

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA UNIVERSITY CHAPTER)
OF TURNING POINT USA, and)
KYLE REYNOLDS,)

Plaintiffs,)

v.)

CITY OF BLOOMINGTON, INDIANA,)
ADAM WASON, in his official capacity as)
Director of Public Works for the City of)
Bloomington, and KYLA COX DECKARD,)
BETH H. HOLLINGSWORTH and DANA)
HENKE in their official capacities as members)
of the Board of Public Works of the City of)
the Bloomington, Indiana,)

Defendants.)

Case No. 1:22-cv-00458-SEB-TAB

**DEFENDANTS’ ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS’
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Defendants, by counsel, hereby submit their Answer to Plaintiffs’ Complaint for Declaratory and Injunctive Relief as follows:

INTRODUCTION

1. This case is an as-applied civil rights action brought pursuant to state law and 42 U.S.C. §§ 1981 and 1983 challenging the legality under both the state and federal constitutions of a denial by the City of Bloomington, Indiana (“Bloomington” or the “City”) and the City’s officials of Plaintiffs’ application to paint an “All Lives Matter” street mural on East Kirkwood Avenue in front of the Von Lee building on the campus of Indiana University (“IU” or the “University”) at Bloomington as approved by IU officials.

ANSWER: Defendants admit that Plaintiffs are attempting to assert claims pursuant to state law and 42 U.S.C. §§ 1981 and 1983 relating to the City of Bloomington’s denial of

Plaintiffs’ request to paint an “All Lives Matter” street mural on East Kirkwood Avenue. Defendants deny that any such legal claim exists. Defendants deny all remaining allegations in paragraph 1 of Plaintiffs’ Complaint.

2. IU is a publicly funded state university located within the City.

ANSWER: Defendants admit the allegations in paragraph 2 of Plaintiffs’ Complaint.

THE PARTIES

3. Plaintiff, Indiana University Chapter of Turning Point USA (“Turning Point USA” or “TPUSA”) is a recognized, on-campus student organization at IU.

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 3 of Plaintiffs’ Complaint.

4. Plaintiff, Kyle Reynolds (“Mr. Reynolds”), is an authorized agent of Turning Point USA and its campus coordinator, and a current resident of Bloomington, Indiana.

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 4 of Plaintiffs’ Complaint.

5. Defendant City of Bloomington is an Indiana municipal corporation and is a corporate entity capable of suing and being sued.

ANSWER: Defendant admits that the City of Bloomington is a municipality and a subdivision of the State of Indiana capable of suing and being sued. Defendants deny the remaining allegations in paragraph 5 of Plaintiffs’ Complaint.

6. Defendant Adam Wason is the Director of Public Works of the City and in that capacity is a policymaking official. He is sued in his official capacity as the City’s Director of Public Works.

ANSWER: Defendants admit that Adam Wason is the Director of Public Works for the City of Bloomington, admit in his role as the Director of Public Works Mr. Wason is considered a policymaking official, and admit that Mr. Wason is sued in his official capacity. Defendants deny all remaining allegations in paragraph 6 of Plaintiffs' Complaint.

7. Defendant Kyla Cox Deckard is a member of the City's Board of Public Works and in that capacity is a policymaking official. She is sued in her official capacity as a member of the Board of Public Works.

ANSWER: Defendants admit that Kyla Cox Deckard is a member of the City's Board of Public Works, admit in her role as a member of the City's Board of Public Works Ms. Deckard is considered a policymaking official, and admit that Ms. Deckard is sued in her official capacity. Defendants deny all remaining allegations in paragraph 7 of Plaintiffs' Complaint.

8. Defendant Beth H. Hollingsworth is a member of the City's Board of Public Works and in that capacity is a policymaking official. She is sued in her official capacity as a member of the Board of Public Works.

ANSWER: Defendants admit that Beth H. Hollingsworth is a member of the City's Board of Public Works, admit in her role as a member of the City's Board of Public Works Ms. Hollingsworth is considered a policymaking official, and admit that Ms. Hollingsworth is sued in her official capacity. Defendants deny all remaining allegations in paragraph 8 of Plaintiffs' Complaint.

9. Defendant Dana Henke is a member of the City's Board of Public Works and in that capacity is a policymaking official. She is sued in her official capacity as a member of the Board of Public Works.

ANSWER: Defendants admit that Dana Henke is a member of the City’s Board of Public Works, admit in her role as a member of the City’s Board of Public Works Ms. Henke is considered a policymaking official, and admit that Ms. Henke is sued in her official capacity. Defendants deny all remaining allegations in paragraph 8 of Plaintiffs’ Complaint.

JURISDICTION & VENUE

10. This action arises under Article 1, Section 9 and Article 1, Section 23 of the Indiana Constitution and under 42 U.S.C. §§ 1981 and 1983 and the First and Fourteenth Amendments to the United States Constitution.

ANSWER: Defendants admit that Plaintiffs are attempting to assert claims pursuant to the Indiana Constitution and the First and Fourteenth Amendments to the United States Constitution. Defendants deny that any such legal claims exist. Defendants deny all remaining allegations in paragraph 10 of Plaintiffs’ Complaint.

11. Indiana “trial courts, as courts of general jurisdiction, have jurisdiction concurrent with the federal courts in enforcing rights conferred by the Constitution and laws of the United States.” *Petition of Ackerman*, 409 N.E.2d 1211, 1222 (Ind. Ct. App. 1980).

ANSWER: Defendants admit the allegations in paragraph 11 of Plaintiffs’ Complaint.

12. The Monroe Circuit and Superior Courts have original and concurrent jurisdiction in all civil cases. IC 33-28-1-2 (Circuit Court); IC 33-29-1.5-2 (Superior Court).

ANSWER: Defendants admit the allegations in paragraph 12 of Plaintiffs’ Complaint.

13. The Monroe Circuit and Superior Courts have authority to issue declaratory relief pursuant to IC 34-14-1-1 *et seq.*

ANSWER: Defendants admit the allegations in paragraph 13 of Plaintiffs’ Complaint.

14. The Monroe Circuit and Superior Courts have authority to issue injunctive relief pursuant to IC 34-26-1-3.

ANSWER: Defendants admit the allegations in paragraph 14 of Plaintiffs' Complaint.

15. This Court has authority to award costs, attorneys' fees and expert witness fees under 42 U.S.C. § 1988(b) and (c).

ANSWER: Defendants admit the allegations in paragraph 15 of Plaintiffs' Complaint.

16. Preferred venue is present in Monroe County under Trial Rule 75 because it is the County where the defendant governmental organization to which the claim relates is located.

ANSWER: Defendants admit the allegations in paragraph 16 of Plaintiff's Complaint.

FACTUAL ALLEGATIONS

A. Maintenance of Public Streets in the City of Bloomington

17. Pursuant to the Bloomington Municipal Code the chief administrative body of Bloomington is the Board of Public Works (the "Board of Public Works" or the "Board"), which has control of the day-to-day operation of the City's Department of Public Works. *See* Bloomington Municipal Code, Chapter 2.09, § 2.09.030.

ANSWER: Defendants admit the allegations in paragraph 17 of Plaintiffs' Complaint.

18. The Board consists of three members appointed by the Mayor of Bloomington. *See* Bloomington Municipal Code, Chapter 2.09, § 2.09.010.

ANSWER: Defendants admit the allegations in paragraph 18 of Plaintiffs' Complaint.

19. The Department of Public Works is the general administrative department of the City with responsibility for street maintenance and the management of all physical facilities of the City, with the sole exception of property managed by the utility service board or the board of parks commissioners. *See* Bloomington Municipal Code, Chapter 2.10, § 2.10.000.

ANSWER: Defendants admit the allegations in paragraph 19 of Plaintiffs' Complaint.

20. The head of the Department of Public Works is the "Director of Public Works," who is appointed by the Mayor with approval of the Board and serves at the pleasure of the Mayor. *See* Bloomington Municipal Code, Chapter 2.10, § 2.10.010.

ANSWER: Defendants admit the allegations in paragraph 20 of Plaintiffs' Complaint.

21. Mr. Adam Wason ("Director Wason") has at all times relevant to this matter been the City's Director of Public Works.

ANSWER: Defendants admit the allegations in paragraph 21 of Plaintiffs' Complaint.

22. In this capacity Director Wason has full powers and duties of a City Department Head, "administrative responsibility for the divisions, boards, commissions, councils and physical facilities" falling under the purview of the Board and the Department of Public Works, and "is subject to any rules promulgated by the Mayor and Board of Public Works which do not conflict with state law." *See* Bloomington Municipal Code, Chapter 2.10, § 2.10.020.

ANSWER: Defendants admit the allegations in paragraph 22 of Plaintiffs' Complaint.

B. Board of Public Works' Encroachment Policy

23. As explained below, The Board of Public Works has adopted a policy and practice of approving expressive activity which encroaches on public rights-of-ways.

ANSWER: Defendants admit that the Board of Public Works has the authority to approve applications for encroachment on public rights-of-ways. Defendants deny the remaining allegations in paragraph 23 of Plaintiffs' Complaint.

24. For instance, the Board of Public Works has approved at least three street murals painted on City streets. All three street murals in the City contain the phrase, "Black Lives Matter."

ANSWER: Defendants admit that the Board of Public Works has approved and endorsed the painting of Black Lives Matter murals on the surface of three City streets. Defendants deny all remaining allegations in paragraph 24 of Plaintiffs' Complaint.

25. While two of the street murals on City streets in Bloomington were erected by the City, as explained below, the Black Lives Matter Street Mural was erected on a public right-of-way on the IU campus by IU students and other volunteers.

ANSWER: Defendants admit that the City approved and endorsed the painting of Black Lives Matter murals on the surface of three City streets, and that volunteers participated in the painting of each of the three murals. Defendants deny all remaining allegations in paragraph 25 of Plaintiffs' Complaint.

26. The Board (at the City' council's urging) approved these two murals as "encroachments" on the City's right of way.

See https://bloomington.in.gov/onboard/meetingFiles/download?meetingFile_id=8674 at 48; https://bloomington.in.gov/onboard/meetingFiles/download?meetingFile_id=7660 at 36.

ANSWER: Defendants admit the City allowed an encroachment upon the public right of way to demonstrate its animosity to all forms of racism and hereby agreed to allow Black Lives Matters public art street murals on the surface of three City streets. Defendants deny all remaining allegations in paragraph 26 of Plaintiffs' Complaint.

27. The Board of Public Works has approved other types of expressive activity encroaching on public rights-of-way, including an Indiana University homecoming parade and a student organization showcase.

ANSWER: Defendants admit that the City has from time-to-time approved temporary expressive activities to occur within a public right of way. Defendants deny all remaining allegations in paragraph 27 of Plaintiffs' Complaint.

28. In September 2021, the Board of Public Works approved Middle Way House, an emergency shelter and advocacy group for survivors of sexual violence, to wrap handmade blankets around trees and lamp posts along public rights-of-way. The Board approved these encroachments in public rights-of way to be displayed for six months, until March 2022.

ANSWER: Defendants admit that on August 3, 2021, the City approved a Special Event Application submitted by Middle Way House for the annual "Wrapped in Love" public art display which included wrapping trees in downtown Bloomington with tree sweaters for the proposed public art display, and wrapping lampposts around the square with yarn. The City approved the Special Event Application to allow for the public art display to begin on October 1, 2021 and end on March 1, 2022, Defendants deny all remaining allegations in paragraph 28 of Plaintiffs' Complaint.

29. These examples illustrate that the City through the Board has created a practice or policy of allowing encroachments which contain messages with which the City agrees.

ANSWER: Defendants deny the allegations in paragraph 29 of Plaintiffs' Complaint.

30. The Board of Public Works' Encroachment Policy contains no concrete standards which guide or confine the exercise of discretion in approving encroachments in public rights-of-way.

ANSWER: Defendants deny the allegations in paragraph 30 of Plaintiffs' Complaint.

31. Rather, as explained below, the Board of Public Works has employed its Encroachment Policy in standardless fashion permitting some expressive activity and denying

other expressive activity encroaching on rights-of-way based upon the view point expressed or to be expressed in the encroachment.

ANSWER: Defendants deny the allegations in paragraph 31 of Plaintiffs' Complaint.

32. As explained below, the Board of Public Works' Encroachment Policy allows for encroachments through murals which express view points they like.

ANSWER: Defendants deny the allegations in paragraph 32 of Plaintiffs' Complaint.

C. "Black Lives Matter" Street Mural Jointly Approved by Indiana University and The Board of Public Works

33. As explained below, a "Black Lives Matter" street mural (the "BLM Street Mural" or the "Black Lives Matter Street Mural" or the "BLM Mural") was painted on Bloomington's Jordan Avenue (now Eagleson Avenue) on the campus of IU during July 3 – 5, 2021, and officially announced by IU on July 8, 2021.

ANSWER: Defendants admit that on July 3-5, 2021, a Black Lives Matter street mural was painted on the surface of Jordan Avenue (now Eagleson Avenue). Defendants admit that Jordan Avenue (now Eagleson Avenue) is a public street owned by the City and admit that Indiana University owns the land adjacent to Eagleson Avenue, where the Black Lives Matter Mural was painted. Defendants deny all remaining allegations in paragraph 33 of Plaintiffs' Complaint.

34. There exist no written standards that were followed relating to the manner in which the BLM Street Mural, which was an encroachment on the City's public right-of-way, was approved.

ANSWER: Defendants deny the allegations in paragraph 34 of Plaintiffs' Complaint.

35. Prior to July 3, 2021, when erection of the BLM Street Mural commenced, the BLM Street Mural was verbally authorized by the City's Director of Public Works after the location and content of the street mural had received the approval of the IU Administration.

ANSWER: Defendants admit that prior to July 3, 2021, the City's Director of Public Works approved and authorized the painting of the Black Lives Matter Mural on the surface of Eagleson Avenue and admit that the Indiana University administration had advised that it agreed with the City's approved street mural. Defendants deny all remaining allegations in paragraph 35 of Plaintiff's Complaint.

36. As a result, those working to erect the BLM Street Mural were able to paint the mural on a City street without prior official approval by the Board of Public Works.

ANSWER: Defendants admit that the Board of Public Works did not take official action to approve the Black Lives Matter street mural before it was painted on the surface of Eagleson Avenue. Defendants deny all remaining allegations in paragraph 36 of Plaintiffs' Complaint.

37. Funding for the BLM Street Mural came primarily from the IU Funding Board and this funding was derived from student fees distributed to student organizations on the IU campus by the IU Funding Board.

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 37 of Plaintiffs' Complaint.

38. The BLM Street Mural was envisioned by IU students Joa'Quinn Griffin and Tiera Howleit, and officially sponsored by Black Collegians, an IU student group led by IU student Tiera Howleit.

ANSWER: Defendants admit that the City of Bloomington Economic & Sustainable Development Department, Office of the Mayor, Community Family Resources Department, and the Public Works Department endorsed the painting of a Black Lives Matter mural on Jordan Avenue adjacent to the IU Neil Marshall Black Cultural Center in partnership with the IU Provost's Office and the Black Collegians student group. Defendants deny all remaining allegations in paragraph 38 of Plaintiffs' Complaint.

39. Tiera Howleit worked closely with Thomas Morrison, IU Capital Planning and Facilities Vice President, to identify a location for the mural and secure the University's support for locating the mural at one of the Black Collegians' favored sites.

ANSWER: Defendant is without sufficient information to admit or deny the allegations in paragraph 39 of Plaintiffs' Complaint.

40. Tiera Howleit also communicated with the City administration, including Public Works Director Adam Wason, on the mural project.

ANSWER: Defendant admits that Tiera Howleit communicated with the City, including Public Works Director Adam Wason about the approval and endorsement of the Black Lives Matter mural on Eagleson Avenue. Defendants deny all remaining allegations in paragraph 40 of Plaintiffs' Complaint.

41. IU campus leadership approved the location of the BLM Street Mural and approval from the City was received from Public Works Director Wason.

ANSWER: Defendants admit that members of the administration of Indiana University advised the City that IU, as the adjacent landowner, supported the painting of the Black Lives Matter Mural on Eagleson Avenue and admits that the City approved the location and the public art to be painted on the surface of Eagleson Avenue.

42. About a month after the street mural was painted, on August 3, 2021, the Board of Public Works ratified the earlier decision to approve the BLM Street Mural.

ANSWER: Defendants admit that on August 3, 2021, the Board of Public Works took official action to approve the painting of the Black Lives Matter Mural on the surface of Eagleson Avenue and join in the public display of support for Black and Brown residents who have been fighting for justice. Defendants further admit that the City's intentions were always to work with IU and the Black Collegians student group and submit the matter for official action by the Board of Public Works in early June, but due to transitions in City personnel and a resulting oversight, the approval was requested after the fact. Defendants deny all remaining allegations in paragraph 42 of Plaintiffs' Complaint.

43. The BLM Street Mural is located on a public right-of-way of the City which runs through the IU campus.

ANSWER: Defendants admit the allegations in paragraph 43 of Plaintiffs' Complaint.

44. This public right-of-way, like all public roads in the City, is under the control and supervision of the Department of Public Works, which is under the supervision of the Board of Public Works.

ANSWER: Defendants admit the allegations in paragraph 44 of Plaintiffs' Complaint.

45. Sometime on or before July 3, 2021, when work erecting the BLM Street Mural commenced, Director Wason approved the Black Collegians' plan for the BLM Street Mural, and he approved the location for that mural which he understood had been identified through a collaboration between IU student Tiera Howleit and IU Capital Planning and Facilities Vice President, Thomas Morrison.

ANSWER: Defendants admit that prior to July 3, 2021, Mr. Wason within his capacity as the Director of Public Works, approved the location of the public art display for the Black Lives Matter mural on the surface of Eagleson Avenue. Defendants deny all remaining allegations in paragraph 45 of Plaintiffs' Complaint.

46. Director Wason did not obtain approval from the Board of Public Works before authorizing Tiera Howleit and the Black Collegians group to commence painting the BLM Street Mural on Jordan (now Eagleson) Avenue, a public right-of-way under the management and authority of the City.

ANSWER: Defendants admit that prior to August 3, 2021, Mr. Wason within his capacity as the Director of Public Works, approved the location of the public art display for the Black Lives Matter mural on the surface of Eagleson Avenue, but he did not seek or obtain official approval of the Board of Public Works until August 3, 2021. Defendants deny all remaining allegations in paragraph 46 of Plaintiffs' Complaint.

47. In reliance upon authorization from Director Wason, work commenced on the BLM Street Mural on or about July 3, 2021 and was completed on or about July 5, 2021.

ANSWER: Defendants admit that the painting of the Black Lives Matter mural began on or about July 3, 2021 and was completed on or about July 5, 2021. Defendants further admit that the painting of the Black Lives Matter mural was endorsed by the City as part of the City's effort to demonstrate its animosity to all forms of racism and by allowing an encroachment for a public art street mural upon the public rights-of-ways in the City. Defendants deny all remaining allegations in paragraph 47 of Plaintiffs' Complaint.

48. Here is a bird's eye photo of the BLM Street Mural on Eagleson Avenue on the IU campus as it looked soon after the completion of the mural on or about July 5, 2021:



ANSWER: Defendants admit that the above image is a bird’s eye photo of the Black Lives Matter street mural on Eagleson Avenue on or about July 5, 2021. Defendants deny all remaining allegations in paragraph 48 of Plaintiffs’ Complaint.

49. Painting the BLM Street Mural, which was accomplished largely through the active involvement of student volunteers, required temporary closure of Eagleson Avenue as depicted in the following photo:



ANSWER: Defendants admit that Eagleson Avenue was temporarily closed during the time the Black Lives Matter street mural was painted. Defendants further admit that volunteers painted the mural and that the above photo appears to be a depiction of some of the mural with some of the volunteer still working on painting the mural.

50. The BLM Street Mural occupies a prominent location on the IU campus between the Neal Marshall Black Culture Center and the IU Groups Building, as depicted by this photo:



ANSWER: Defendants admit the Black Lives Matter street mural on Eagleson Avenue occupies a prominent location on the IU campus between the Neal Marshall Black Culture Center and the IU Groups Building. Defendants further admit that the above photo appears to be an accurate depiction of the Black Lives Matter street mural on Eagleson Avenue soon after it was completed. Defendants deny all remaining allegations in paragraph 50 of Plaintiffs' Complaint.

51. Completion of the BLM Street Mural was met by an approving tweet from the IU Provost on July 6, 2021, who commented, “[t]he Black Collegians finished the amazing Black Lives Matter mural on Jordan Ave. If you’re on the @IUBloomington campus, check it out between @NMBCC_IU and @IU_Groups buildings!”

ANSWER: Defendants admit the allegations contained in paragraph 51 of Plaintiffs' Complaint.

52. Similarly, on July 8, 2021, IU's official twitter feed said: "Black Lives Matter. Thank you to the Black Collegians group for bringing this mural to life on our campus."

ANSWER: Defendants admit the allegations contained in paragraph 52 of Plaintiffs' Complaint.

D. "All Lives Matter" Street Mural Approved by Indiana University but Rejected by the City of Bloomington

53. On July 20, 2021, Kyle Reynolds, in his capacity as a representative of multiple IU student organizations, including the IU Chapter of Turning Point, USA, wrote to IU's Provost and Vice President Morrison stating, in part:

[W]e would like a space on campus to represent our views with an All Lives Matter mural. Ideally, this would be on a large street, such as the one utilized for the BLM mural, however, any large space with high visibility on campus should be adequate.

Assuming we need a permit for such an undertaking, I would like to get that process started as soon as possible. If you, the recipients of this email, are not the correct parties to contact for this matter, would it be possible for you to direct me to the appropriate party?

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 53 of Plaintiffs' Complaint.

54. After a couple of follow-ups from Mr. Reynolds, a representative of IU's Student Involvement and Leadership organization responded:

We believe Vice President Morrison will be following up soon on the logistics for painting a street on campus. Similarly to the Black Lives Matter mural, you as leader and member of a student organization can request funding from the IU Funding Board for this project.

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 54 of Plaintiffs' Complaint.

55. The following morning (July 27, 2021) IU Vice President Morrison reached out to

Kyle:

Good morning Mr. Reynolds. Apologies for not responding sooner but I am just returning from a vacation. I will address the facility related questions posed in your email. Please realize that the Black Lives Matter street mural was not placed on Indiana University property nor the Campus. The BLM mural was created on a street owned by the City of Bloomington. Thus, the City was entity that ultimately approved the mural.

As information, the students who proposed this mural did request of IU to place the mural a several proposed locations on the IU Campus. Each of those proposed locations was not approved. IU does not permit mural type art on the Bloomington Campus. The students did propose the location ultimately chosen and were directed to the City for approval.

Please know that we did offer the students advice on facility related logistics (types of paint, colors, temperatures, surface preparation, sizing, etc.). We would provide that expertise to you or any student or group who inquired. We did not pass any judgement on the art itself.

Should you desire to propose a street mural, I would direct you to the City of Bloomington. Thank you for the inquiry.

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 55 of Plaintiffs' Complaint.

56. The same day, Mr. Reynolds responded to Mr. Morrison, saying:

Thank you so much for getting back to me. I suspected that the permit would have to be issued by the city, but I figured I'd contact university leadership first to see what level of control, if any, IU has over the streets on campus. If you wouldn't mind, I would greatly appreciate any advice you have on facility related logistics such as paint type or surface preparation.

Additionally, if you could direct me to the appropriate city official, I would be extremely grateful.

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 56 of Plaintiffs' Complaint.

57. Mr. Morrison then directed Kyle as follows:

Kyle, my recommendation would be to begin with the Board of Public Works at the City. I believe they have a published process and staff who can assist. If your project advances, please do feel free to reach out to me and we will be glad to provide logistical advice.

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 57 of Plaintiffs' Complaint.

58. As recommended by V.P. Morrison, that same day, July 27, 2021, Mr. Reynolds reached out to the City's Public Works Department, stating:

I represent two student organizations at IU . . . we would like a road on campus to represent our views with an All Lives Matter mural. Ideally, this would be on a large and highly visible street, although we are relatively open with regard to the mural's location.

With the Fall semester starting in less than a month, we would like to get this process started as soon as possible.

ANSWER: Defendants admit the on July 29, 2021, Mr. Reynolds sent an email to public.works@bloomington.in.gov, which email stated:

To whom it may concern,

I represent two student organizations at IU, Turning Point USA and The Crimson Post. We're aware that the Bloomington Department of Public Works issued a permit for a Black Lives Matter mural to be painted on IU's campus.

We feel that the BLM moniker is highly divisive and not representative of all the groups on campus. As such, we would like a road on campus to represent our views with an All Lives Matter mural. Ideally, this would be on a large and highly visible street, although we are relatively open with regard to the murals location.

With the Fall semester starting in less than a month, we would like to get this process started as soon as possible.

Defendants deny all remaining allegations in paragraph 58 of Plaintiffs' Complaint.

59. On August 2, 2021, Director Wason, responded to Kyle and explained the City's practice and policy, illustrated through working with the Black Collegians group (*i.e.*, the "other

group” referred to in Wason’s email), of the City deferring to IU for approval of street murals “for placement” on City streets located within the IU campus. Director Wason instructed Kyle as follows:

Kyle,

You'll need to work with the IUB President's Office, *as did the other group*, in order to get the concept for any murals approved for placement on any streets on campus.¹

ANSWER: Defendants admit that that on August 2, 2021, Mr. Wason sent an email to Kyle Reynolds that stated, “You’ll need to work with the IUB President’s Office, as did the other group, in order to get the concept for any murals approved for placement on any streets on campus.” Defendants deny all remaining allegations in paragraph 59 of Plaintiffs’ Complaint.

60. Having been directed back to IU by the City to “get the concept for [his] mural[] approved for placement on any streets on campus,” on the afternoon of August 2, 2021, Mr. Reynolds emailed Karen Adams, Chief of Staff to IU President Pamela Whitten, copying President Whitten and Mr. Morrison. Mr. Reynolds wrote:

Dear Ms. Adams,

I was informed by Adam Wason, the director of the Bloomington Public Works Department, that I'll "need to work with the IUB President's Office, as did the other group, in order to get the concept for any murals approved for placement on any streets on campus." Supposedly, nothing else can be done until I receive approval from the president's office.

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 60 of Plaintiffs’ Complaint.

61. V.P. Morrison responded to Kyle’s email two hours later, saying:

¹ Italics added.

Good afternoon Mr. Reynolds. Sounds like you have made proper contact with the City and have been routed back to me. In the City sending you the to the IU Presidents office, your request actually is then delegated to me, *as it was with the BLM group*. It is the City's ultimate approval. However, they do consult with us as an adjacent property owner, as they probably would with any owner. IU did not object to the BLM location on Jordan. Please let me (or the City) know your proposed location, size, design, etc. I am glad to review. *As with BLM, I cannot promise that IU will approve of your initial requested location, but we are open to exploring options*. Thanks.

Tom²

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 61 of Plaintiffs' Complaint.

62. Shortly thereafter, Kyle Reynolds responded to V.P. Morrison:

Well it's good to know that I am finally in contact with the right person. I will start by listing a few possible locations. Potential locations, in order of preference, are E 7th St in front of the Union, E 10th St in front of Hodge Hall, E Kirkwood Ave in front of Von Lee, or Indiana Ave in front of Franklin Hall. The size of the mural will be approximately 15' x 145'. I have attached the mural design below. As you can see, in addition to simply stating "All Lives Matter," the mural will also offer support to first responders with a variation of the traditional thin blue line and thin red line iconography.

Thank you for your help thus far, and I look forward to hearing your response.

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 62 of Plaintiffs' Complaint.

63. Kyle Reynolds attached to his August 2, 2021, email to Mr. Morrison the following full color representation of the All Lives Matter ("ALM") Street Mural design proposed by Kyle and the Turning Point USA student organization:

² Italics added.

ALL LIVES MATTER

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 63 of Plaintiffs' Complaint.

64. The next day Mr. Morrison responded:

Kyle, thank you for the proposed graphic, sizing, and potential locations. *The graphic and sizing look good on my end.* On the locations, allow me to provide the following feedback:

E7th north of the IMU – IU would not permit any public street art at this location as this portion of 7th Street is University owned property. In fact, the students who worked on the BLM mural requested the same location and it was not approved for the same reasons.

E-10th Street at Hodge Hall – IU would not be in favor of this location due to the separation in the street by the traffic safety islands and the need to keep the dedicated turn lanes marked and prominent.

East Kirkwood in front of the Von Lee - IU would not have any objection to this location.

Indiana Avenue in front of Franklin Hall – IU would not be in favor of this location due to its proximity to the Sample Gates. For similar reasons to the E 7th location, we object to any permanent displays at this location.

Thanks for the proposal. *You can relay to the City that IU is ok with the East Kirkwood location.* Please reach out with any further questions.³

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 64 of Plaintiffs' Complaint.

³ Italics added.

65. Having received IU's approval of both the "graphic and sizing" of the proposed ALM Street Mural and of "the East Kirkwood location" for the ALM Street Mural, Kyle Reynolds wrote DPW Director Wason on August 3:

Our concept for a 15' x 145' "All Lives Matter" mural was approved by the IUB President's Office, specifically by IU Vice President for Capital Planning and Facilities Thomas Morrison, for placement on E Kirkwood Ave in front of the Von Lee building. I have attached the design for the mural below.

ANSWER: Defendants admit that on August 3, 2021, Kyle Reynolds sent an email to Mr. Wason stating, "Our concept for a 15' x 145' "All Lives Matter" mural was approved by the IUB President's Office, specifically by IU Vice President for Capital Planning and Facilities Thomas Morrison, for placement on E Kirkwood Ave in front of the Von Lee building. I have attached the design for the mural below." Defendants are without sufficient information to admit or deny the allegations in paragraph 65 of Plaintiffs' Complaint.

66. A copy of the above graphic design of the ALM Street Mural was attached to Kyle Reynolds' August 3, 2021, email to Mr. Wason.

ANSWER: Defendants admit that Kyle Reynolds attached to his August 3, 2021, email to Mr. Wason, a copy of the proposed graphic for the All Lives Matter Street Mural. Defendants deny all remaining allegations in paragraph 66 of Plaintiffs' Complaint.

67. Kyle Reynolds' request for approval of the ALM Street Mural was sent to Director Wason on the very day that Director Wason submitted a staff report to the Board recommending ratification of the earlier decision to approve the design, content, location, and placement of the BLM Street Mural on the IU campus.

ANSWER: Defendants admit that Kyle Reynolds sent an email to Mr. Wason on the afternoon of August 3, 2021, regarding his proposed All Lives Matter Mural. Defendants further admit that on August 3, 2021, as part of a previously scheduled Board of Works Public

Meeting, the Board Members were provided with a copy of the Staff Report prepared by Mr. Wason about the Black Lives Matter mural on Eagleson Avenue. Defendants deny all remaining allegations in paragraph 67 of Plaintiffs' Complaint.

68. Director Wason's staff report was placed on the "consent agenda" of the Board for its August 3, 2021, meeting. His report stated:

The City of Bloomington Economic & Sustainable Development Department, Office of the Mayor, Community Family Resources Department, and the Public Works Department endorse the painting of a Black Lives Matter mural on Jordan Avenue adjacent to the IU Neil Marshall Black Cultural Center *in partnership with the IU Provost's Office and the Black Collegians student group*. This community project is requesting the Board of Public Works to permit this use of a public right of way and *join in this public display of support for our Black and Brown residents* who have been fighting for justice. This request is coming to the Board of Public Works after the project was completed due to an oversight by staff as City personnel transitioned out of the organization. Intentions were always to work with IU and this student group, and have this before the Board in early June. Due to the oversight, we are requesting after the fact approval.⁴

ANSWER: Defendants admit the allegations in paragraph 68 of Plaintiffs' Complaint.

69. Director Wason's proposal for the Board to ratify the BLM Street Mural and the Department of Public Works' "partnership with the IU Provost's Office and the Black Collegians student group" was approved by the Board at its August 3, 2021, meeting, just seven (7) days *after* Kyle Reynolds had first reached out to Director Wason asking the City to approve Turning Point USA's All Lives Matter Mural and on the very day that the IU Administration approved the All Lives Matter Mural.

ANSWER: Defendants agree that official action was taken by the Board of Works on August 3, 2021, to approve the use of a public right of way for the Black Lives Matter mural on Eagleson Avenue and join in that public display of support for Black and Brown residents

⁴ Italics added.

who have been fighting for justice. Defendants further admit that at the August 3, 2021, public meeting, the Board of Works took official action to endorse the painting of a Black Lives Matter mural on Eagleson Avenue adjacent to the IU Neil Marshall Black Cultural Center in partnership with the IU Provost's Office and the Black Collegians student group. Defendants deny all remaining allegations in paragraph 69 of Plaintiffs' Complaint.

70. Nevertheless, it would take Director Wason another week and multiple prompts from Kyle Reynolds to respond to Kyle's follow up request.

ANSWER: Defendants admit that on August 10, 2021, Mr. Wason sent Kyle Reynolds an email that stated, "City Legal is who you can speak with. Mr. Morrison's office is also not in agreement with your take on IU 'giving permission'." Defendants deny all remaining allegations in paragraph 70 of Plaintiffs' Complaint.

71. After three follow up inquiries from Kyle Reynolds, Director Wason finally responded on August 10, 2021. At that time, Director Wason passed Kyle Reynolds off to the City Attorney, writing:

Mr. Reynolds,

City Legal is who you can speak with. Mr. Morrison's office is also not in agreement with your take on IU "giving permission".

Take care and be well,

Adam

ANSWER: Defendants admit that on August 10, 2021, Mr. Wason sent Kyle Reynolds an email that stated, "City Legal is who you can speak with. Mr. Morrison's office is also not in agreement with your take on IU 'giving permission'." Defendants deny all remaining allegations in paragraph 71 of Plaintiffs' Complaint.

72. Kyle Reynolds dutifully reached out that same day, August 10, 2021, to the Bloomington City Attorney, Mike Rouker. Mr. Reynolds' email to City Attorney Rouker explained:

I represent . . . two student organizations at Indiana University. . . . [W]e would like a road on campus to represent our views with an All Lives Matter mural.

After speaking with the director of the public works department, Adam Wason, we were informed that we would first need permission from the IU President's Office before such a project could proceed. The president's office then delegated the project to Thomas Morrison, the vice president for capital planning and facilities at IU. After submitting our proposed design, sizing, and locations to Mr. Morrison, we were told that graphic and sizing "look good" and that the university would "not have any objection to" a 15' x 145' mural on E Kirkwood in front of the Von Lee building. We were then told by Mr. Morrison to "relay to the City that IU is ok with the East Kirkwood location."

After again contacting Mr. Wason and informing him of IU's approval, we were told that we would have to contact the city's legal department. I have CC'd everyone that appears to be involved in the decision making process on this email in the hope of moving this project forward.

ANSWER: Defendants admit that on August 10, 2021, Kyle Reynolds sent an email to City Attorney Mike Rouker which email is quoted in part in paragraph 72 of Plaintiffs' Complaint. Defendants deny all remaining allegations in paragraph 72 of Plaintiffs' Complaint.

73. Kyle Reynolds waited another week on City Attorney Rouker to respond before again initiating follow up requests. Mr. Reynolds sent Mr. Rouker follow-up emails on August 17, August 18, and August 19, 2021, but still received no response.

ANSWER: Defendants admit that Kyle Reynolds sent follow up emails to City Attorney Rouker on August 17, 18, and 19, 2021. Defendants admit that City Attorney Rouker did not immediately respond to those emails. Defendants deny all remaining allegations in paragraph 73 of Plaintiffs' Complaint.

74. Finally, on August 23, 2021, City Attorney Rouker wrote to Kyle Reynolds' as follows:

Mr. Reynolds:

The City of Bloomington's Board of Public Works approves the placement of art in the public right of way. The City does not take recommendations for art in its right of way from individuals, and, at this time, the City is not considering adding additional art within its right of way.

ANSWER: Defendants admit that on August 23, 2021, City Attorney Rouker sent an email to Kyle Reynolds, which email is quoted in paragraph 74 of Plaintiffs' Complaint. Defendants deny all remaining allegations in paragraph 74 of Plaintiffs' Complaint.

75. By referring Kyle Reynolds to Mr. Rouker for the above communication, the Board of Public Works, through its Director Mr. Wason, denied Mr. Reynolds and TPUSA's request to place an All Lives Matter mural in the City's public right-of-way.

ANSWER: Defendants deny the allegations in Paragraph 75 of Plaintiffs' Complaint.

76. Despite the response by Mr. Roukers [sic] on behalf of the Board and Mr. Wason, the City had recently taken recommendations for art encroaching in its right-of-way from individuals associated with the Black Collegians group and from the IU administration and had officially ratified taking such recommendations within the precise time frame in which Turning Point USA's request to the City was made, including the Board's official action to ratify the erection of the BLM Street Mural taken *after* Turning Point USA's request was received by the City.

ANSWER: Defendants admit that the City of Bloomington has worked with community partners and local groups to make and install public art on the surface of City streets. Defendants deny all remaining allegations in paragraph 76 of Plaintiffs' Complaint.

77. In response, Kyle Reynolds immediately wrote City Attorney Rouker, noting Mr. Reynold's concern that the Board of Public Works was engaging in viewpoint discrimination through approving the "Black Lives Matter" message while rejecting the "All Lives Matter" message. Kyle said:

Dear Mr. Rouker,

I would like to point out that the city approved a BLM piece of art only a few months ago, and I and the organizations I represent will be pursuing legal action against the city if this mural doesn't receive approval. As an attorney, I'm sure I don't need to inform you that governmental entities cannot discriminate in the viewpoints they allow to be expressed.

ANSWER: Defendants admit that on August 23, 2021, Kyle Reynolds sent an email to City Attorney Mike Rouker, which email is quoted in paragraph 77 of Plaintiffs' Complaint.

78. At the time, Kyle Reynolds was unaware that the Board had only officially approved the BLM Street Mural for the first time on August 3, 2021, just hours after Kyle's follow up request to Director Wason had been made.

ANSWER: Defendants are without sufficient information to admit or deny the allegations in paragraph 78 of Plaintiffs' Complaint.

79. Neither City Attorney Rouker, nor anyone else from the Board has responded to Kyle Reynolds' August 23, 2021, communication stating that the City was engaging in viewpoint discrimination.

ANSWER: Defendants admit the allegations in paragraph 79 of Plaintiffs' Complaint.

E. The IU Chapter of Turning Point USA and Kyle Reynolds Have Been Injured by the City's Viewpoint Discrimination and Are Entitled to a Declaratory Judgment and Nominal Damages

80. Plaintiffs have been injured by the City's approval and preference for the BLM Street Mural because a message with which they disagree has been preferred over their message,

they have been prevented from communicating their message through the proposed ALM Street Mural, they are unable to bring as much attention to their message because they have lost the highly effective communication vehicle of placing a street mural bearing their message on the IU Campus, and they have incurred the time, inconvenience, costs and expense of this litigation.

ANSWER: Defendants deny the allegations in paragraph 80 of Plaintiffs' Complaint.

81. Plaintiffs are entitled to injunctive relief to address the discriminatory actions of the Board of Public Works and Director Wason.

ANSWER: Defendants deny the allegations in paragraph 81 of Plaintiffs' Complaint.

82. Plaintiffs are entitled to a declaratory judgment declaring that the Board of Public Works and Director Wason have violated their legal rights as further described below.

ANSWER: Defendants deny the allegations in paragraph 82 of Plaintiffs' Complaint.

83. Plaintiffs are entitled to nominal damages for the violation of their rights.

ANSWER: Defendants deny the allegations in paragraph 83 of Plaintiffs' Complaint.

STATEMENT OF CLAIMS

FIRST CLAIM FOR RELIEF

Violation of the Free Speech Clause of the First Amendment to the United States Constitution – Viewpoint Discrimination

84. The foregoing allegations in paragraphs 1 through 83 above are incorporated herein by reference into this First Claim for relief as if fully set forth.

ANSWER: Defendants incorporate their Answers to paragraphs 1-83 of Plaintiffs' Complaint as if stated herein.

85. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ANSWER: Defendants admit the allegations in paragraph 85 of Plaintiffs' Complaint.

86. The Free Speech Clause of the First Amendment applies to the City through the Due Process Clause of the Fourteenth Amendment. *Near v. Minnesota*, 283 U.S. 697, 628 (1931).

ANSWER: Defendants admit the allegations in paragraph 86 of Plaintiffs' Complaint.

87. The First Amendment protects free speech in part by shielding citizens from discriminatory government regulation. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29, (1995).

ANSWER: Defendants deny that the allegations in paragraph 87 of Plaintiffs' Complaint are an accurate representation of the First Amendment law relevant to this case. Defendants deny all remaining allegations in paragraph 87 of Plaintiffs' Complaint.

88. The public ways where Plaintiffs and others attempted to communicate their message are traditional public fora. Traditional public fora such as streets and sidewalks “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969) (internal citations omitted).

ANSWER: Defendants deny the allegations in paragraph 88 of Plaintiffs' Complaint.

89. Plaintiffs' speech and expressive activity is protected by the First Amendment. “Commenting on matters of public concern” is a classic form of speech lying at the heart of the First Amendment. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377 (1997).

ANSWER: Defendants deny that the allegations in paragraph 89 of Plaintiffs' Complaint are an accurate representation of the First Amendment law relevant to this case. Defendants deny all remaining allegations in paragraph 89 of Plaintiffs' Complaint.

90. The First Amendment emphatically prohibits the government from discriminating against ideas based on the content or viewpoint of protected speech. The government, "including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (cleaned up).

ANSWER: Defendants deny that the allegations in paragraph 90 of Plaintiffs' Complaint are an accurate representation of the First Amendment law relevant to this case. Defendants deny all remaining allegations in paragraph 90 of Plaintiffs' Complaint.

91. Content-based laws, including the application of otherwise constitutional laws in a content-based manner, "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163 (cleaned up).

ANSWER: Defendants deny that the allegations in paragraph 91 of Plaintiffs' Complaint are an accurate representation of the First Amendment law relevant to this case. Defendants deny all remaining allegations in paragraph 91 of Plaintiffs' Complaint.

92. Policies, practices or the actions of municipal officials that discriminates on the basis of viewpoint are presumed unconstitutional.

ANSWER: Defendants deny that the allegations in paragraph 92 of Plaintiffs' Complaint are an accurate representation of the First Amendment law relevant to this case. Defendants deny all remaining allegations in paragraph 92 of Plaintiffs' Complaint.

93. Plaintiffs and others were impermissibly prohibited from communicating their message when Defendants prohibited Plaintiffs from painting their message on the public streets but permitted similar messages by others to be painted on the public streets or to otherwise encroach on public right-of-ways. The Board's enforcement of its Encroachment Policy to censor the message of Plaintiffs is impermissibly content and viewpoint based. The application of the Board's Encroachment Policy to Plaintiffs therefore unconstitutionally discriminates against Plaintiffs' speech based on its content and Plaintiffs' viewpoint.

ANSWER: Defendants deny the allegations in paragraph 93 of Plaintiffs' Complaint.

94. By prohibiting Plaintiffs from communicating their message in their desired way, the Defendants' actions also constitute an impermissible prior restraint.

ANSWER: Defendants deny the allegations in paragraph 94 of Plaintiffs' Complaint.

95. There are no guidelines governing the unbridled discretion of City officials and prohibiting them from discriminating against viewpoints when enforcing the Encroachment Policy.

ANSWER: Defendants deny the allegations in paragraph 95 of Plaintiffs' Complaint.

96. The application of the Encroachment Policy to Plaintiffs serves no legitimate, or compelling, government interest, and Defendants lack any evidence or sufficient evidence to demonstrate the existence of such an interest.

ANSWER: Defendants deny the allegations in paragraph 96 of Plaintiffs' Complaint.

97. The application of the Encroachment Policy to Plaintiffs is not narrowly tailored to further any government interest, and is not the least restrictive means of achieving any alleged government interest.

ANSWER: Defendants deny the allegations in paragraph 97 of Plaintiffs' Complaint.

98. The application of the Encroachment Policy to Plaintiffs suppresses substantially more speech than is necessary to further any alleged government interest.

ANSWER: Defendants deny the allegations in paragraph 98 of Plaintiffs' Complaint.

99. Plaintiffs do not have any, much less ample, alternative channels to communicate their desired message.

ANSWER: Defendants deny the allegations in paragraph 99 of Plaintiffs' Complaint.

100. City officials acted under color of state law when enforcing the Encroachment Policy against the Plaintiffs.

ANSWER: Defendants deny the allegations in paragraph 100 of Plaintiffs' Complaint.

101. The City and its Board of Public Works have a policy and practice of enforcing the Encroachment Policy against speech it disagrees with and not enforcing it against speech it prefers.

ANSWER: Defendants deny the allegations in paragraph 101 of Plaintiffs' Complaint.

102. The Encroachment Policy is unconstitutional as applied to Plaintiffs' speech under any applicable standard of scrutiny.

ANSWER: Defendants deny the allegations in paragraph 102 of Plaintiffs' Complaint.

103. Accordingly, Defendant's enforcement of the Encroachment Policy against Plaintiffs violates the First Amendment of the United States Constitution.

ANSWER: Defendants deny the allegations in paragraph 103 of Plaintiffs' Complaint.

104. Therefore, Defendants' enforcement of the Encroachment Policy against Plaintiffs' speech unconstitutionally infringes on Plaintiffs' rights, thereby entitling Plaintiffs to the relief requested below under 42 U.S.C. § 1983.

ANSWER: Defendants deny the allegations in paragraph 104 of Plaintiffs' Complaint.

105. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

ANSWER: Defendants deny that Plaintiffs are entitled to any relief from Defendants.

SECOND CLAIM FOR RELIEF

Violation of Article 1, Section 9 of the Indiana Constitution – Freedom of Thought, Opinion, Speech, Writing, and Printing on Any Subject

106. The foregoing allegations in paragraphs 1 through 105 above are incorporated herein by reference into this Second Claim for relief as if fully set forth.

ANSWER: Defendants incorporate their Answers to paragraphs 1-105 of Plaintiffs’

Complaint as if stated herein.

107. Article 1, Section 9 of the Indiana Constitution provides:

No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.

ANSWER: Defendants admit the allegations in paragraph 107 of Plaintiffs’

Complaint.

108. Like the Free Speech Clause of the U.S. Constitution, Article 1, Section 9, applies not only to legislative activity but to the activities of all branches and levels of Indiana government. *Cantrell v. Morris*, 849 N.E.2d 488, 492-93 (Ind. 2006). Accordingly, Article 1, Section 9 applies to the City and the actions of its Board of Public Works and Director of Public Works.

ANSWER: Defendants admit the allegations in paragraph 108 of Plaintiffs’

Complaint.

109. Article 1, Section 9 sets forth free speech protections that are in some respects broader than the free speech clause of the First Amendment to the U.S. Constitution. *See, e.g., Journal-Gazette Co., Inc. v. Bandido’s, Inc.*, 712 N.E.2d 446, 471 (1999) (“Article I, section 9, is

even more emphatic than the First Amendment in prohibiting any law ‘restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever’”) (Boehm, J., concurring); *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993) (Indiana’s disorderly conduct statute was not unconstitutional under federal constitution but conviction under it could not be supported under Indiana Const. Art. 1, Sec. 9).

ANSWER: Defendants deny that the allegations in paragraph 109 of Plaintiffs’ Complaint are an accurate representation of the Indiana Constitution or First Amendment law relevant to this case. Defendants deny all remaining allegations in paragraph 109 of Plaintiffs’ Complaint.

110. As Section 9 “extends to ‘any subject whatever’ . . . it is difficult to imagine a topic it does not cover.” *Whittington v. State*, 669 N.E.2d 1363, 1368 (Ind. 1996). And, Section 9 “reaches every conceivable mode of expression.” *Id.*

ANSWER: Defendants deny that the allegations in paragraph 110 of Plaintiffs’ Complaint are an accurate representation of the Indiana Constitution or First Amendment law relevant to this case. Defendants deny all remaining allegations in paragraph 110 of Plaintiffs’ Complaint.

111. Unlike the First Amendment, Indiana’s “right to speak clause articulates a liberty interest, not an equality interest. It protects against *restriction* of expressive activity, not *discrimination* because of content or viewpoint.” *Whittington*, 669 N.E.2d at 1368 (emphasis original).

ANSWER: Defendants deny that the allegations in paragraph 111 of Plaintiffs’ Complaint are an accurate representation of the Indiana Constitution or First Amendment

law relevant to this case. Defendants deny all remaining allegations in paragraph 111 of Plaintiffs' Complaint.

112. “The right to speak clause focuses on the restrictive impact of state action on an individual’s expressive activity. At a minimum, the clause is implicated when the state imposes a direct and significant burden on a person’s opportunity to speak his or her mind, in whatever manner the speaker deems most appropriate.” *Whittington*, 669 N.E.2d at 1368.

ANSWER: Defendants deny that the allegations in paragraph 112 of Plaintiffs' Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 112 of Plaintiffs' Complaint.

113. “The right to speak is qualified . . . by § 9’s responsibility clause, which provides that ‘for the abuse of that right, every person shall be responsible[;]’ . . . [t]he responsibility clause expressly recognizes the state’s prerogative to punish expressive activity that constitutes an ‘abuse’ of the right to speak.” *Whittington*, 669 N.E.2d at 1368.

ANSWER: Defendants deny that the allegations in paragraph 113 of Plaintiffs' Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 113 of Plaintiffs' Complaint.

114. “[I]f a claimant demonstrates that the right to speak clause is implicated, he or she retains the burden of proving that the State could not reasonably conclude that the restricted expression was an ‘abuse.’” *Whittington*, 669 N.E.2d at 1369.

ANSWER: Defendants deny that the allegations in paragraph 114 of Plaintiffs' Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 114 of Plaintiffs' Complaint.

115. “One way a claimant can try to meet this burden is to show that his or her expressive activity was political. If a claimant succeeds in that attempt, the State must demonstrate that its action has not materially burdened the claimant’s opportunity to engage in political expression.” *Whittington*, 669 N.E.2d at 1369.

ANSWER: Defendants deny that the allegations in paragraph 115 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 115 of Plaintiffs’ Complaint.

116. “This approach reflects [Indiana’s] recognition that political expression is often beyond the scope of the delegated police power.” *Whittington*, 669 N.E.2d at 1369.

ANSWER: Defendants deny that the allegations in paragraph 116 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 116 of Plaintiffs’ Complaint.

117. Article 1, “§ 9 enshrines pure political speech as a core value.” *Price*, 622 N.E.2d at 963.

ANSWER: Defendants deny that the allegations in paragraph 117 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 117 of Plaintiffs’ Complaint.

118. Therefore, Article 1, Section 9 forbids the City from “impos[ing] a material burden upon the free exercise of political speech.” *Price*, 622 N.E.2d at 963.

ANSWER: Defendants deny that the allegations in paragraph 118 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 118 of Plaintiffs’ Complaint.

119. However, Article 1, Section 9 is not limited to speech characterized as political as it extends to “any subject whatever” and “reaches every conceivable mode of expression.” *Whittington*, 669 N.E.2d at 1368.

ANSWER: Defendants deny that the allegations in paragraph 119 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 119 of Plaintiffs’ Complaint.

120. Importantly, a municipal government is without authority to burden its residents’ speech merely because some may be offended by it.

ANSWER: Defendants deny that the allegations in paragraph 120 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 120 of Plaintiffs’ Complaint.

121. Applying Article 1, Section 9, the Indiana Supreme Court has observed:

Whenever the state dictates the means by which political opinion may be voiced . . . it teeters on the edge of its authority. The machinery of democracy produces a sonorous cacophony, not a drone. . . ‘you cannot limit free speech to polite criticism, because the greater a grievance the more likely men are to get excited about it.’ . . . the efficacy of political speech often depends upon its ability to jar and galvanize.

Price, 622 N.E.2d at 963 (citations omitted).

ANSWER: Defendants deny that the allegations in paragraph 121 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 121 of Plaintiffs’ Complaint.

122. The All Lives Matter Street Mural to be erected on East Kirkwood Avenue in front of the Von Lee Building as approved by the IU administration was Plaintiffs’ chosen mode of expression.

ANSWER: Defendants deny the allegations in paragraph 122 of Plaintiffs’ Complaint.

123. By interfering with Plaintiffs' chosen method of expression and restricting them from erecting the street mural approved by the IU administration the City imposed a material burden upon Plaintiffs' expression and by imposing a permitting requirement on Plaintiffs the City engaged in prior restraint.

ANSWER: Defendants deny the allegations in paragraph 123 of Plaintiffs' Complaint.

124. The City is unable to demonstrate that its actions have not materially burdened the Plaintiffs' opportunity to engage in political expression.

ANSWER: Defendants deny the allegations in paragraph 124 of Plaintiffs' Complaint.

125. Further, regardless of whether the Plaintiffs' street mural is considered political expression, the City is unable to demonstrate that Plaintiffs' expression constituted an "abuse" or that the steps taken by the City to prevent Plaintiffs' from erecting the street mural was a legitimate exercise of the City's police power because the City did not reject, but approved, the street mural proposed by other similarly situated individuals.

ANSWER: Defendants deny the allegations in paragraph 125 of Plaintiffs' Complaint.

126. Accordingly, the City's signage rules, as applied to Plaintiffs, place an intolerable material burden on Plaintiffs' free speech rights in violation of Article 1, Section 9 of the Indiana Constitution.

ANSWER: Defendants deny the allegations in paragraph 126 of Plaintiffs' Complaint.

127. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

ANSWER: Defendants deny the that Plaintiffs are entitled to any relief from Defendants.

THIRD CLAIM FOR RELIEF

Violation of Article 1, Section 23 of the Indiana Constitution – Equal Privileges and Immunities

128. The foregoing allegations in paragraphs 1 through 127 above are incorporated herein by reference into this Third Claim for relief as if fully set forth.

ANSWER: Defendants incorporate their Answers to paragraphs 1-127 of Plaintiffs’

Complaint as if stated herein.

129. Article 1, Section 23 of the Indiana Constitution provides:

The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

ANSWER: Defendants deny that the allegations in paragraph 129 of Plaintiffs’

Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 129 of Plaintiffs’ Complaint.

130. “The requirements of Article 1, Section 23 ‘govern not only state statutes, but also the enactments and actions of county, municipal, and other governmental agencies and their equivalents.’” *Paul Stielor Enterprises, Inc. v. City of Evansville*, 2 N.E.3d 1269 (Ind. 2014) (citation omitted); *see also Whistle Stop Inn, Inc. v. City of Indianapolis*, 51 N.E.3d 195, 199 (2016) (Section 23 “applies to municipal ordinances as well as state statutes”).

ANSWER: Defendants deny that the allegations in paragraph 130 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 130 of Plaintiffs’ Complaint.

131. For instance, an early application of Section 23 was to invalidate a City of Rushville municipal ordinance which attempted to “grant privileges to the citizens of Rushville, which are

not equally and upon the same terms open to all citizens.” *Graffy v. City of Rushville*, 8 N.E. 609, 612 (Ind. 1886).

ANSWER: Defendants deny that the allegations in paragraph 131 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 131 of Plaintiffs’ Complaint.

132. More recently, the Indiana Supreme Court relied upon Section 23 to invalidate “an Evansville ordinance expanding the city’s smoking ban to bars and restaurants but exempting its only riverboat casino.” *Stieler*, 2 N.E. 3d at 1271.

ANSWER: Defendants deny that the allegations in paragraph 132 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 132 of Plaintiffs’ Complaint.

133. Therefore, Article 1, Section 23 applies to the City and to the actions of the City, the Board and the Director of Public Works.

ANSWER: Defendants deny that the allegations in paragraph 133 of Plaintiffs’ Complaint.

134. Article 1, Section 23 of the Indiana Constitution has been given robust application to ensure that *equal* privileges and immunities be extended to Indiana citizens in a long line of Indiana cases, and Indiana’s assurance of equal privileges and immunities has in many cases extended far beyond the due process and equal protection guarantees in the federal constitution.

ANSWER: Defendants deny that the allegations in paragraph 134 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 134 of Plaintiffs’ Complaint.

135. “There are striking textual differences between [Article 1, Section 23 of the Indiana Constitution and the Fourteenth Amendment to the U.S. Constitution]. The Fourteenth Amendment prohibits laws which “abridge” privileges or immunities, whereas Section 23 prohibits laws which “grant” unequal privileges or immunities.” *Collins v. Day*, 644 N.E.2d 72, 74 (Ind. 1994).

ANSWER: Defendants deny that the allegations in paragraph 135 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 135 of Plaintiffs’ Complaint.

136. The Indiana Supreme Court has therefore concluded that “Section 23 should be given independent interpretation and application” from the Fourteenth Amendment. *Collins*, 644 N.E.2d at 75.

ANSWER: Defendants deny that the allegations in paragraph 136 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 136 of Plaintiffs’ Complaint.

137. Indiana’s “independent state privileges and immunities jurisprudence . . . extend[s] protection to all Indiana citizens in addition to that provided by the federal Fourteenth Amendment.” *Collins* 644 N.E.2d at 81.

ANSWER: Defendants deny that the allegations in paragraph 137 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 137 of Plaintiffs’ Complaint.

138. In *Collins v. Day* the Indiana Supreme Court recognized at least three independent lines of cases arising from Article 1, Section 23, to include:

- (1) “cases which have applied federal equal protection methodology to state Section 23 issues,”
- (2) cases “focus[ing] upon the nature of the classifications of citizens upon which the legislature is basing its disparate treatment” and requiring “that the basis of such classification must ‘inhere in the subject matter’” and
- (3) cases focusing upon “the need for uniformity and equal availability of the preferential treatment for all persons similarly situated.” *Collins*, 644 N.E.2d at 78-79.

ANSWER: Defendants deny that the allegations in paragraph 138 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 138 of Plaintiffs’ Complaint.

139. Unlike under the Fourteenth Amendment, “[t]he resolution of Section 23 claims does not require an analytical framework applying varying degrees of scrutiny for different protected interests.” *Collins*, 644 N.E.2d at 80.

ANSWER: Defendants deny that the allegations in paragraph 139 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 139 of Plaintiffs’ Complaint.

140. Instead, “[t]he protections assured by Section 23 apply fully, equally, and without diminution to prohibit any and all improper grants of unequal privileges or immunities, including not only those grants involving suspect classes or impinging upon fundamental rights but other such grants as well.” *Collins*, 644 N.E.2d at 80.

ANSWER: Defendants deny that the allegations in paragraph 140 of Plaintiffs' Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 140 of Plaintiffs' Complaint.

Disparate treatment resulting from a classification must be reasonably related to inherent characteristics which distinguish the unequally treated classes

141. Under Section 23, where the government “singles out one person or class of persons to receive a privilege or immunity not equally provided to others, such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics.” *Collins*, 644 N.E.2d at 78-79; accord *Myers v. Crouse-Hinds Div. of Cooper Industries, Inc.*, 53 N.E.3d 1160, 1165 (2016); *Paul Stieler Enterprises, Inc. v. City of Evansville*, 2 N.E.3d 1269, 12775 (Ind. 2014).

ANSWER: Defendants deny that the allegations in paragraph 141 of Plaintiffs' Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 141 of Plaintiffs' Complaint.

142. The City allowed Joa'Quinn Griffin, Tiera Howleit, the Black Collegians, and others associated with them (the “BLM Street Mural Group”) to paint a street mural on a public right-of-way of the City on the IU campus.

ANSWER: Defendants admit that the City joined in the display support for our Black and Brown residents who have been fighting for justice by authorizing and endorsing the painting of a Black Lives Matter mural on the public right-of-way on Eagleson Avenue, which painting was done in partnership with the IU Provost's Office and the Black Collegians student group. Defendants deny all remaining allegations in paragraph 142 of Plaintiffs' Complaint.

143. However, the City refused to permit Kyle Reynolds and the IU chapter of Turning Point USA and others associated with them (the “ALM Street Mural Group”) to paint a street mural on a public right-of-way of the City on the IU campus.

ANSWER: Defendants admit that the City did not authorize, endorse, or permit the painting of an All Lives Matter mural on the public right-of-way as proposed by Kyle Reynolds. Defendants deny all remaining allegations in paragraph 143 of Plaintiffs’ Complaint.

144. There exist no permissible distinctive, inherent characteristics which rationally distinguish the BLM Street Mural Group from the ALM Street Mural Group or which justify the BLM Street Mural Group having the privilege of painting a street mural and the ALM Street Mural Group being denied that privilege.

ANSWER: Defendants deny the allegations in paragraph 144 of Plaintiffs’ Complaint. Preferential treatment must be uniformly applicable and equally available to all persons similarly situated

145. A separate and independent requirement of Section 23 is that, “any privileged classification must be open to any and all persons who share the inherent characteristics which distinguish and justify the classification, with the special treatment accorded to any particular classification extended equally to all such persons.” *Collins*, 644 N.E.2d at 79.

ANSWER: Defendants deny that the allegations in paragraph 145 of Plaintiffs’ Complaint are an accurate representation of Indiana constitutional law relevant to this case. Defendants deny all remaining allegations in paragraph 145 of Plaintiffs’ Complaint.

146. The City created a privileged classification of students and/or a student group or groups from IU who were permitted to paint a street mural on a public right-of-way on the IU campus upon approval of the planned mural by the IU administration.

ANSWER: Defendants deny the allegations in paragraph 146 of Plaintiffs' Complaint.

147. Turning Point USA and Kyle Reynolds lacked no relevant and inherent characteristics which distinguished and justified the special treatment given the BLM Street Mural Group.

ANSWER: Defendants deny the allegations in paragraph 147 of Plaintiffs' Complaint.

148. However, Defendants refused to allow Plaintiffs Turning Point USA and Kyle Reynolds to paint a street mural on a public right-of-way on the IU campus after approval of the planned mural by the IU administration.

ANSWER: Defendants admit that the City refused to allow Plaintiffs to paint a street mural on a public right-of-way. Defendants deny all remaining allegations in paragraph 148 of Plaintiffs' Complaint.

149. The City is unable to demonstrate a sufficiently compelling reason to reject the street mural proposed by similarly situated individuals of other races.

ANSWER: Defendants deny the allegations in paragraph 149 of Plaintiffs' Complaint.

150. Accordingly, for the foregoing reasons the City's actions violated Article 1, Section 23 of the Indiana Constitution.

ANSWER: Defendants deny the allegations in paragraph 150 of Plaintiffs' Complaint.

151. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

ANSWER: Defendants deny the that Plaintiffs are entitled to any relief from Defendants.

IRREPARABLE INJURY ALLEGATIONS

152. “The loss of First Amendment freedoms ... unquestionably constitutes irreparable injury.” *New Hope Family Servs, Inc. v. Poole*, 966 F.3d 145, 181 (2d Cir. 2020) (internal quotation marks omitted).

ANSWER: Defendants deny that the allegations in paragraph 152 of Plaintiffs’ Complaint are an accurate representation of the law relevant to this case. Defendants deny all remaining allegations in paragraph 152 of Plaintiffs’ Complaint.

153. Likewise, the loss of other freedoms and liberties guaranteed by the state and federal constitutions constitutes irreparable injury.

ANSWER: Defendants deny that the allegations in paragraph 153 of Plaintiffs’ Complaint are an accurate representation of the law relevant to this case. Defendants deny all remaining allegations in paragraph 153 of Plaintiffs’ Complaint.

154. As a result of Defendants’ policies, practices, procedures, deliberate actions, failures and omissions, Turning Point USA and Kyle Reynolds have suffered and will continue to suffer immediate and irreparable injury in the form of deprivation of their constitutional rights.

ANSWER: Defendants deny the allegations in paragraph 154 of Plaintiffs’ Complaint.

155. Turning Point USA and Kyle Reynolds have no plain, adequate, and complete remedy at law to redress the wrongs described herein.

ANSWER: Defendants deny the allegations in paragraph 155 of Plaintiffs’ Complaint.

156. Monetary damages are not sufficient to compensate for continuing violation of their Constitutional rights, restriction of their speech and denial of the equal protection of the law.

ANSWER: Defendants deny the allegations in paragraph 156 of Plaintiffs’ Complaint.

157. Turning Point USA and Kyle Reynolds will continue to suffer irreparable injury unless the Court promptly grants the injunctive relief requested.

ANSWER: Defendants deny the allegations in paragraph 157 of Plaintiffs' Complaint.

PRAYER FOR RELIEF

For the foregoing reasons, Plaintiff requests that the Court grant the following relief:

1. Declaring that Defendants Encroachment Policy violates the free speech protections of the state and federal constitutions;
2. Declaring that the Defendants' Encroachment Policy constitutes a prior restraint forbidden under the state and federal constitutions;
3. Declaring Defendant violated the First and Fourteenth Amendments to the U.S. Constitution by failing to permit Plaintiffs to paint a street mural depicting "All Lives Matter" in Bloomington, Indiana, on East Kirkwood Avenue in front of the Von Lee building on the Indiana University campus as approved by Indiana University officials;
4. Declaring Defendant violated Article I, Section 9 and Article 1, Section 23 of the Indiana Constitution by failing to permit Plaintiffs to paint a street mural depicting "All Lives Matter" in Bloomington, Indiana, on East Kirkwood Avenue in front of the Von Lee building on the Indiana University campus as approved by Indiana University officials;
5. Issuing Preliminary and Permanent Injunctions requiring Defendant to permit Plaintiffs to paint a street mural depicting "All Lives Matter" in Bloomington, Indiana, on East Kirkwood Avenue in front of the Von Lee building on the Indiana University campus as approved by Indiana University officials;
6. Issuing Preliminary and Permanent Injunctions enjoining Defendants from enforcing their Encroachment Policy in a content- and viewpoint-discriminatory manner;
7. Awarding Plaintiffs nominal and/or punitive damages for the violations of their constitutional rights;
8. Awarding the Plaintiffs their costs, expert witness fees, and attorneys' fees pursuant to 42 U.S.C. § 1988 and any other applicable authority; and
9. Awarding all other just and proper relief.

ANSWER: Defendants deny that Plaintiffs are entitled to any relief requested.

WHEREFORE, Defendants, by counsel, pray that Plaintiffs take nothing by way of their Complaint, for judgment in favor of the Defendants, for costs of this action, for attorneys' fees permitted by statute, and for all other just and proper relief in the premises.

AFFIRMATIVE DEFENSES

1. Defendants have failed to state a claim upon which relief can be granted.
2. The individual Defendants are entitled to qualified immunity.
3. Defendants reserve the right to amend or modify these affirmative defenses as additional information is obtained through discovery and the litigation process.

WHEREFORE, Defendants, by counsel, pray that Plaintiff take nothing by way of their Complaint, for judgment in favor of the Defendants, for costs of this action, for attorneys' fees permitted by statute, and for all other just and proper relief in the premises.

Respectfully submitted,

Liberty L. Roberts

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April 2022, a true and exact copy of the foregoing was filed electronically via the Court's Electronic filing system. Notice of this filing was sent to the following persons by operations of the Court's Electronic filing system.

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