signs, political signs, portable A-frame signs, roadside stand signs, garage sale signs, not-for-profit signs, residential contractor signs, and other similar signs.”
7. Town Code § 155-26(B) prohibits posting these temporary signs “in positions that will obstruct or impair vision or traffic, or in any manner [...] create a hazard or disturbance to the health and welfare of the general public.”

8. Any legitimate Town interest in protecting the public's safety, health and welfare is served by § 155-26(B). *See generally, Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 530 n.7 (1981) (Brennan, J. concurring).
9. Although political signs are not the only temporary signs subject to additional regulation beyond § 155-26(B), they are the only such signs for which a speaker must obtain prior town approval before each instance of speech, and the only such signs that the Town attempts to regulate on the basis of aesthetics.
10. Even assuming a legitimate aesthetic interest in regulating temporary political signs, a statutory scheme like the Town's—which singles out political speech for prior restraint and more-stringent regulation—cannot be appropriately tailored to that interest and must fail constitutional scrutiny.
11. Thus, Dr. Rubin seeks permanent injunctions against enforcement of § 155-26(E)(4) and (5) as unconstitutional, content-based burdens upon and prior restraints of his protected political speech.
12. Additionally, Dr. Rubin seeks declarations that § 155-26(E)(4) and (5) are facially unconstitutional under the First Amendment. In the alternative, Dr. Rubin seeks declarations that § 155-26(E)(4) and (5) are unconstitutional as applied to him and his desired activities.

JURISDICTION & VENUE

13. This Court has jurisdiction because this action arises under the First and Fourteenth Amendments to the United States Constitution. *See* 28 U.S.C. § 1331.
14. This Court also has jurisdiction under the Declaratory Judgment Act. *See* 28 U.S.C. §§ 2201-02.
15. This Court also has jurisdiction under the Civil Rights Act. *See* 42 U.S.C. § 1983.
16. This Court also has jurisdiction to, in its discretion, award attorney's fees in this action. *See* 42 U.S.C. § 1988(b).
17. Venue in this Court is proper under 28 U.S.C. §§ 1391(b)(1) and (b)(2).

PARTIES

18. Plaintiff Dr. David Rubin is a private individual and resident of the Town of Manlius, New York, who wishes to speak in support of candidates for office whenever he chooses, without first obtaining permission from the Town.
19. Defendants are Town Supervisor Edmond Theobald, sued in his official capacity as administrative head of the Town government; John R. Loeffler, sued in his official capacity as Councilor and Deputy Supervisor of the Town Board; Councilors Vincent Giordano, David M. Marnell, Sr., Karen Green, Nicholas J. Marzola, and Jason Cassalia, all sued in their official

capacities as members of the Town Board; Code Enforcement Officer Michael Jones, sued in his official capacity as the individual charged with enforcing Chapter 155 of the Town Code under Art. I § 11-2(A); Code Enforcement Officer David Weber, sued in his official capacity as an individual with authority to enforce provisions of the Town Code under Art. I § 11-1; and Code Enforcement Officer Mike Wildrick, sued in his official capacity as an individual with authority to enforce provisions of the Town Code under Art. I § 11-1.

FACTUAL BACKGROUND

20. Dr. Rubin is a private individual and resident of the Town of Manlius, New York.
21. Dr. Rubin wishes to engage in constitutionally protected speech by posting election-related yard signs on his private property. He wishes to do this at any time, and not merely in the 30 days before and 7 days after an election.
22. Dr. Rubin also wishes to engage in this speech without first obtaining a permit from the Town or otherwise obtaining the Town's prior approval.

COUNT 1

Declaratory Judgment concerning Town Code Art. IV § 155-26(E)(4)

23. Plaintiff realleges and incorporates by reference paragraphs 1-22.

24. § 155-26(E)(4)'s Ban provides, “[n]o sign may be erected more than 30 days prior to the election to which it applies, and shall be removed within 7 days after that election date.”
25. Restrictions that apply only to political speech are not content-neutral, but content-based. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 197 (1992) (invalidating a restriction on election-related speech when “[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign...the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.” (citing *Consolidated Edison Co. of N. Y. v. Public Service Comm'n of N. Y.*, 447 U.S. 530, 537 (1980))).
26. § 155-26(E)(4)'s Ban is content-based, since it singles out political speech for prohibition outside the 30 days before and 7 days after an election.
27. The justification the Town offers in support of the Ban is “to preserve aesthetics and ensure traffic safety in the Town of Manlius.” § 155-26(E).
28. In *Ladue v. Gilleo*, 512 U.S. 43 (1994), the Supreme Court recognized that a city may have a valid interest in minimizing visual clutter to further aesthetic and safety concerns, but found that such interest was not compelling enough to justify a content-based restriction on speech. *Id.* at 48.

29. Because the Ban completely forecloses just one type of speech—political speech via temporary lawn signs—during this specific (and significant) portion of the year, it is content-based, and cannot be justified by the Town of Manlius’s proffered “aesthetic and safety” interest. *See, e.g., Ladue v. Gilleo*, 512 U.S. at 59 (“With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one.” (O’Connor, J., concurring) (citation omitted)).
30. Additionally and in the alternative, the Ban is unconstitutional as applied to Dr. Rubin, since it prohibits him from engaging in activity specifically protected by the First Amendment and Supreme Court precedent: posting and displaying political yard signs on his property.
31. Moreover, in *Mills v. Alabama*, 384 U.S. 214, 220 (1966), the Supreme Court invalidated a state statute that prohibited a newspaper editor from “[doing] no more than urge people to vote one way or another in a publicly held election.” That statute’s limited application to an election day did nothing to render it constitutional.

32. Since the Ban prohibits the very activity the Supreme Court found to be protected in *Mills*, the Ban must also fail under that precedent. Its limited temporal application does not save it.

COUNT 2

Permanent Injunction concerning Town Code Art. IV § 155-26(E)(4)

33. Plaintiff realleges and incorporates by reference paragraphs 1-32.

34. § 155-26(E)(4) is contrary to the First Amendment to the United States Constitution.

35. Enforcement of § 155-26(E)(4) violates and would violate the constitutional rights of Plaintiff and other residents of the Town.

36. Consequently, Plaintiff asks that this Court issue a permanent injunction prohibiting the enforcement of § 155-26(E)(4).

COUNT 3

Declaratory Judgment concerning Town Code Art. IV § 155-26(E)(5)

37. Plaintiff realleges and incorporates by reference paragraphs 1-36.

38. § 155-26(E)(5) provides, “[n]o [temporary political] sign may be erected without a permit on a form supplied by the Town after registration with the Town Clerk.” Because it prohibits speech before that speech takes place, it is a prior restraint.

39. None of the Town's other signage regulations require the Town to approve each posting of a temporary sign. *See* § 155-26. Only political signs are subject to a permit requirement for each instance of speech.
40. Under *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and other Supreme Court and Second Circuit precedent, prior restraints on protected speech are subject to strict scrutiny.
41. Under *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and other Supreme Court and Second Circuit precedent, a statute subject to strict scrutiny must be narrowly tailored to a compelling governmental interest.
42. Additionally, under *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992), permit or licensing schemes that burden constitutionally protected speech must not be content based.
43. The Permit Requirement is neither justified by a compelling state interest nor narrowly tailored, and is therefore unconstitutional. Moreover, the Permit Requirement is content-based, and is therefore unconstitutional.
44. The justification the Town offers in support of the Permit Requirement is "to preserve aesthetics and ensure traffic safety in the Town of Manlius." § 155-26(E).

45. While a town's interest in regulating signs may—in some circumstances—be “valid,” it is not compelling in instances such as this. *Ladue v. Gilleo*, 512 U.S. at 54.
46. Even if the Town of Manlius's aesthetic and traffic safety interests are compelling, § 155-26(B)'s general restrictions on temporary signs serve the Town's safety interests, and the Permit Requirement is not narrowly tailored to any aesthetic interest which may remain. In the Second Circuit, “[t]he essence of narrow tailoring is having the regulation focus on the source of the evils the city seeks to eliminate and eliminate them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils.” *Vincenty v. Bloomberg*, 476 F.3d 74, 84-84 (2d Cir. 2007) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n. 7 (1989)) (punctuation marks omitted).
47. The Permit Requirement requires Town approval of just one kind of speech, a type which has no greater effect on aesthetics than any type of speech not subject to prior approval. Thus, it is not narrowly tailored.
48. As noted in Paragraph 25, *supra*, restrictions that apply only to political speech are content-based. Thus, the Permit Requirement is unconstitutional, because it singles out political speech for its preclearance scheme.

49. Additionally and in the alternative, the Permit Requirement is unconstitutional as applied to Dr. Rubin, because it burdens activity specifically protected by the First Amendment and Supreme Court precedent: displaying election-related yard signs on his private property.

COUNT 4

Permanent Injunction concerning Town Code Art. IV § 155-26(E)(5)

50. Plaintiff realleges and incorporates by reference paragraphs 1-49.

51. § 155-26(E)(5) is contrary to the First Amendment to the United States Constitution.

52. Enforcement of § 155-26(E)(5) violates and would violate the constitutional rights of Plaintiff and other residents of the Town of Manlius.

53. Consequently, Plaintiff asks that this Court issue a permanent injunction prohibiting the enforcement of § 155-26(E)(5).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

A. A declaration that Town Code Art. IV § 155-26(E)(4) and (5) are facially unconstitutional as a violation of the First Amendment protection of political speech, as incorporated against the state of New York and its municipalities by the Fourteenth Amendment.

B. In the alternative, a declaration that Town Code Art. IV § 155-26(E)(4) and (5) are unconstitutional as applied to Dr. Rubin.

C. Permanent injunctions against enforcement of Town Code Art. IV § 155-26(E)(4) and (5) pursuant to 42 U.S.C. § 1983, and any such additional injunctive relief as this Court may direct.

D. Costs and attorney's fees under 42 U.S.C. § 1988 and any other applicable statute or authority, and further relief this court may grant in its discretion.

Dated this 6th day of August, 2013.

Respectfully submitted,

/s/ Allen Dickerson
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2013, I caused a copy of the foregoing Verified Complaint to be sent to Don Martin, Town Attorney for Town of Manlius, via electronic mail at djmartin@harrisbeach.com, and via First Class

Mail at the following address:

Donald J. Martin
Town of Manlius Attorney
333 West Washington Street, Ste. 200
Syracuse, NY 13202

/s/ Allen Dickerson
Allen Dickerson
Attorney for Plaintiff