

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

M. Christine BredenKoetter,)	
)	
Plaintiff,)	
)	No. 4:11-cv-6
v.)	
)	
City of Florissant, Missouri, et al.,)	
)	
Defendants.)	

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

In this case, Plaintiff seeks declaratory judgment, injunctive relief, and damages for the violation of her constitutional rights arising from enforcement of restrictions on political yard signs contained in *Florissant City Code § 520.020.5*. Plaintiff seeks a preliminary injunction enjoining Defendants from enforcing § 520.02.5 while this case is resolved on the merits. Plaintiff is likely to succeed on the merits of her claims, a preliminary injunction is needed to prevent the irreparable harm that will be done to Plaintiff, no harm will come to Defendants, and enjoining the enforcement of the ordinance is in the public interest.

II. STATEMENT OF FACTS

Plaintiff is a resident of Florissant, Missouri. *Ex. A (Declaration of Plaintiff)* at ¶ 2. Plaintiff and her husband, Andrew Podleski, jointly own a home located at 2185 St. Catherine, Florissant, Missouri 63021. *Id.* at ¶¶ 2, 5.

On or about November 14, 2010, Plaintiff placed a sign outside their residence that read, “Elect Andrew Podleski Mayor.” *Id.* at ¶ 3. Plaintiff placed the sign in her yard in

response to the incumbent mayor's re-election announcement and accompanying political statements that she viewed as critical of her husband, Andrew Podleski. *Id.* at ¶ 4.

Defendant City of Florissant, Missouri (hereinafter "Florissant"), is a municipal corporation and a political subdivision of the State of Missouri. Defendant Philip E. Lum is building commissioner for Florissant. Defendant Robert G. Lowery, Sr., is mayor for Florissant.

On or about November 19, 2010, Plaintiff's husband with whom she jointly owns their home, received a letter from Defendant Lum, dated November 16, 2010, regarding Plaintiff's sign. *Id.* at ¶ 5. (A copy of the letter and its enclosures are attached as *Ex. B.*) The letter stated:

We are writing to inform you of an illegal political sign on your property. Such a sign is deemed illegal if it appears "*no sooner than thirty (30) days before the election and must be removed 10 days after the election*", under the City Code, Section 520.020, see attached. Please remove the illegal sign(s) immediately. Failure to remove the sign within 10 days will result in removal of the sign by the City and/or further action against you. Attached is a picture of the illegal sign.

With his letter Defendant Lum included a photo of the offending political sign and excerpts from *Florissant City Code § 520.020* which stated:

CHAPTER NOT APPLICABLE TO CERTAIN SIGNS. The following classes of signs shall be exempt from the provisions of the Chapter relating to registration, payment of permit fees, structural requirements ad

annual inspection fees; but such exemption shall not be construed so as to relieve the owner of the sign from responsibility for its erection and maintenance in a safe matter:

5. Signs of political parties, issues and candidates seeking public office provided such signs do not exceed four (4) square feet when placed in any area which has been zoned and developed “R-1” through “R-6”, and “HR”, “HD” and “HMD and, provided further that such signs do not exceed sixteen (16) square feet when placed in zoning district “B-1” through “B-5”, “HB”, “M1”, “M2” and “M3”. All such political signs wherever located shall be erected no sooner than thirty (30) days before the election and removed within ten (10) days after the election to which they applied. Any political sign erected contrary to the provisions of this Section may be immediately removed at the direction of the Mayor of the City of Florissant. Signs herein referred to shall be limited to two (2) such signs per candidate per lot.

Section 520.020 (Ex. C) exempts some signs and provides different, and in most cases less onerous, restrictions on signs with different content than political signs. For example:

- a) Only “political sign[s] erected contrary to the provisions of [§ 520.020] may be immediately removed at the direction of the Mayor of the City of Florissant” and no other signs with non-political content.

- b) *Sections 520.020.3 – 4* exempt informational signs at churches and signs of “charitable, benevolent, religious associations or fraternal or non-profit associations” -

520.020.3. Signs erected on church property giving the name of the church, the time of services and similar information;

520.020.4. Signs of charitable, benevolent, religious associations or fraternal or non-profit associations;

- c) *Section 520.020.8* exempts “[m]emorial signs or tablets, names of buildings and the date of erection when cut into any masonry surface or when constructed of bronze or any other incombustible materials”.
- d) *Section 520.020.9* exempts “[s]igns and special decorative displays used for the Valley of Flowers Festival, special events, holidays, public demonstrations or promotion of civic welfare or charitable purposes, when authorized by the Mayor or City Council”.
- e) *Section 520.020.11* exempts “for sale sign[s] located within the confines of one (1) motor vehicle which is legally parked in accordance with the ordinances of the City on an improved parking area in a residential district, provided that such motor vehicle shall be the property of the owner or occupant of the residential property” [one sign per vehicle].
- f) *Section 520.020.13* exempts “Christmas tree signage as authorized under Section 605.070...”

g) *Sections 520.020.1.a -b.* has different restrictions for “sale, rental, or lease” signs:

520.020.1.a. All signs in a residential district not exceeding six (6) square feet in area advertising the sale, rental or lease of real estate when offered for sale, rental or lease by the individual owner of the property or by a real estate business and located upon the property to which such signs refer. Such signs shall not be a hazard to traffic safety. Such signs shall be affixed to a post in the ground or the wall so advertised. Such signs containing the words "sold" shall be removed within (10) days after the sale, rental or lease of such property. Only one (1) sign shall be allowed per lot or building except for corner lots or lots in which the front and back face different streets where there shall be two (2) such signs permitted, one (1) on each side of the property;

520.020.b. All signs in zoning districts "H-B" and "B-1" through "M-3" not exceeding sixteen (16) square feet in an area advertising the sale, rental or lease of real estate when offered for sale, rental or lease by the individual owner of the property or by a real estate business and located upon the property to which such signs refer. Such signs shall not be a hazard to traffic safety. Such signs shall be affixed to a post in the ground or the wall so advertised. Such signs containing the words "sold" shall be removed within ten (10) days after the sale, rental or lease of such property. Only one (1)

sign shall be allowed per lot or building except for corner lots, where there shall be two (2) such signs permitted, one (1) on each side of the property;

h) *Sections 520.020.1.c., 520.020.2, and 520.020.14* have different restrictions for commercial signs:

520.020.c. In the "HB" zoning district, on-site single- and double-sided portable "A" frame signs and pedestal signs shall be allowed, provided that:

(1) Such signs shall not exceed twelve (12) square feet per side in area and only advertise the products or services of the business at the site;

(2) There shall be a clear passage of three (3) feet between any sign and the curb of the street;

(3) Such signs shall not be located in any required parking space, any parking lot drive or in any location that interferes with traffic;

(4) Such signs shall be removed upon the daily close of the business and at all times when the business is closed, but at no time shall the signs be displayed between the hours of 10:00 P.M. and 6:00 A.M.;

(5) Only one (1) sign shall be allowed per business with a maximum of two (2) signs per building;

- (6) Such signs shall not be attached in any manner to any trees, bushes, shrubs or other vegetation but may be placed upon lawn areas or ground covered by ground cover or among flowers;
- (7) Such signs shall be maintained in a good state of repair and all parts and supports of such signs, unless the same are galvanized or otherwise treated to prevent rust, shall be painted or otherwise treated so as to avoid a state of disrepair or to be unsightly by reason of need of paint or by partial destruction or dilapidated condition thereof;
- (8) Such signs shall not be illuminated;
- (9) Such signs shall comply with all the provisions of Article II, "H" Historic District (Old Town Area), of this Chapter unless the provisions of this Section are stricter or more stringent, in which case the stricter or more stringent provisions shall apply;
- (10) Such signs shall comply with all of the other provisions of the Code of Ordinances in addition to those set forth herein.

520.020.2. Signs advertising the name of the merchant and his/her business, when painted upon the windows of such establishment;

520.020.14. Upon application to the Building Commissioner a permit shall be issued for commercial banners, pennants, balloons, signs, flags and displays for the limited purpose of announcing the

grand opening of a business, provided that such displays shall not exceed seven (7) days and for the limited purpose of announcing the annual anniversary date of the opening of a business, provided that such displays shall not exceed four (4) days.

- i) *Section 520.020.10* has different standards for signs “denoting the architect, engineer and contractors when placed upon work under construction” (i.e., “not exceeding thirty-two (32) square feet in area. Such signs shall be removed within ten (10) days after the completion of such construction”);
- j) *Section 520.020.12* has different standards for “garage sale” signs:

One (1) sign located on the property where the garage sale is held and no more than two (2) other signs providing the address of the property, directional information and the name of the person(s) conducting the garage sale provided that such signs shall not exceed six (6) square feet in area advertising a garage sale that has been duly authorized under Section 405.085(A)(12) of the Zoning Code or any other districts which authorize such sales. Such signs shall only be displayed on the day of the authorized garage sale, and permission must be obtained from the property owners of locations where sign(s) are displayed. All signs must be removed by 5:00 P.M. on the date of the garage sale. Any person who fails to comply with the provisions and regulations set forth herein will be subject to the penalties as provided in Section 100.080 of the

Code of Ordinances, provided that any fine shall not exceed thirty dollars (\$30.00) and, upon conviction, shall be prohibited from obtaining a garage sale permit for a period of two (2) years from the date of such conviction;

Fearing involuntary removal and seizure of her sign by Florissant and fearing legal action being taken against her, Plaintiff removed the sign from her yard on or about November 21, 2010. *Ex. A* at ¶ 6.

Plaintiff desires to return the sign to her yard, but fears doing so will subject the sign to involuntary removal and seizure by Florissant. *Id.* at ¶ 7. She also fears prosecution and is aware that at least one individual has received a summons for having a political sign in her yard. *Id.* at ¶ 8.

III. ARGUMENT

The Eighth Circuit has long and consistently held that courts should consider four factors in determining whether to issue a preliminary injunction:

(1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the interest of the public.

Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981).

It is significant here that in *First Amendment* cases courts have found that “the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue.” *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2865 (2009).

A. Plaintiff is likely to succeed on the merits of her *First Amendment* Claim

An ordinance that places restrictions on the size, placement, and durational limitations based on the content of a sign being regulated is an unconstitutional restriction on speech. *Whitton v. City of Gladstone*, 54 F.3d 1400, 1403-04, & n. 6 (8th Cir. 1995); *Quinly v. City of Prairie Vill.*, 446 F. Supp. 2d 1233, 1238 - 45 (D. Kan. 2006). When evaluating the constitutionality of an ordinance restraining or regulating speech, the court first inquires whether the ordinance is content-based or content neutral. *Quinly*, 446 F. Supp. 2d at 1238. Restrictions are content based if “a violation of the ordinance may be determined only by examining the content of the sign.” *Quinly*, 446 F. Supp. 2d at 1238; *Whitton*, 54 F. 3d at 1403-04 (a sign is content-based because it makes impermissible distinctions based solely on the content or message conveyed); *see also Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1262 & n. 11 (11th Cir. 2005).

The challenged restrictions in § 520.020 apply only to “signs of political parties, issues and candidates seeking public office.” Accordingly, the regulations are content-based because they apply only upon examination of the speech displayed on the sign.

Because § 520.020 is content-based, it faces exacting scrutiny. *Burson v. Freeman*, 504 U.S. 191, 198 (1992). The government must show that the “regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983). Defendants will be unlikely to meet this burden.

Durational Limitations

Plaintiff is likely to succeed on the merits of her claim that the time limits on political signs are unconstitutional. Ordinances containing the durational limitations that are applicable only to political signs are a content-based restrictions. *Whitton*, 54 F.3d at 1403. The Supreme Court has held that a restriction on speech is content-based when the message conveyed determines whether the speech is subject to the restriction. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516-17 (1993).¹

Section 520.020.5 provides, “all such political signs wherever located shall be erected no sooner than thirty (30) days before the election and removed within ten (10) days after the election to which they applied.” This language clearly places durational limitations on political signs. Yet § 520.020 permits signs without political content to be displayed without the durational limitation. For example, church signs and signs of charitable, benevolent, religious associations or fraternal or non-profit associations can be displayed at any time and for any length of time. Signs indicating that real estate is for sale or lease are not subject to the restriction that political signs are. And the Mayor or the City Council have discretion to allow signs “used for the Valley of Flowers Festival, special events, holidays, public demonstrations or promotion of civic welfare or charitable purposes,” without time restriction.

¹ The restriction is content-based even though it applies, on its face, to all political speech and, thus, might be viewpoint neutral. *Whitton*, 54 F.3d at 1405. *See also Consolidated Edison v. Public Serv. Comm’n*, 447 U.S. 530, 537 (1980) (“the First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic”); *Burson*, 112 S. Ct. at 1850 (statute barring political speech within 100 feet of polling place on election day content-based even though it applied to all political speech).

As amply demonstrated Defendant Lum's letter to Plaintiff, the only way for an enforcement official to tell whether § 520.020 is violated is to judge the content of a sign. The durational limitations on political signs do not further compelling government interests. *Whitton*, 54 F.3d at 1409. Consequently, Plaintiff is likely to succeed on the merits of her challenge to the time limitations of § 520.020.5.

Size Limitations

Plaintiff is likely to succeed on her claim that the size limitation on political signs § 520.020 is unconstitutional. Florissant purports to limit political signs in neighborhood such as where Plaintiff resides to four square feet. *See* § 520.020(5). Signs with content that is not political are not subjected to the size limitation.

A Florissant official would be required to consider the content of the sign to determine whether the sign complied with the applicable size limitation set forth in the ordinance; thus, the restriction is content-based. *Quinly*, 446 F. Supp. 2d at 1239. *See also, Advantage Media, LLC v. City of Hopkins*, 379 F. Supp. 2d 1030, 1039-40 (D. Minn. 2005) (ordinance was content-based where it regulated size of signs based upon type of sign; residential political signs were limited to 4 square feet and other temporary signs were given more latitude); *Clear Channel Outdoor, Inc. v. Town Board of the Town of Windham*, 352 F. Supp. 2d 297, 308 (N. D. N. Y. 2002) (ordinance was content-based where some temporary signs were limited to 8 square feet and other temporary signs were limited to 32 square feet); *Sugarman v. Village of Chester*, 192 F. Supp. 2d 282, 302 (S.D.N.Y. 2002) (size limitation was content-based where political signs were limited to 32 square feet; the "First Amendment proscribes municipal favoritism of one form of speech over another, even if the ordinance merely allows one entity to post larger signs

than another on the basis of the sign's content").

Plaintiff is aware of no compelling interest furthered by placing size limitations on political signs but not signs with other content. Accordingly, Plaintiff is likely to succeed on the merits of her *First Amendment* challenge to the limitations on the size of political signs permitted by § 520.020.5.

Number of Signs

Plaintiff is likely to succeed on her claim that the size limitation on political signs § 520.020.5 is unconstitutional. Political signs are restricted to two signs per candidate per lot. Other types of permitted signs that are non-political are not limited in number.

The restriction on the number of signs is doubly content-based. As with the durational and size limitations, the restriction on the number of signs is content based in that it restricts political speech on yard signs in a manner that other, non-political speech on yard signs are not restricted. But it also is a content based restriction in that Defendants are required to judge who the sign supports to determine whether to it counts as one of the two signs per candidate permitted on each lot.

The restriction of the number of signs is not narrowly tailored to further a compelling government interest. Indeed, a homeowner could have dozens of signs on her yard and not violate the ordinance so long as no more than two of those signs were for any single candidate. And there is no limit on the number of other, non-political signs permitted by the ordinance that could be on the lot at the same time. This belies any notion that the restriction is narrowly tailored toward furthering an interest in aesthetics or traffic safety by limiting the total number of signs on any given lot. Therefore, Plaintiff is likely to succeed on the merits of her challenge to §520.020.5's restriction on

the number of political yard signs allowed.

B. Plaintiff will suffer irreparable harm without a preliminary injunction

Plaintiff will suffer irreparable harm if an injunction does not issue. Absent an injunction that enjoins the enforcement of the durational, size, and number restrictions on political yard signs in § 520.020, Plaintiff faces the prospect of criminal charges if she engages in core political speech. She has already removed a political yard sign because of the threat her sign will be confiscated and further action taken against her. She is aware of another person who has been charged in municipal court for having a political yard sign. She would have a sign in her yard now but for the threats of enforcement of the unconstitutional restrictions.

This restriction on Plaintiff's protected free speech constitutes irreparable harm. It is well-settled law that a "loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Because Plaintiff has established she is likely to succeed on the merits of her *First Amendment* claims, she has also established irreparable harm as the result of the deprivation. *See e.g., Marcus v. Iowa Pub. Television*, 97 F.3d 1137, 1140-41 (8th Cir.1996).

C. The balance of harms favors an injunction

Plaintiff will be harmed if § 520.020's restrictions on political speech are enforced while this matter is resolved on the merits. "The balance of equities ... generally favors the constitutionally-protected freedom of expression." *Phelps-Roper*, 545 F.3d at 690.

There is no harm to the Defendants, who have no significant interest in the enforcement of the challenged ordinance, which is likely unconstitutional.

D. An injunction will serve the public interest

“It is always in the public interest to protect constitutional rights.” *Phelps-Roper*, 545 F.3d at 689. Because Plaintiff has demonstrated the likelihood she will succeed on the merits, the public interest is served by preventing the continuation of likely unconstitutional enforcement of the challenged ordinance while this case is considered on the merits. The public interest supports an injunction that is necessary to prevent a government entity from violating the Constitution. *Doe v. South Iron R-1 School Dist.*, 453 F.Supp.2d 1093, 1103 (E.D.Mo. 2006).

III. CONCLUSION

Plaintiff has established that she meets the standards for preliminary injunctive relief. Accordingly, Plaintiff requests that this Court enter a preliminary injunction prohibiting Defendants and all persons acting in concert with them, or in connection with them, from enforcing or threatening to enforce the time, durational, size, and numerical restrictions on political yard signs contained in *Florissant City Code § 520.020.5* until further order of this Court. Plaintiff further requests bond be waived or a nominal bond be established because no financial harm will come to Defendants as a result of a preliminary injunction.

Respectfully submitted,
AMERICAN CIVIL LIBERTIES UNION
OF EASTERN MISSOURI

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2011, I mailed a copy of this memorandum, first-class postage pre-paid, to the following Defendants:

City of Florissant
c/o City Clerk
955 Rue St. Francois
Florissant, Missouri 63031

Mr. Robert G. Lowery, Sr.
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City of Florissant
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Florissant, Missouri 63031

Mr. Philip E. Lum, AIA
Building Commissioner
City of Florissant
955 Rue St. Francois
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/s/ Grant R. Doty