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United States District Court, W.D. Texas, San Antonio Division.

Etta FANNING, Plaintiff
v.
CITY OF SHAVANO PARK, TEXAS, Defendant.

SA-18-CV-00803-XR
|
Signed 12/19/2019

Attorneys and Law Firms

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ORDER ON SUMMARY JUDGMENT

XAVIER RODRIGUEZ, UNITED STATES DISTRICT JUDGE

***1** On this date, the Court considered Defendant City of Shavano Park, Texas' Motion for Summary Judgment (ECF No. 29) and Plaintiff Etta Fanning's Motion for Summary Judgment (ECF No. 31). Both motions are fully briefed, oral argument was heard on December 16, 2019 before this Court, and the motions are ripe for review. For the reasons stated herein, the Court will GRANT the City's Motion and DENY Plaintiff's Motion.

BACKGROUND

Plaintiff Etta Fanning ("Plaintiff") lives in the City of Shavano Park, Texas ("City"), in a gated community called Bentley Manor, which is governed by a homeowners' association ("HOA"). Plaintiff is one of the residents who volunteers to host an annual neighborhood party on the Fourth of July. In years past, Plaintiff and others have used invitations and signs to invite the Bentley Manor community to the Fourth of July party. Plaintiff and other volunteers pay for the cost of the signs and other materials. In July 2018 Plaintiff and other volunteers planned the Fourth of July party, and distributed invitations and posted signs to promote it. But before the Fourth of July, a storm knocked down their signs and caused the cancellation of the party due to weather. A "raincheck party" was planned for July 28. On the morning of July 26, Plaintiff and other volunteers posted signs to promote the raincheck party: they hung banner signs[1] on trees at two gate exits of Bentley Manor, and placed three small yard signs on what they believed to be the private property of three homeowners who had given them permission to do so. Compl. ¶ 12 (ECF No. 1); Fanning Dep.[2] 21:7–11 ("Three residents gave us permission to put up ... small signs ... [T]hey gave us permission to put them in their yard"); 21:18–20 ("We thought we placed them on their property at the edge of the curb so that people driving by could see them.") As in years past, Plaintiff and other volunteers knocked on doors to ask their neighbors if they could place the yard signs in each yard to promote the party. Fanning Dep. 21:7–11; 23:23–24:1 (Q: "[Y]ou're saying there's no doubt in your mind you had permission from all three?" A: "Yes, we had permission from all three people we asked.") Plaintiff never placed yard signs unless she had permission from the resident homeowner. Fanning Dep. 40:1–11 ("I never ... put up a sign ever, political sign, party sign, never ever put up a sign without asking the resident ... for these party signs we've never had anyone say no.") For the July 2018 raincheck party, Plaintiff did not place any signs in her own yard. Fanning Dep. 50:23–51:2 (Q: "[Y]ou did not place any signs or banners on your property itself, did you?" A: "At my home?" Q: "At your home." A: "No.")

***2** By 4:00 p.m. on July 26, the City Police Chief, Ray Lacy ("Chief Lacy"), had removed all of the banner and yard signs. Compl. ¶ 13; Answer 2 (ECF No. 22); Pl.'s Resp. to Def.'s Mot. For Summ. J., Ex. 3 (ECF No. 32-5) [hereinafter, "Lacy Report"]. He removed them as violations of the City's sign regulations, found in Chapter 24 of its Code of Ordinances ("Sign Code"). Lacy Report. The City's Sign Code makes all signs on private property unlawful unless they fit within one of several "non-nuisance sign" categories laid out in the Code. Code Sec. 24-3.[3] The Code "combine[s] the need to protect the public safety and welfare, the need to encourage pedestrian movement, the need for a well maintained and attractive community, and the need to adequately convey ideas, provide communication and identify features within the community." Code Sec. 24-1. The "purpose" section of the Code goes on to explain:

> The sign standards are intended to allow signs to have adequate visibility from streets and rights-of-way that abut a site, but not for visibility from streets and rights-of-way farther away. The regulations for signs and awnings have the following specific objectives:
>
> (1) To ensure that signs and awnings are designed, constructed, installed and maintained according to standards to safeguard life, health, property and public welfare and to eliminate excessive and/or confusing sign displays that create potential hazards to motorists, pedestrians and to property;
>
> (2) To allow and promote positive conditions for sign communication while at the same time restrict signs which create continuous visual clutter and hazards at public right-of-way intersections;
>
> (3) To reflect and support the desired character and development patterns of the various zoning districts in order to plan and promote an attractive environment;
>
> (4) To allow for adequate and effective signs in business and office districts, while preventing signs from dominating the appearance of the area, thereby encouraging a positive business atmosphere;
>
> (5) To establish a sign application and sign permit review process that effectively regulates issues pertaining to the location, placement and physical characteristics of signs in an effort to ensure compatibility with adjoining land uses, architecture and landscape; and
>
> (6) To provide for consistent, fair, and content neutral application and enforcement of regulations pertaining to signs and to ensure that the constitutionally guaranteed right of free speech is protected.

Id. In residential zoning districts, the following types of signs are considered "non-nuisance signs" allowable under the Code:

> (1) Upon final plat approval, a single sign may be erected temporarily on each approved plat or development, provided, however, that such sign shall not exceed 60 square feet in sign area, including its framing, trim and molding, and shall be placed so as not to interfere with the occupancy or use of any lots in the subdivision. All such signs shall be removed upon completion of the sale of 95 percent of the lots in the subdivision.
>
> (2) Each residential property may erect one sign[4] on the property that conforms to the following requirements:
>
> a. The sign cannot be displayed in such a manner that it can be visibly viewed from the public right-of-way for more than 60 days per calendar year;
>
> b. The gross sign area shall not exceed six square feet in sign area including framing, trim and molding;
>
> c. The sign shall not be higher than six feet above grade;
>
> d. The sign shall not be placed on public property including a public easement or right-of-way; and
>
> e. The sign cannot be an illuminated or backlit.
>
> (3) In encouragement of the practice of recognizing achievements and student activities, each residential property may erect two signs that conform to the following requirements:
>
> ***3** a. The signs cannot exceed four square feet in sign area, including framing, trim and molding;

b. Signs shall be placed within ten feet of the front facing of the primary residence;

c. Signs shall not be higher than four feet above grade;

d. The sign cannot be an illuminated or backlit.

(4) During the period the residential property is listed for sale or lease, a sign may be erected on the property, subject to the restrictions noted in section 24-6(2)(b)–(e). Residential lots fronting on two streets shall be allowed one sign facing each street.

(5) Signs during voting periods. Each residential property may erect signs in addition to those described in section 24-6(2) and section 24-6(3) during voting periods, as defined in section 24-2, subject to the following restrictions:

a. No sign may be erected more than 60 days prior to the start of the voting period;

b. All signs must be removed by 11:59 p.m. the day following the voting period;

c. The total sign area of all voting period signs must be no more than 36 square feet, and no one sign shall be larger than 24 square feet;

d. No voting period sign may be higher than six feet above grade; and

e. The signs cannot be illuminated or backlit.

Code Sec. 24-6. The Code also specifically addresses "banner signs" in Section 24-7:[5]

Banner signs in residential zoning districts are allowed subject to the following requirements:

(1) Banner signs may be erected by property owners' associations as defined by the Texas Residential Property Owners Protection Act.

(2) Each property owner's association may erect one banner sign at each entrance.

(3) Each residential property owner may erect one banner sign.

(4) No banner sign may be erected more than seven days prior to the first Tuesday in October.

(5) Banner signs must be removed by 11:59 p.m. the day following the first Tuesday in October.

(6) Banner signs on public property shall be governed by a separate City policy.

Code Sec. 24-7.

According to Chief Lacy, he removed all of the banner signs because he found them tied to trees at two different exit gates of Bentley Manor on property that is part of the public right-of-way, in violation of the general prohibition on banner signs in Code Section 24-3 and outside of the temporal limitations found in Code Section 24-7. Lacy Report. Chief Lacy removed the three yard signs because he believed them to be "bandit signs" posted without the permission of the landowner. *Id.* Chief Lacy stated that he found these three signs in public right-of-way areas: he observed one in the right hand median at the north entrance of Bentley Manor on Farne Castle, one in the "middle of the island where Farne Castle divides into a landscaped island," and one on Bentley Manor Road near the south exit of the neighborhood. *Id.* Chief Lacy knew the HOA had not given permission to post signs on HOA property such as a right-of-way, and later that afternoon he confirmed the same with the HOA President Adam Holzhauer ("Holzhauer"). Fanning Dep. Ex. 4, Holzhauer Voicemail Tr. (ECF No. 29-1 at 88); Lacy Report. Through later investigation conducted by City Manager Bill Hill ("Hill"), the City determined that the third yard sign, found near the south entrance of Bentley Manor, was in fact on private property and not the public right-of-way, and so the City returned and replaced the sign on Friday, July 27. Fanning Dep. Ex. 5, Text Messages between Plaintiff and Hill.

***4** When Plaintiff involved her counsel, the City attorney explained that "one of the confiscated yard signs was returned to its

original location after further review" but that the other two "were on HOA owned property without permission and in violation of the ordinance." Fanning Dep. Ex. 7, July 27 Email Exchange between Plaintiff's Counsel and City Attorney. The City attorney also stated that all the banner signs "were placed at the entrance of the subdivision on HOA owned property, also without HOA permission" and that banner signs "are allowed in residential districts under very strict limitations concerning the time of year." The City offered to return all signs to Plaintiff if the parties could agree that "(1) Banners may not be placed at the entrance unless during the authorized period in October and by the HOA," and "(2) 18"x27" signs can be displayed for this event if solely on private residential property with the property owner's permission." *Id.* Plaintiff did not agree to conform with these stipulations, and the signs were never returned.

Plaintiff thereafter filed the present lawsuit on August 3, 2018, alleging that the City's Sign Code had deprived Plaintiff of her fundamental rights protected by the First and Fourteenth Amendments of the U.S. Constitution. Compl. ¶ 43. Specifically, Plaintiff claims that the Code's banner sign limitation is facially unconstitutional as a content-based speech restriction (Count I), and that the Code's one-sign limitation is facially invalid and unenforceable as a content-based speech restriction (Count II).

After filing this lawsuit, in July 2019 Plaintiff again planned for the annual Fourth of July party. According to Plaintiff, she wanted to place banner signs on HOA property and received permission from an HOA representative to do so, but she could not place the signs because they would have been in violation of the Code. Pl.'s Mot. For Summ. J. at 7; Fanning Dep. 32:14–33:9. The HOA did give Plaintiff permission to place yard signs allowable under the Code on HOA property, which she did. Fanning Dep. 32:18–19; 33:5–9. Plaintiff claims that, in addition to desiring to put banner signs on HOA property with permission, she desires the ability to place banner signs on her own property and on her neighbors' property with their permission to promote the Fourth of July party and other messages, but she has not done so because it would violate the Sign Code. Pl.'s Mot. For Summ. J. 7; Fanning Dep. 59:18–21.

Plaintiff and the City have now filed cross-motions for summary judgment. The City argues that Plaintiff's complaint should be dismissed because she lacks Article III standing. Def.'s Mot. For Summ. J. 3. According to the City, Plaintiff's complaints are based on the removal of banner and yard signs that were all on HOA property without permission, necessarily meaning she lacks standing. The City further argues that the Code should not be subject to strict scrutiny because neither the banner sign limitation nor the one-sign limitation are content-based restrictions. *Id.* at 4. As to the banner sign limitation, the City claims that it is a time, place, and manner restriction with no mention of content. As to the one-sign limitation, the City seems to argue that Plaintiff's concerns are mooted by the allowance under a different part of the Code for every resident to erect two signs all year long. *Id.* at 5. In Plaintiff's motion for summary judgment, she argues that she is entitled to relief as a matter of law because the Code is content based and subject to strict scrutiny, and the City has failed to demonstrate that the Code is narrowly tailored to serve any compelling interest. Plaintiff also argues that she has standing under Article III, and that the banner sign limitation on "entrances" is unconstitutionally vague. Both motions are ripe for review.

DISCUSSION

I. Article III Standing

Because the City has alleged that Plaintiff lacks Article III standing to bring her claims, the Court will first evaluate Plaintiff's standing before examining the merits of the parties' motions for summary judgment. For a plaintiff to have constitutional standing, she must meet the well-known three-prong test by showing: (1) an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that a favorable decision will redress the injury. *Croft v. Governor of Texas*, 562 F.3d 735, 745 (5th Cir. 2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

a. <u>Plaintiff has standing to challenge the Code's banner sign limitation.</u>

***5** As to Plaintiff's challenge to the banner sign limitation in Count I, the City argues that Plaintiff's complaint concerns the placing of banner signs on HOA property, which she did not have permission to do. Were that the only basis of Plaintiff's complaint, she likely could not meet either the causal connection or the redressability prongs of Article III standing; the cause of the signs being taken down is not the alleged content discrimination, but rather is the fact that Plaintiff does not have permission to post signs on property that is not hers, and striking down the Code would not change that.

But Plaintiff alleges more injury than just the banner signs being taken down from HOA property. She specifically claims that she wants to display banner signs in her own yard outside of the temporal limitations in the Code. *See* Pl.'s Mot. For Summ. J. 7; Fanning Dep. 59:18–21 (Q: "Would you like to place a banner sign on your own property?" A: "Well, yes, of course."); Fanning Dep. 60:8–10 (Q: "Do you want to hang banner signs in your neighbors' yards?" A: "With permission, yes.") She also claims that she had permission from the HOA to place banner signs in July 2019 but did not do so because of the Code. It is well-established law that "[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 754 (5th Cir. 2010). Plaintiff's chilled speech is undisputedly caused by the Code and changing the Code's banner sign limitation could redress her injury. Thus, the Court finds that Plaintiff has constitutional standing to challenge the banner sign limitation.

b. Plaintiff lacks standing to challenge the Code's one-sign limitation.
As to Plaintiff's complaints about the one-sign limitation alleged in Count II, the City again asserts that her purported "injury" is the removal of three yard signs that were on HOA property without permission. Def.'s Mot. For Summ. J. 3. Plaintiff argues that there is a factual dispute about the placement of the yard signs.[6] Pl.'s Resp. to Def's Mot. for Summ. J. 4–5. The parties' disputes about the placement of the signs—whether on HOA property or on private property, and if the latter whether Plaintiff had permission—muddle the question of standing. Even taking the facts in the light most favorable to Plaintiff, she cannot challenge the one-sign limitation because she cannot meet the causation or redressability prongs of the standing test.

***6** Plaintiff challenges the one-sign limitation of the City's Code found at Section 24-6(2). Compl. ¶ 63. But the three yard signs at issue were removed pursuant to an altogether separate provision of the Sign Code: the prohibition on "bandit signs," which are signs "erected without the written permission of the land owner." *See* Code Sec. 24-2. Section 24-13 of the Code provides that such signs "may be removed and discarded without notice." The City has an extensive history of enforcing the "bandit sign" provision. *See* Pl.'s Resp. to Def.'s Mot. for Summ. J. Exs. 10A, 10B. Chief Lacy, the officer who observed the placement of Plaintiff's signs and removed them, noted in his report that they were "bandit signs" that were "illegally posted." Pl.'s Mot. for Summ. J. Ex. 3. His report makes no mention of the one-sign limitation Plaintiff is challenging. These three signs, and any other yard sign Plaintiff wanted to place, are in fact perfectly allowable under the one-sign limitation if placed on Plaintiff's own property or property where she has permission from the owner. The City informed Plaintiff of this, and offered to return the signs to her, but she refused to agree that she would only place the yard signs on private property where she had permission from the resident to do so. *See* Fanning Dep. Ex. 2 ("18"x27" signs can be displayed for this event if solely on private residential property with the property owner's permission"); Compl. ¶ 18 ("Plaintiff Fanning cannot agree that the City may enforce an unconstitutional ordinance, so she did not accept these terms and has not received her confiscated signs.")

The one-sign limitation did not cause any injury to Plaintiff; the prohibition on placing "bandit signs" without permission of the landowner did, but Plaintiff is not challenging that prohibition. Likewise, striking down the one-sign limitation would not redress Plaintiff's complaints, because the "bandit sign" prohibition would remain intact and she would still not be allowed to post signs to property without the permission of the landowner. For these reasons, Plaintiff cannot meet the causation or redressability prongs of Article III standing, and thus lacks standing to bring Count II of her Complaint. And unlike in Count I, Plaintiff has not sufficiently alleged that the one-sign limitation otherwise chilled her speech.[7] Thus, as to Count II, the Court DISMISSES Plaintiff's claims for lack of standing.

II. Summary Judgment Standard
The Court will grant summary judgment if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). "A fact is material only if its resolution would affect the outcome of the action." *Wiley v. State Farm Fire & Cas. Co.*, 585 F.3d 206, 210 (5th Cir. 2009). Thus, a genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 355 (5th Cir. 2010).

The moving party bears the initial burden of informing the court of the basis for the motion and of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Adams v. Travelers Indem. Co.*, 465 F.3d 156, 163 (5th Cir. 2006). Once the moving party meets this burden, the

nonmoving party must "go beyond the pleadings" and designate competent summary judgment evidence "showing that there is a genuine issue for trial." *Adams*, 465 F.3d at 164; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986). "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

***7** The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). Mere conclusory allegations, unsubstantiated assertions, improbable inferences, unsupported speculation, and hearsay evidence (unless within a recognized exception) are not competent summary judgment evidence. *Walker v. SBC Servs., Inc.*, 375 F.Supp.2d 524, 535 (N.D. Tex. 2005) (citing *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994); *Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995)). When ruling on a motion for summary judgment, the Court must view all facts and inferences in the light most favorable to the nonmoving party and resolve all disputed facts in favor of the nonmoving party. *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir. 2005). A court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254–55. However, when the nonmoving party has failed "to address or respond to a fact raised by the moving party and supported by evidence, then the court may consider the fact as undisputed" and "[s]uch undisputed facts may form the basis for a summary judgment." *Broadcast Music, Inc. v. Bentley*, Civil Action No. SA-16-CV-394-XR, 2017 WL 782932, at *2 (W.D. Tex. Feb. 28, 2017). "The court also considers 'evidence supporting the moving party that is uncontradicted and unimpeached.' " *Gordon v. Acosta Sales & Mktg., Inc.*, No. SA-13-CV-662-XR, 2014 WL 7339117, at *3 (W.D. Tex. Dec. 22, 2014), *aff'd*, 622 F. App'x 426 (5th Cir. 2015) (quoting *Reeves*, 530 U.S. at 151).

III. First Amendment Analysis

The First Amendment, as applied to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. CONST., amend. 1. A government such as the City "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). Laws restricting speech that are content based "are presumptively unconstitutional" and subject to strict scrutiny —that is, they "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* On the other hand, laws that restrict speech without regard to its content and impose an incidental burden on speech are subject to intermediate scrutiny—that is, they must "further[ ] an important or substantial government interest" and the restriction on speech must be "no greater than is essential to the furtherance of that interest." *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994).

So, this Court's first task is to determine whether the banner sign limitation is content based. A government regulation of speech "is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. A law can be content based on its face if it draws distinctions based on the message a speaker conveys. These distinctions may be "obvious" if they regulate speech "by particular subject matter," or "more subtle" if they regulate speech "by its function or purpose." *Id.* Even if a speech restriction is facially content neutral, it will be considered content based and subject to strict scrutiny if it "cannot be 'justified without reference to the content of the regulated speech,' " or if it was "adopted by the government 'because of disagreement with the message [the speech] conveys." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Plaintiff argues that the Code's banner sign limitation is content based either because (1) it requires a sign to be read before determining the restrictions applicable, and so is facially content based under *Reed*, or (2) even if it is content neutral, the "more subtle" exception to the banner sign prohibition "meant specifically to accommodate signs promoting National Night Out" subjects it to strict scrutiny. Pl.'s Mot. for Summ. J. 13.

a. <u>The banner sign limitation is not facially content based.</u>

***8** The banner sign section of the Code restricts both property owners' associations and residential property owners from erecting banner signs except for "seven days prior to the first Tuesday in October." Code Sec. 24-7(4). Contrary to Plaintiff's claims, this does not require "a sign to be read before determining the restrictions applicable." Rather, a City enforcement official need not read a banner sign at all—it either is erected within the timeframe allowed by the Code or it is not, regardless of the sign's content. As admitted by both parties in open court, a banner sign erected during the allowable timeframe may bear any content desired. Similarly, the restriction does not regulate speech "by its function or purpose,"

because it is undisputed that Plaintiff could hang a banner sign bearing any message, having any function or purpose, so long as it is within the temporal window allowed. As a matter of law, the Court finds the banner sign limitation to be facially content neutral.

b. The banner sign limitation can only be justified by reference to content, and so is subject to strict scrutiny.

That does not, however, mean the banner sign limitation avoids strict scrutiny. Plaintiff argues that under *Reed*, even a facially content-neutral law is subject to strict scrutiny "where the government's purpose or justification for enacting the law depends on the underlying idea or message expressed." Pl.'s Mot. for Summ. J. 11–12 (emphasis added). Plaintiff is correct that evidence of impermissible legislative motive or a government interest related to the suppression of free expression may subject an otherwise content-neutral speech restriction to strict scrutiny. *See Reed*, 135 S. Ct. at 2228 (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663–64 (2011) (statute was content based "on its face," and there was also evidence of an impermissible legislative motive) and *United States v. Eichman*, 496 U.S. 310, 315 (1990) ("Although the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related to the suppression of free expression.")).

The Court is persuaded that the banner sign limitation at issue was motivated by content-based concerns. The tight one-week period where banner signs are allowed falls every year as the week before National Night Out, which is celebrated in the state of Texas on the first Tuesday of October.[8] There is evidence that City officials understand the banner sign restriction in effect prohibits banner signs except those related to National Night Out. *See* Pl.'s Mot. for Summ. J. Ex. 3 (noting the "banner sign in question is ... [n]ot related to National Night Out" and was "[t]herefore ... removed from the right of way")[9]; Def.'s Mot. for Summ. J. Ex. B at 59 (answering the question of where the banner signs were located: "Inside the South Gate. Same place they hang the National Night Out banner"). There can be no justification for the one-week exception to the general ban on banner signs without "reference to the content of the regulated speech"—that is, the one-week exception is so obviously related to National Night Out and cannot be justified without referencing that event. *See Reed*, 135 S. Ct. at 2227 (citing *Ward*, 491 U.S. at 791). If there is another possible justification for this one-week exception, the City has not put it forward in this case.

Counsel for Plaintiff argued persuasively at the December 16 hearing that restrictions so tightly tailored to an event are content based. Plaintiff's counsel presented an analogy: a legislative body allows prayer by anyone of any religious background, regardless of the prayer's content, but only for the week before the Christian holiday of Easter. Prayers, regardless of content, are prohibited entirely during other religious holidays, Christian and non-Christian alike. The tight temporal restriction would lead a Court to believe that the legislature's motivation in passing such a regulation was to promote prayers related to Easter but prohibit prayers related to other religious holidays.

***9** So too here: the tight temporal restriction related to one particular event is enough for the Court to conclude that the City's motivation in enacting the banner sign limitation was to promote speech related to National Night Out and restrict speech related to any other content. It does not matter that the City's favoritism benefits a generally well-regarded, positive, community-oriented event. The tipping of the scales of speech towards content the government favors over content the government does not favor implicates First Amendment concerns, regardless of the government's benign motives. A law may be "subject to strict scrutiny regardless of the government's benign motive ... or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). Despite any well-meant intention, the City's content-based motivation in enacting the banner sign restriction with an exception for the week of National Night Out subjects even a facially content-neutral regulation to strict scrutiny.

c. The banner sign limitation withstands strict scrutiny.

Because the banner sign limitation is subject to strict scrutiny, the burden is on the City to show that it is narrowly tailored to a compelling government interest. *Reed*, 135 S. Ct. at 2226. The City has detailed its interests in the Code's "purpose" section, which lays out six "specific objectives." Code Sec. 24-1. Specifically in support of the banner sign limitation, counsel for the City has stated that the City's interest is in the beauty and aesthetic of the City embodied in its slogan: "City Living with Country Charm." As stated in the Code's "purpose" section, the City's interest is "[t]o reflect and support the desired character and development patterns of the various zoning districts in order to plan and promote an attractive environment." Code Sec. 24-1.

Plaintiff argues that “aesthetics” cannot be a compelling government interest. The Court disagrees. Plaintiff states in her Motion for Summary Judgment that she “is not aware of any federal court that has found [aesthetics] to be a compelling justification for regulation of non-commercial signs” and cites five cases as support—none from within this Circuit. Pl.’s Mot. for Summ. J. 17–18. The cases cited by Plaintiff do not support the proposition that aesthetics can never be a compelling government interest, and in any event are not binding law on this Court. To this Court’s knowledge, no court within the Fifth Circuit has even considered whether aesthetics are a compelling government interest since *Reed* was decided in 2015. This Court has recognized an interest in aesthetics (furthered by “limiting ‘visual clutter’ ”) qualifies as a “substantial” government interest. *Reagan Nat’l Advert. of Austin, Inc. v. City of Cedar Park*, 387 F. Supp. 3d 703, 714 (W.D. Tex. 2019), *reconsideration denied*, No. AU-17-CA-00717-SS, 2019 WL 3845455 (W.D. Tex. Aug. 15, 2019). Plaintiff points to no authority that prevents this Court from going further to find a government’s interest in aesthetics to be compelling.

It seems apparent that a government’s interest in aesthetics is more likely to be compelling where the government asserting that interest has a mission or focus based on aesthetics. Such is the case here. Shavano Park is a small city with a population of around 3,000.[10] The City puts a central focus on its appearance, beauty, and charm. *See* CITY OF SHAVANO PARK, http://www.shavanopark.org/index.php (last visited December 18, 2019) (noting on the City’s website’s homepage the slogan of “City Living with Country Charm” and that the City is “Proud to be a Certified Scenic City”). Accordingly, the Court is persuaded that the City’s asserted interest in aesthetics is a compelling government interest.

***10** The Court also finds the banner sign limitation to be narrowly tailored to that interest. If the City believes banner signs damage its interest in the aesthetics of its community and prohibits such signs for 51 weeks out of the year, then the restriction can hardly be more narrowly drawn. Plaintiff argues to the contrary that “[a] law cannot be ‘regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.’ ” Pl.’s Mot. for Summ. J. 19–20 (citing *Reed*, 135 S. Ct. at 2231). In *Reed*, the code applied strict rules only to one type of sign (temporary directional signs) in the name of “traffic safety,” but permitted many other types of signs. In that case, the Court found the temporary directional sign restriction not narrowly drawn to the asserted interest of traffic safety, since other signs could similarly cause traffic safety issues but were permitted by the code. *Reed*, 135 S. Ct. at 2232. But here, the City prohibits almost all of the banner signs they assert harm their interest in aesthetics, with a mere one-week exception. The City’s banner sign limitation does not suffer from the same degree of “underinclusiveness” discussed in *Reed.* The Court finds the banner sign limitation to be narrowly drawn to serve the City’s compelling interest in aesthetics.

CONCLUSION

For the reasons stated above, the Court will DENY Plaintiff’s Motion for Summary Judgment (ECF No. 31), DISMISS Plaintiff’s Count I for lack of standing, and GRANT the City’s Motion for Summary Judgment (ECF No. 29) as to Count II.

The Clerk is DIRECTED to enter judgment in favor of Defendant and against Plaintiff. Plaintiff shall take nothing by her claims.

It is so ORDERED.

All Citations

Slip Copy, 2019 WL 7284945

Footnotes

1	The record is unclear if there were two banner signs or four banner signs total. *Compare* Fanning Dep. 20:23–25 (“I was part of putting up the two banners at the gate”) *with* Lacy Report (“All seven (7) signs, four banner signs and three plastic signs were removed.”) It is undisputed that, regardless of the total number, all banner signs were placed on HOA property.

2	Plaintiff Fanning's deposition was attached in full as an exhibit to the City's Motion for Summary Judgment, ECF No. 29-1, and in part as an exhibit to Plaintiff's own Motion for Summary Judgment as well as to both parties' respective responses (ECF Nos. 32-3, 33-2, 34-1).
3	The Sign Code is attached in its entirety as Exhibit 8 to Plaintiff's Response in Opposition, ECF No. 32-10.
4	This Section 24-6(2) is referred to herein as "the one-sign limitation" and is the subject of Count II of Plaintiff's Complaint.
5	This Section 24-7 is referred to herein as "the banner sign limitation" and is the subject of Count I of Plaintiff's Complaint.
6	Contrary to Plaintiff's assertions otherwise, the facts about two of the signs are not in dispute. Chief Lacy was the enforcing officer who personally witnessed the signs' placement and removed them, as evidenced by his report submitted as evidence by both parties. *See* Pl.'s Mot. for Summ. J. Ex. 3 ("I then observed a second plastic 18x27 sign stuck into the [right-of-way] in the middle of the island where Farne Castle divides into a landscaped island"; "I observed ... another plastic sign in the entrance [right-of-way] area of the road of Bentley Manor.") Hill also testified in his deposition that he had Chief Lacy take him out and physically show him where all three signs had been located, which he marked on three maps attached as exhibits to his deposition. *See* Hill Dep. 21:4–22:12; Hill Dep. Exs. 5–6. In her Motion, Plaintiff attempts to create a factual dispute by claiming this evidence is contradicted by (1) the voicemail where Holzhauer complained of banner signs on HOA property but did not mention yard signs, and (2) Plaintiff's own deposition testimony. Pl.'s Mot. for Summ. J. 5. Neither is sufficient to create a factual dispute. Plaintiff's own deposition testimony is that she requested permission from three homeowners, and that she wanted to and thought she did place the signs on private property. *See* Pl.'s Resp. to Def.'s Mot. for Summ. J. 2 ("Desiring to place the three yard signs in neighbors' private yards ..."). Such mere subjective belief is insufficient to create a factual dispute about these two signs. Even if there is a factual dispute about the placement of the third sign, this dispute is immaterial as explained above because the one-sign limitation did not cause the removal of any of the signs.
7	Plaintiff's Complaint makes no mention of desiring to place signs outside of the one-sign limitation. *See* Compl. ¶ 63–69. Plaintiff attempts in her response to Defendant's motion for summary judgment to assert that "If the Sign Code allowed, Plaintiff would place both banner signs and yard signs, outside the time periods allowed, on her own property and neighbors' property with their permission." Pl.'s Resp. to Def.'s Mot. For Summ. J. 3. However, the record evidence cited to—Plaintiff's own deposition—does not provide support for this assertion. Plaintiff admits that she does not "personally" want to put up larger signs than allowed by the Code. Fanning Dep. 66:23–67:1 (Q: "Do you want to put up larger signs than what the Shavano Park sign code allows?" A: "I personally don't ..."). Plaintiff's statement that she "want[s] to put up signs to invite people to the events that we have to build our community," Fanning Dep. 68:5–16, and that she doesn't "want signs to be selective" does not allege a concrete and particularized harm caused by the one-sign limitation.
8	The Court takes judicial notice of this fact. *See, e.g., National Night Out*, CITY OF SAN ANTONIO, https://www.sanantonio.gov/sapd/national-night-out (last visited December 18, 2019) ("NNO IN TEXAS – ALWAYS THE 1ST TUESDAY IN OCTOBER").
9	The Court notes that, curiously, the version of Chief Lacy's report used by the City in the deposition of Plaintiff did not include these lines where Chief Lacy discussed National Night Out. *Compare* Def.'s Mot. for Summ. J. Ex. A p. 86 *with* Pl.'s Mot. for Summ. J. Ex. 3.
10	*Geographic Identifiers: 2010 Demographic Profile Data (G001): Shavano Park city, Texas*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited December 18, 2019) (noting the City's population count of 3,035 as of the 2010 Census).

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