

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

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

Plaintiffs, )

v. )

CITY OF BLOOMINGTON, INDIANA, )  
DIRECTOR OF THE BLOOMINGTON )  
DEPARTMENT OF PUBLIC WORKS )  
ADAM WASON, in his individual capacity, )  
BOARD OF PUBLIC WORKS MEMBERS, )  
KYLA COX DECKARD, BETH H. )  
HOLLINGSWORTH and DANA HENKE in )  
their individual capacities, and CITY )  
ATTORNEY MIKE ROUKER, in his )  
individual capacity, )

Defendants. )

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

**DEFENDANTS’ BRIEF IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

**I. Introduction**

Plaintiffs wanted to paint a mural on a Bloomington city street. Plaintiffs’ request was denied, and this lawsuit ensued. Plaintiffs originally focused their case on a claim of First Amendment viewpoint discrimination based on the comparison of the Black Lives Matter murals painted on City streets and the All Lives Matter mural that Plaintiff’s proposed, but which was rejected. Plaintiffs requested a preliminary injunction and after full briefing, the Court determined the Black Lives Matter murals were government speech, not private speech; “that the City was speaking on its own behalf and purposefully communicating a message of its own choosing with the installation of all three BLM street murals;” and that the City did not engage in viewpoint

discrimination in violation of the First Amendment by “installing those murals on City streets, while not permitting Plaintiffs to paint a similar ALM mural” on the City street. [Dkt 35, at 23].

Plaintiffs continue to pursue their claim of First Amendment viewpoint discrimination, but there is no new evidence to present to the Court to change the ruling on the issue of government speech or viewpoint discrimination. Additionally, Plaintiffs pursue four additional claims. First, Plaintiffs assert the City’s Policy and Procedures on Private Art Installations within the Public Right of Way adopted December 20, 2022 (“Policy”), violates Indiana Constitution, Article I, Section 9’s free speech clause because it bans all speech in certain art placed in the City’s right of way. Second, Plaintiffs assert the City violated Indiana Constitution, Article 1, Section 23’s equal privileges clause when it allowed the third BLM mural to be painted on a City street but did not allow the ALM mural to be painted on a City street. Third, Plaintiff’s claim the Policy adopted on December 20, 2022, is a violation of the Court’s Order dated November 18, 2022, because the policy contains more than just procedural steps for applying to place art in the public right of way. Finally, Plaintiffs assert the City violated the Fourteenth Amendment to the United States Constitution by not allowing “[w]ords, letters, numbers, universally recognized symbols, or logos” in permanent or semi-permanent art in the public right of way and by “subjected Plaintiffs to unequal treatment from similarly situated individuals and organizations.”

As shown by the undisputed evidence, the Black Lives Matter murals were government speech not subject to the First Amendment viewpoint discrimination claims. Additionally, the Policy adopted by the City on December 20, 2022 was consistent with this Court’s order dated November 18, 2022, provided relevant and necessary procedures, protocols, and policies that the City applies to private individuals’ or external organizations’ requests for public art in the City’s right of way. The procedures and policies apply equally to all private individuals and external

organizations and properly limit what anyone other than the City can put in a City public right of way. Application of the law to the undisputed facts shows that Defendants are entitled to judgment as a matter of law on each of the claims raised by Plaintiffs.

## **II. Statement of Material Facts Not in Dispute**

### ***A. Roles of Individual Defendants***

Dana Henke served on the Board of Public Works for five years ending her tenure on December 21, 2021. [[Exhibit 128, at 1 - Minutes of Board of Works Meeting December 21, 2021](#)] Beth Hollingsworth served on the Board of Public Works from April 3, 2018, until May 24, 2022. [[Exhibit 129, at 5:11 – Deposition of Beth Hollingsworth](#)] Kyla Cox Deckard served on the Board of Public Works from January of 2016 through present. [[Exhibit 130, at 6:3 – Deposition of Kyla Cox Deckard](#)] Adam Wason is the Public Works Director for the City of Bloomington and had held that position since 2016. [[Exhibit 131, at p. 8-9 – Deposition of Adam Wason](#)]

### ***B. Black Lives Matter Murals***

On May 6, 2020, the City passed a resolution “denounce[ing] and condemn[ing] hate based on racial, social, and cultural bias and hold[ing] up values of peace, respect, inclusivity, and equity.” [Dkt. 18-1– Resolution 20-06]

On July 10, 2020, a group of City employees and appointees to a City advisory council known as the Banneker Community Center Advisory Committee, or the BCCAC<sup>1</sup>, met to discuss the feasibility of developing Black Lives Matter street murals at the Banneker Community Center<sup>2</sup> and other locations in the City. [Dkt. 18-15 – Affidavit of Erik Pearson, ¶ 4-5] The July 10, 2020,

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<sup>1</sup> The members of the BCCAC are appointed by the City of Bloomington Board of Park Commissioners.

<sup>2</sup> The Banneker Community Center is a building owned by the City of Bloomington and used by the City’s Parks and Recreation Department for City programs and Services. facility, which is owned by the City of Bloomington.

group discussion was based on a suggestion that came from BCCAC members. [Dkt 18-15, ¶ 7] As of July 10, 2020, several City of Bloomington Departments – including the Office of the Mayor, Department of Public Works, Street Department, Community and Family Resources, Safe and Civil City, and Economic and Sustainable Development – had offered support for and endorsement of a Black Lives Matter street mural project. [Dkt 18-15, ¶ 8]

On July 10, 2020, that group of City employees and appointees to the City’s Advisory Council decided it was important for the City to commission and install multiple murals around Bloomington to recognize historical Black spaces (like the Banneker Community Center) and in other areas of increased public visibility to serve as a visual message to the non-BIPOC (Black, Indigenous, and people of color) community. [Dkt. 18-15, ¶ 9] It was decided that the City of Bloomington needed to “own” the projects in funding and purpose to show the BIPOC community its commitment to equity and justice. [Dkt. 18-15, ¶ 10] The goal was to engage the BCCAC members and the Enough is Enough (a protest organization) to ensure that the projects were done correctly and with respect for the BIPOC community. [Dkt. 18-15, ¶ 11] At that initial meeting, three locations for the Black Lives Matter street murals were discussed, namely (1) Elm Street in front of the Banneker Community Center gymnasium; (2) Kirkwood Avenue/the Courthouse square area (with particular attention to the area near People’s Park to recognize the firebombing of The Black Market in 1968); and (3) Jordan Avenue (now known as Eagleson Avenue). [Dkt. 18-15, ¶ 12]

In the July 10, 2020 meeting, discussion was had as to how the City should share information with the public about the project, and it was determined that the City should issue press releases about the Black Lives Matter street mural project and that those press releases should coincide with two other key events that were anticipated or in process, namely, (1) the City’s

formal policy actions in support of equity and justice for Black residents, and (2) the renaming of Jordan Avenue<sup>3</sup>. [Dkt. 18-15, ¶14]

The Black Lives Matter street mural near the Banneker Community Center was selected to be the first mural to be created. [Dkt. 18-15, ¶15] The group discussed the need to use a certain type of paint, and the need to take into consideration the level of traffic and design type to determine whether high traffic paint or exterior paint would be used. [Dkt. 18-15, ¶16] At the conclusion of the meeting, the City employees and the members of the City's Advisory Council were assigned action items to move the Black Lives Matter street mural project forward, including exploring funding sources, paint types, local artists, and communicating with IU administration, student groups at IU, and engaging other community partners in the project. [Dkt. 18-15, ¶ 17]

Over the next several months, the BCCAC took the lead in developing the project's next steps; determining the locations for the murals (focusing on Elm Street, Kirkwood Avenue /the Courthouse square area, and Jordan Avenue); developing a timeline for the project; determining the type of paint and the paint's impact on the design of the mural; the proposed content for the City's press release announcing the project; and the policy initiatives the BCCAC wanted to recommend to provide a more equitable and justice-driven environment for BIPOC residents. [Dkt. 18-15, ¶ 21-23]

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<sup>3</sup> The City renamed Jordan Avenue south of 17th Street as "Eagleson Avenue." The name "Eagleson" was to honor four generations of the Eagleson family, starting with Halson Vashon Eagleson who was born a slave in 1851, and who arrived in Bloomington in the 1880s and became a prominent barber, his five children attended Indiana University, and opened a home for "colored" orphans in Unionville. The Eagleson name was used to replace the "Jordan" family name. Jordan Avenue was previously named in honor of David Starr Jordan, whose "views on eugenics and racial differences conflict [] with the City's commitment to promote inclusion and equity in the community...." [Dkt 7-3]

As part of the Black Lives Matter street mural project development phase, the project was presented to the Parks Department and the Parks Board, where there was detailed discussion of the project. [Dkt. 18-3 – Parks Department July 28, 2020 Staff Report; Dkt. 18-4 – BCCAC Proposal; Dkt 18-5 – Parks Department July 28, 2020 Minutes, p. 4-5] The Board discussed that the City “needs to take the onus of funding [the Black Lives Matter street mural project] to show the BIPOC community its commitment to equality and justice.” [Dkt 18-5, p. 5] During that meeting, Sean Starowitz, City of Bloomington Assistant Arts Director, explained the goal was to have three Black Lives Matter street murals, and noted that there were on-going conversations with Enough is Enough and with Indiana University in an effort to select a location and artist for the third mural. [Dkt 18-5, p. 5] The Parks Board recognized that the “funding mechanism is a bit of a challenge” and a member of the BCCAC expressed that she felt there were “many hoops to jump through” and “the process in general is a big hurdle.” [Dkt 18-5, p. 5] After the detailed discussion, the Parks Board unanimously approved the Black Lives Matter street mural project. [Dkt 18-5, p. 6]

On September 23, 2020, the City passed a resolution “endors[ing] the painting of two Black Lives Matter murals – one on Elm Street in front of the Banneker Center, or at such other nearby location as the City and the Banneker Community Center Advisory Council agree is appropriate, and one at a downtown location to be determined, and support[ing] the City’s use of existing funds to pay the artist(s) hired to design and paint the mural.” [Dkt 18-6 – Resolution 20-16] That Resolution “call[ed] on the Board of Public Works to permit th[e] use of a public right of way and join in th[e] public display of support for [] Black and Brown residents who have been fighting for justice and equality for far too long.” [Dkt 18-6]

On September 29, 2020, Sean Starowitz, the Assistant Director of Arts for the City of Bloomington, presented the Board of Works with Resolution 2020-50 for a right-of-way

encroachment for the painting of a Black Lives Matter mural on the surface of Elm Street between 7<sup>th</sup> and 8<sup>th</sup> Streets. [Dkt 18-7, p. 2 – Board of Works Resolution 2020-50 (September 29, 2020)] Starowitz explained that the BLM street mural project was “a collaboration between the Board of Parks Commissioners, Banneker Community Center Advisory Council, Bloomington Arts Commission, the Office of the Mayor, Community and Family Resources Department and Bloomington Common Council.” [Dkt. 18-7, p. 2] Starowitz explained that in addition to the encroachment he was requesting at that time, the City was “also planning an additional mural somewhere downtown, pending public engagement.” [Dkt. 18-7, p. 2] He further explained, the “interdepartmental project [was] requesting the Board of Public Works to permit [the] 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 and equality for far too long.” [Dkt. 18-7, p. 2] Resolution 2020-50 noted the Black Lives Matter street mural project was an “effort to demonstrate [the City’s] animosity to all forms of racism. [Dkt. 18-8] The Board of Works unanimously approved Resolution 2020-50 allowing for the encroachment for the first BLM street mural. [Dkt. 18-7, p. 3]

On April 13, 2021, Starowitz presented another proposal to the Board of Works for the painting of the second BLM mural on a city street. [Dkt. 18-9 – Board of Works Staff Report] As this was the second mural submitted for approval, and it was part of the same project previously approved, the Staff Report, and the requested Resolution for the encroachment of the right-of-way for the second mural, were addressed as part of the Board of Works consent agenda. [Dkt. 18-10, p 1, Consent Agenda item 4 – Board of Works Minutes April 13, 2021]. Like the first BLM street mural, the second one was an “interdepartmental project” for the City of Bloomington to display support for “Black and Brown residents who have been fighting for justice and equality for far too

long.” [Dkt. 18-9 – Staff Report April 13, 2021] On April 13, 2021, the Board of Works approved Resolution 2021-10, and the Staff Report for the second Black Lives Matter street mural, without further discussion. [Dkt. 18-10, p. 1]

In June 2021, Starowitz began transitioning out of his position as the Assistant Arts Director for the City, which created a temporary vacancy in that position until a new Assistant Director was hired in September 2021. [Dkt. 18-14, ¶6-7 – Affidavit of Adam Wason]. In June and July (during the time that Starowitz was transitioning out of his position and when the position was vacant), the City continued working on the third and final Black Lives Matter street mural. [Dkt. 18-14, ¶ 8] The third mural was to be installed on Jordan Avenue – one of the initial locations discussed in July 2020 – and was in partnership with IU (as was also originally discussed in July 2020). [Dkt. 18-14, ¶ 10; Dkt. 18-15 – July 10, 2020 Meeting summary; Dkt. 18-9].

The City worked with Indiana University and the Black Collegians to bring to life the third BLM street mural which was approved for Jordan Avenue/Eagleson Avenue; and the City approved the painting of that mural on Jordan Avenue/Eagleson Avenue and the work was completed on July 5, 2021. [Dkt. 18-14, ¶ 10-19] Starowitz had presented the Staff Reports to the Board of Works on the first two BLM street murals, but because he was transitioning out of his position, he did not prepare the Board of Works Staff Report for the third (Jordan Avenue/Eagleson Avenue) mural prior to the mural’s installation. [Dkt. 18-14, ¶ 13-14] Instead, Adam Wason prepared the staff report and presented it to the Board of Works on August 3, 2021. [Dkt. 18-12 – Staff Report August 2, 2021]

That Staff Report noted the oversight in not presenting the project to the Board of Works for approval prior to the completion of the project. [Dkt. 18-12] The Staff Report advised the Board of Works that, the “[i]ntentions were always to work with IU and this student group, and have this

before the Board in early June,” [but] [d]ue to the oversight, [the staff was] requesting after the fact approval.” [Dkt. 18-13] It further noted that like the first two Black Lives Street Murals, this third mural was endorsed by “[t]he City of Bloomington Economic & Sustainable Development Department, Office of the Mayor, Community Family Resources Department, and the Public Works Department.” [Dkt. 18-13]

The Staff Report showed that the mural was completed in “partnership with the IU Provost’s Office and the Black Collegians student group,” which was consistent with Starowitz’s original stated plan as of July 28, 2020, of working with IU and other groups (such as Enough is Enough) to complete the anticipated third mural. [Dkt. 18-5, p. 5, Dkt. 18-12]

The Staff Report for the third mural was addressed as part of the Board of Works consent agenda (just as the Staff Report for the second mural was addressed). [Dkt. 18-13, p 1, Consent Agenda item 7 – Board of Works Minutes August 3, 2021] Like the first two BLM street murals, the third one was an interdepartmental project for the City as a “public display of support for [] Black and Brown residents who have been fighting for justice and equality for far too long.” [Dkt. 18-12 – Staff Report August 3, 2021] On August 3, 2021, the Board of Works approved the BLM street mural’s encroachment on Jordan Avenue/Eagleson Avenue. [Dkt. 18-13, p. 2] The Black Lives Matter street mural project took months to develop and approve and nearly a full year to complete the installation. [Dkt. 18-15, & Dkt. 18-14, ¶ 11].

***C. Plaintiffs’ All Lives Matter email request in July and August 2021***

Plaintiffs found the third Black Lives Matter mural to be "highly divisive and not representative of all groups on campus." [Dkt 7-3] On July 29, 2021, Plaintiff Kyle Reynolds sent an email to the general email for the City’s Public Works Department (public.works@bloomington.in.gov) requesting approval to paint "All Lives Matter" on the

surface of a city street; Plaintiffs did not submit a proposal for the Black Lives Matter street mural project. [Dkt 7-1; Dkt 7-2; Dkt 7-3; Dkt 7-4]

Kyle Reynolds July 29, 2022, email was sent to the general email account for the Public Works Department. [[Exhibit 131 at p. 42-43 – Deposition of Adam Wason](#)] That email account is answered by a customer service representative who was new to the position at that time, and the position of the Assistant Arts Director was vacant at the time, so Adam Wason agreed to respond to Kyle Reynolds’ email. [[Exhibit 131 at p. 42-43 – Deposition of Adam Wason](#)] Adam Wason did not usually handle requests for mural paintings, but given the staff vacancy, Mr. Wason stepped in to facilitate Mr. Reynolds’ request. [[Exhibit 131 at 43-44 – Deposition of Adam Wason](#)]

Mr. Reynold’s email request was unique because it came directly to the Department of Public Works from the public and did not start with the Economic and Sustainable Development Department or the director for the arts. [[Exhibit 131 at 44:2-6 – Deposition of Adam Wason](#)] Adam Wason called Kyle Reynolds and advised him of the procedure for him to follow, which included contacting the Economic and Sustainable Development Department to work through the procedure for requesting a mural. [[Exhibit 131 at p. 45-46 – Deposition of Adam Wason](#)]

To Adam Wason’s knowledge, Mr. Reynolds did not contact the Economic and Sustainable Development Department, but he continued to contact the Public Works Office seeking approval of his proposed mural. [[Exhibit 131 at 46-49 – Deposition of Adam Wason](#)] In August 2021, Adam Wason referred Kyle Reynolds to “City Legal” and Kyle Reynolds began emailing City Attorney Mike Rouker. [[Exhibit 131 at p. 47-48](#); [Exhibit 132 ¶ 13 - Affidavit of Mike Rouker](#)]

On or about August 10, 2021, Kyle Reynolds sent Mike Rouker an email stating that he represented The Crimson Post and Turning Point USA. [[Exhibit 132 ¶ 13 - Affidavit of Mike Rouker](#)] Mr. Reynolds’ email to me referred to the Black Lives Matter Mural that the City

approved for Eagleson Avenue (formally known as Jordan Avenue); he stated that the groups he represented found the Black Lives Matter moniker to be highly divisive and not representative of all the groups on IU's campus; and stated that the groups he represented wanted to paint a mural on a City street that said, "All Lives Matter." [\[Exhibit 132 ¶ 14 - Affidavit of Mike Rouker\]](#)

Mr. Reynolds' email specifically referred to the City's Black Lives Matter mural project and suggested he wanted to do a mural like the Black Lives Matter murals. [\[Exhibit 132 ¶ 15 - Affidavit of Mike Rouker\]](#) Mr. Rouker responded to Mr. Reynolds' email, specifically thinking about the Black Lives Matter mural project that was a city initiative and Mr. Reynolds' request related to that initiative [\[Exhibit 132 ¶ 16 & 19 - Affidavit of Mike Rouker\]](#) Mr. Rouker advised Mr. Reynolds that the City of Bloomington's Board of Public Works approves the placement of art in the public right of way; that the City did not take recommendations for art in its right of way from individuals; and that at that time, the City was not considering adding additional art within its right of way. [\[Exhibit 132 ¶ 17 - Affidavit of Mike Rouker\]](#)

When Mr. Rouker responded to Mr. Reynolds, he did not recall any time that the City had taken a request from a private individual or external group to put art in the public right of way, nor did he know of any private art projects on City of Bloomington streets that had been presented to the City by a private individual or external group seeking to use the City Street for art that was not part of a City initiative or project. [\[Exhibit 132 ¶ 18 & 21 - Affidavit of Mike Rouker\]](#)

Mr. Rouker believed his response to Mr. Reynolds was correct, as Mr. Rouker had not been made aware of, nor was he personally involved with, a request by a private citizen or external group to paint a message on a City Street. [\[Exhibit 132 ¶ 22 & 23 - Affidavit of Mike Rouker\]](#) Mr. Rouker did not send the email to Mr. Reynolds because of the content or viewpoint expressed in the requested mural. Rather, he sent that email because he truly believed that what Mr. Reynolds

was requesting – painting a personal or private groups’ message on the city street – was not something the City allowed or approved, regardless of the viewpoint expressed in the message.

[[Exhibit 132 ¶ 32-33 - Affidavit of Mike Rouker](#)]

Because Mr. Rouker responded to Mr. Reynolds, and because Mr. Reynolds did not submit a Special Events Application as part of his July or August emails, Mr. Reynolds’ email request was not submitted to the Board of Public Works. [[Exhibit 132 ¶ 24 - Affidavit of Mike Rouker](#)]

Months after this lawsuit was filed, and as part of the preliminary injunction briefing, Plaintiffs submitted information to the Court about street painting projects that were done by neighborhood associations or groups in 2017, 2018, and 2021. [Dkt. 32-1] Prior to that filing, Mr. Rouker was not familiar with those projects. [[Exhibit 132 ¶ 28 - Affidavit of Mike Rouker](#)] Even after discovering those street paintings Mr. Rouker did not consider them comparable to what Mr. Reynolds had requested in July or August 2021, because the neighborhood street painting projects were part of a grant process, used city funds, or was a project approved as part of a City initiative. [[Exhibit 132 ¶ 29-30 - Affidavit of Mike Rouker](#)] The All Lives Matter Mural was not part of a grant process, did not use city funds, and was not a project approved as part of a City initiative or project. [[Exhibit 132 ¶ 31 - Affidavit of Mike Rouker](#)]

***D. The City’s Promulgation of the Policy for Art in the Public Right of Way***

On November 22, 2022, this Court issued an order directing the City “to promulgate and disseminate to the public, including to Plaintiffs, the procedural steps whereby private individuals and groups can seek approval for an encroachment on the City of Bloomington’s rights-of-way for the purpose of displaying public art.” [Dkt. 35] In response to that Order, the City worked to put in writing the procedures and policies used by the City for placement of public art in the City’s right of ways. [[Exhibit 132 ¶ 35 - Affidavit of Mike Rouker](#)]

The City of Bloomington’s Policy and Procedures on Private Art Installations within the Public Right of Way (the “Policy”) authorized two processes for requests by individuals and external groups: (1) the Neighborhood Improvement Grant Program or (2) a Special Event Application. [\[Exhibit 132 ¶ 36 - Affidavit of Mike Rouker\]](#) The Policy included information about the two programs and procedures, including key information for individuals or groups who wanted to submit a request through one of those processes. The key information included definitions, and criteria applicable to the various types of art. [\[Exhibit 132 ¶ 37 - Affidavit of Mike Rouker\]](#)

The Policy included a definition for “speech” as that term related to the art requested under either of the two processes. [\[Exhibit 132 ¶ 38 - Affidavit of Mike Rouker\]](#) The definition for the term “speech” was consistent with what the City had applied to prior neighborhood street paintings. [\[Exhibit 132 ¶ 38 - Affidavit of Mike Rouker; Dkt 32-3\]](#) The City had applied that same criteria to earlier street paintings, but as this Court noted while the City had been referring to that criteria in its decision-making process, the City had not officially adopted that criteria as an official policy. [Dkt 35, FN 8] Noting the Court’s comment, the City, when working to officially adopt its Policy and Procedures on Private Art Installations within the Public Right of Way, officially adopted the criteria or similar criteria it had been applying since 2017, to make it an officially adopted policy of the City. [\[Exhibit 132 ¶ 42 - Affidavit of Mike Rouker; Exhibit 133 - The Policy\]](#)

This Court directed the City to act within forty-five days (by January 2, 2023) to promulgate and disseminate to the public the procedural steps for private individuals to request the placement of public art in the right of way. [Dkt. 35] On December 6, 2022, the Board of Public Works passed Resolution 2022-90 placing a moratorium on consideration of Special Event Applications until the Policy could be adopted as required by this Court. [\[Exhibit 132 ¶ 45 - Affidavit of Mike Rouker\]](#) The moratorium was requested because, while the City was in the

process of revising the protocols that govern the installation of private art in the right-of-way, the protocols to be applied to an application were uncertain and the City wanted to wait until the protocols were clarified in the Policy before considering any more Special Event Applications. [\[Exhibit 132 ¶ 46 - Affidavit of Mike Rouker\]](#) The moratorium was enacted on December 6, 2022, and was lifted on December 20, 2022, upon the adoption of the Policy. [\[Exhibit 132 ¶ 47 - Affidavit of Mike Rouker\]](#)

***E. Kyle Reynolds' Special Event Application under the Policy for an All Lives Matters Mural***

On December 19, 2022, Kyle Reynolds on behalf of Turning Point USA at Indiana University submitted a Special Events Application to paint an All Lives Matter mural on a City of Bloomington public street. [\[Exhibit 132 ¶ 48 - Affidavit of Mike Rouker\]](#) The December 19, 2022, Special Events Application was considered under the Policy after the moratorium was lifted. [\[Exhibit 132 ¶ 49 - Affidavit of Mike Rouker\]](#)

Mr. Reynolds' Application requested a special event to:

[P]aint an approximately 12' x 120' "All Lives Matter" street mural on East Kirkwood in front of the Von Lee Building and Indiana University Parking Lot. The mural, which will be contained to the westbound side of the road and will not cross the center line, will contain the phrase "All Lives Matter" bisected by red and blue lines to show support for first responders.

[\[Exhibit 132 ¶ 50 - Affidavit of Mike Rouker; Exhibit 134 – Reynolds' Special Event Application\]](#)

After the application was submitted, Kyle Reynolds and City staff worked through the application to address as many issues present in the application as possible. [\[Exhibit 132 ¶ 51 - Affidavit of Mike Rouker\]](#) Most of the issues identified for clarification were addressed during those two months, including traffic control, scaled drawings, and planned paint materials. [\[Exhibit 132 ¶ 52 - Affidavit of Mike Rouker; Exhibit 135 - emails between Mr. Rouker and Mr. Reynolds\]](#)

Mr. Reynolds was advised that his Special Events Application was inconsistent with the City's Policy because it contained words which were not allowed in any semi-permanent or permanent public art in the right of way, which is what Mr. Reynolds' mural was considered. [\[Exhibit 132 ¶ 53 - Affidavit of Mike Rouker\]](#) Mr. Reynolds was given the option to submit an alternative design without words prior to submission of the Application to the Board of Public Works, but he did not wish to do so, and the Special Events Application was submitted to the Board of Public Works with the words in the proposed mural. [\[Exhibit 132 ¶ 54-56 - Affidavit of Mike Rouker\]](#)

The Application was accompanied by a Staff Report recommending that the Board deny the Special Event Application because the application proposed a semi-permanent or permanent art installation in the form of a painted street mural that contained words, and words were not permitted in such art installations. [\[Exhibit 132 ¶ 57-58 - Affidavit of Mike Rouker\]](#) The Board of Public Works denied the Application on the grounds it was "inconsistent with Section IV(B) of the Policy and Procedures on Private Art Installations within the Public Right of Way" because it contained words in the proposed mural. [\[Exhibit 136 - Board of Works Resolution 2023-11\]](#)

### **III. Summary Judgment Legal Standard**

A "principal purpose" of summary judgment is to "isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate when the movant demonstrates that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party need not produce evidence showing the absence of a genuine issue on which the nonmoving party bears the burden of proof. *Celotex Corp.*, 477 U.S. at 325. Rather, "the burden on the moving party may be discharged by 'showing'—that is, pointing

out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.*

Once the movant makes the requisite showing, the non-movant must come forward with specific evidence showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 323. A factual dispute is genuine only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. In reviewing a motion for summary judgment, courts “view the record in the light most favorable to the non-moving party and draw all reasonable inferences in that party’s favor.” *Darst v. Interstate Brands Corp.*, 512 F.3d 903, 907 (7th Cir. 2008). “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex Corp.*, 477 U.S. at 323.

#### IV. Argument

##### **A. No legal claim for First Amendment viewpoint discrimination can exist regarding the Black Lives Matter murals because those murals were government speech.**

As the Court noted in Dkt 35, the Black Lives Matter murals were government speech, not private speech. “The government speech doctrine permits viewpoint discrimination when the ‘government speaks for itself.’” Dkt. 35, at 18 (quoting *Shurtleff v. Boston*, 142 S. Ct. 1583, 1587 (2022)). “When the government wishes to state an opinion, to speak for the community, to formulate politics, or to implement programs, it naturally chooses what to say and what not to say.” Dkt. 35, at 18 (citing *Shurtleff*, 142 S. Ct. at 1589).

The record before the Court regarding the BLM murals has not changed since the preliminary injunction briefing. As the court found based on the same record twenty-months ago, “the City has shown that the three BLM street murals were government, not private, speech,” and when the government speaks “the [First Amendment] forum analysis simply does not apply” so there is no

need to proceed further in the First Amendment analysis. Dkt 35, at 20. Since the Black Lives Matter murals are not subject to First Amendment viewpoint discrimination analysis, summary judgment should be entered in favor of the City on all three of Plaintiff's claims for viewpoint discrimination based on allowing the BLM murals, but not allowing the ALM mural.

**B. There is no evidence of any viewpoint discrimination regarding the proposed All Lives Matter mural.**

Even when looking beyond the BLM murals, there is no evidence to support the assertion that the City engaged in viewpoint discrimination when considering the ALM mural. The first request for Plaintiffs for their All Lives Matter mural was sent to the general email for the Public Works Department. The email arrived at a time when there was a vacancy in the position of the Assistant Arts Director, who would normally handle similar requests. Because of the vacancy the Director Public Works, Adam Wason responded to Kyle Reynolds and advised him of how to proceed with is request. Plaintiffs did not submit a Special Events Application and was not responding to a Request for Proposals from the City, but rather was merely emailing a request to paint a mural because he disagreed with the message conveyed in the Black Live Matter murals. When Adam Wason received additional emails from Kyle Reynolds, he directed Kyle to the City's Legal Department.

City Attorney Mike Rouker responded to Kyle Reynolds. City Attorney Rouker knew the BLM murals were city projects, and he knew that Kyle Reynolds' email specifically referred to the most recent BLM mural. With that in mind, Mr. Rouker responded advising that the City was not looking for other proposals (for projects like BLM) and did not accept proposals from private citizens. Mike Rouker's response was not based on the viewpoint expressed in the proposed ALM mural. He was responding based on his understanding of Kyle Reynolds' request and the process that applied to the BLM murals. Even if Mike Rouker's understanding of Kyle Reynolds' request

was inaccurate, the denial was based on his understanding of what was being requested and how it compared to the BLM process. The denial was not based on the message conveyed in the request, and thus, there is no evidence of viewpoint discrimination.

Plaintiffs have identified three other street paintings that were approved in 2017, 2018, and 2021 by the City. [Dkt 32-1] Again, there is no evidence of viewpoint discrimination when comparing those street paintings to the ALM mural request. The other street paintings were part of a neighborhood grant process, used City funds, or were done in conjunction with the City's initiative or project. Even if those street paintings are used as comparisons to the ALM mural, there is still no evidence of viewpoint discrimination. The City Attorney considered the email request to be a request to the City to approve the ALM mural as it had approved the BLM mural. Right or wrong, the City Attorney did not view the email request to be similar to neighborhood requests for street paintings.

Even if the City Attorney should have known of and been thinking about the other street paintings not referenced in Mr. Reynolds email, such an error is not evidence of viewpoint discrimination. At most, it is evidence of not asking more questions of Mr. Reynolds to explore his request. Not asking Mr. Reynolds to further explain his request is not evidence of viewpoint discrimination. It is not evidence of Mr. Rouker expressing viewpoint discrimination, nor is it evidence of a city policy or custom of denying requests for street paintings based on the viewpoint expressed in the proposed painting.

Mr. Rouker's decision to deny the email request of Mr. Reynolds was not based on the viewpoint expressed in the proposed mural. Additionally, no other Defendant made any decision regarding the ALM request made in Mr. Reynolds' emails in July and August 2021. The request did not proceed beyond the email request made and responded to by Mr. Rouker. It did not go to

the Board of Public Works for consideration. There is no evidence that any Defendant denied Kyle Reynolds' email request for an ALM mural based on the content of the message or the viewpoint expressed in the proposed mural.

Similarly, there is no evidence that the Special Event Application submitted on December 19, 2022 was denied for viewpoint discrimination. The Application was considered by the Board of Public Works on March 14, 2023. The Application was denied because it did not comply with the City's Policy. The Policy prohibited words from being in semi-permanent or permanent art installations in the City's Right of Way. The Special Event Application requested a semi-permanent or permanent mural that contained words, specifically the words "All Lives Matter." The mural was denied because it contained words, not because of the viewpoint expressed in those words.

There is no evidence of any street painting that contained words, other than the City's government speech in the BLM murals which is not comparable to the ALM mural proposed because of the key difference between government speech and private speech. The neighborhood street paintings identified by Plaintiffs did not contain any words. The proposed ALM mural was subject to the same criteria as the neighborhood street paintings. None were permitted to contain words. As such, there is no evidence of viewpoint discrimination.

**C. The City's Policy for Art in the Public Right of Way properly regulates what art can be placed in the right of way owned by the City and is not a violation of Article I, Section 9 of the Indiana Constitution.**

The City's Policy for Art in the Public Right of Way is a proper means of regulating what can be in art placed on the City's property.

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.

Plaintiffs suggest that Article 1, Section 9 provides that *any* restriction on speech is a violation of the Indiana Constitution. It is not. The Indiana courts have explained, “the Indiana Constitution, like the United States Constitution, does not absolutely protect all speech and every means of expression.” *Ellis v. State*, 194 N.E.3d 1205, 1217–18 (Ind. Ct. App.), *transfer denied*, 199 N.E.3d 787 (Ind. 2022) (quoting *Whittington v. State*, 669 N.E.2d 1363, 1368 (Ind. 1996)). Rather, the Court is to employ a two-step inquiry to determine if government action unconstitutionally restricted speech. *Id.* “First, a reviewing court must determine whether state action has restricted a claimant’s expressive activity. Second, if it has, the court must decide whether the restricted activity constituted an ‘abuse’ of the right to speak.” *Id.* When considering the second step the Court must consider whether the restricted expression constituted political speech.

The first step of this inquiry is met because the City has prevented Plaintiffs from communicating their message of “All Lives Matter” in the manner the Plaintiffs prefer – painting the message on a City street. With respect to the second step, the restricted activity – painting a message on city property – constitutes an abuse of the right to speak, thus, making the restriction appropriate under Section 9.

It should be noted that under the Indiana Constitution the second step of the inquiry depends on whether the restricted expression constituted political speech. *State v. Econ. Freedom Fund*, 959 N.E.2d 794, 805 (Ind. 2011). For Article 1, Section 9 claims, if a restriction affects political speech, the Court must engage in material burden analysis. See *Id.* “Speech exclusively directed at state actors and focused exclusively on the conduct or actions of state actors is political speech.” *Id.* Put another way, “[s]peech is political if its point is to comment on government action, whether

applauding an old policy or proposing a new one, or ... criticizing the conduct of an official acting under color of law.” *Id.* “

If the expression which is restricted constitutes political speech, [the Court applies] a higher level of review, but if the expression is ambiguous, [the Court analyzes] any state-imposed restriction on the expression under standard rationality review.” *Id.* The lower “rational review” standard requires only that the Court determine whether the City could reasonably have concluded the proposed activity “was an ‘abuse’ of the right to speak or was, in other words, a threat to peace, safety, and well-being.” *Id.* (quoting *Whittington*, 669 N.E.2d at 1371).

Here, the speech at issue was not political. Plaintiffs were not seeking to comment on government action, and the proposed speech was not focused exclusively on the conduct or actions of state actors. Rather, Plaintiffs simply wanted to express their personal view and “show support for first responders.” The speech at issue is not merely *speaking* words but was *painting* on property not owned by the Plaintiffs. Painting on the property of another without permission would subject the Plaintiffs to tort and/or criminal liability. Under Indiana law a person who “damages or defaces property of another person without the other person’s consent” commits criminal mischief, a Class B misdemeanor Ind. Code § 35-43-1-2. Plaintiffs’ request to “speak” by way of painting on city property would have been a criminal act if it was done without the City’s consent. As such, the City reasonably could have concluded that the requested activity was an abuse of the right to speak.

Under Section 9, the City can limit speech which is an abuse of that right. Denying Plaintiffs the right to paint on City property was not a violation of Article 1, Section 9 of the Indiana Constitution.

**D. The BLM Street Mural Group and the ALM Street Mural Group are not comparable groups for purposes of Section 23’s requirement to give privileges equally “upon the same terms.”**

Plaintiffs’ assertion that the City violated Article I, Section 23 of the Indiana constitution is based on the false assumption that the third BLM mural painted by the Black Collegians is comparable to the ALM mural requested by the Plaintiffs. It is not. Plaintiffs are not entitled to the same privileged granted to the BLM Street Mural Group because that group was chosen to paint the City’s third BLM mural. Plaintiffs did not seek to paint a BLM mural consistent with the City’s initiative, nor were Plaintiffs denied, such privileges “on the same terms” as were provide to the BLM Mural Group.

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.

Section 23 “imposes two requirements upon [government actions] that grant unequal privileges or immunities to differing classes of persons. First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.” *Dvorak v. City of Bloomington*, 796 N.E.2d 236, 238 (Ind. 2003). When determining whether the City’s actions complied with or violated Section 23, the Court “must exercise substantial deference” in favor of the City’s determination. *See Id.*

Here, the two “classes” identified by Plaintiffs are the “BLM Street Mural Group” and ALM Street Mural Group. [Dkt. 62 at ¶ 126 and ¶ 127] Those two classes have inherent characteristics that distinguish them for purposes of the different treatment identified here. In May 2020, the City adopted a resolution "denounc[ing] and condemn[ing] hate based on racial, social, and cultural bias and hold[ing] up values of peace, respect, inclusivity, and equity." Dkt 18-1. In

furtherance of that resolution, the City worked to develop three BLM street murals as a public display of support for [ ] Black and Brown residents who have been fighting for justice and equality for far too long." [Dkt. 18-12]

The BLM Street Mural Group consists of persons or organizations selected by the City to paint the third BLM mural in support of the City's Resolution and public showing of support for Black and Brown residents. The ALM Street Mural Group was not proposing to paint a BLM mural in support of the City's Resolution and public showing of support for Black and Brown residents. To the contrary, the ALM Street Mural Group found the BLM message or moniker "highly divisive and not representative of all the groups on campus." Instead of proposing a BLM mural in support of the City's Resolution or to show support for Black and Brown residents, Plaintiffs proposed an ALM mural "to represent [Plaintiffs] views" and to "show support for First Responders." [[Exhibit 134 - Special Events Application](#)]

The BLM Street Mural Group and the ALM Street Mural Group did not seek privileges "on the same terms." The City's action of allowing the BLM Street Mural Group to paint on the City's Street, but not allowing the ALM Street Mural Group to do so, was rationally related to the inherent characteristics that make the two groups distinct and which show they were not seeking privileges "on the same terms."

The City's approval of the BLM Street Mural Group's mural while denying the ALM Street Mural Groups mural, is not a violation of Article I, Section 23.

**E. Enactment of the Policy regarding Public Art in the Right of Way is not a violation of this Court's Order entered November 18, 2022.**

Plaintiffs' stated "Sixth Claim for Relief" for alleged "Breach of the Court's November 18, 2022 Preliminary Injunction" is not a separate cause of action entitling Plaintiffs to any of the relief requested in the Complaint. Plaintiffs appear to argue that the City is in contempt of the

Court's November 18, 2022, Order, yet they did not file a Motion for Contempt or seek sanctions for the alleged "breach" of the Court's order. Regardless, the action taken by the City in its adoption of the Policy on December 20, 2022, is not a violation of the Court's November 18, 2022, order.

The Court ordered the City to promulgate and disseminate "the procedural steps whereby private individuals and groups can seek approval for an encroachment on the City of Bloomington's rights-of-way for the purpose of displaying public art." [Dkt. 35] The City did as ordered. Plaintiff seems to take issue with the City's inclusion of other relevant information in its enactment, namely the definitions and criteria that would be applied to any application submitted under the procedures identified. The City was not prohibited from including that additional information and criteria relevant to the procedures in the policy. The definitions provide an aid to anyone seeking to prevail himself to either procedure; and the criteria had been applied by the City since at least 2017, but as this Court noted in Footnote 8 of Dkt 35, had not formally promulgated a policy advising that was the criteria applied. The City could have promulgated those definitions, information, or criteria in a separate municipal action. There was nothing in the Court's order that prevented the City from taking further action beyond just publicly declaring the procedures at issue. Taking such action was not a violation of the court order directing the City to promulgate and disseminate certain procedural steps.

The court's order also directed the City was not to "deny[] Plaintiffs access to or otherwise unduly delay[] the application process by which the City of Bloomington passes on requests for encroachments on rights-of-way for the purpose of displaying public art." Dkt. 35, at 33. There is no evidence that the City has done so. To the contrary, the City enacted a moratorium on all Special Event Applications, until the new policy could be enacted so that all person and organizations

would be treated equally and under the same Policy that was to be approved by the Board of Public Works before January 2, 2023. Once the Policy was formally adopted, Plaintiff's Application was considered under the same process and criteria as all other Special Event Applications seeking to install permanent or semi-permanent art in the public right of way.

Plaintiffs seem to take issue with the time it took to get the Special Events Application to the Board of Works. Plaintiffs suggest that delay was because of the criteria in the Policy beyond the procedural information required by the Court. There is no evidence to support Plaintiffs' assertion that their Special Events Application was unduly delayed. The groups working on the BLM murals also expressed frustration with what they perceived as "many hoops to jump through" and "the process in general [being] a big hurdle." [Dkt 18-5, p. 5] The fact that the process is not as smooth or as quick as Plaintiffs desired, is not evidence of delaying Plaintiffs' application or a "breach" of the Court's order.

There is no evidence of any "breach" of the Court's Order and Plaintiffs are not entitled to any relief sought in their Second Amended Complaint based on the City's promulgation and dissemination of the Policy approved by the Board of Public Works on December 20, 2022.

**F. The evidence does not support any claim for violation of the 14<sup>th</sup> Amendment.**

Plaintiffs allege that the Policy, as applied to Plaintiffs violates the Fourteenth Amendment to the United States Constitution because it prevents Plaintiffs from exercising their right to freedom of speech and expression. The evidence shows the City has not impermissibly subjected Plaintiffs to unequal treatment from similarly situated individuals and organizations by applying the Policy to Plaintiffs' Special Events Application. To the contrary, Plaintiffs have been treated like all similarly situated persons or groups.

Plaintiffs' Equal Protection claim appears to be a contingent upon a finding that Plaintiffs' First Amendment right to free speech was violated. As discussed above and in this Court's earlier decision [Dkt. 35], there is no evidence to support Plaintiffs' assertion that the City subjected Plaintiffs to viewpoint discrimination in violation of the First Amendment or otherwise violated Plaintiffs' right to free speech under the First Amendment. But to the extent Plaintiffs' Equal Protection claim is intended to be a stand-alone claim, it nonetheless fails as a matter of law.

The Equal Protection Clause of the Fourteenth Amendment guarantees that "no State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1. "This is essentially a direction that all persons similarly situated should be treated alike." *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1008 (7th Cir. 2019). "[T]he Equal Protection Clause does not endow a private right of action." *Id.* Any such claim must be pursued under 42 U.S.C. § 1983.

Section 1983 imposes liability on any "person" who, while acting under color of state law, violates an individual's federally protected rights. *See First Midwest Bank Guardian of Est. of LaPorta v. City of Chicago*, 988 F.3d 978, 986 (7th Cir. 2021). To support a § 1983 claim against an individual defendant, plaintiffs must demonstrate that the individual defendants, while acting under the color of state law, deprived plaintiffs of a right or an interest secured by the Constitution or laws of the United States. *See Payne for Hicks v. Churchich*, 161 F.3d 1030, 1039 (7th Cir. 1998). The individual defendant must have "personally caused or participated in a constitutional deprivation." *Milchtein v. Milwaukee Cnty.*, 42 F.4th 814, 824 (7th Cir. 2022).

To support a § 1983 claim against a municipality, the alleged deprivation of rights must be caused by the execution of a government's policy or custom. *See Houskins v. Sheahan*, 549 F.3d 480, 493 (7th Cir. 2008) (quotation marks and citation omitted). A plaintiff can show that a

constitutional violation resulted from the execution of a municipal policy or custom in the following three ways: “(1) an express policy causing the loss when enforced; (2) a wide-spread practice constituting a ‘custom or usage’ causing the loss; or (3) a person with final policymaking authority causing the loss.” *Walker v. Sheahan*, 526 F.3d 973, 977 (7th Cir. 2008).

Defendants Wason, Deckard, Henke, and Hollingsworth took no action regarding Plaintiffs’ ALM requests. The email request in July and August 2021 was addressed by City Attorney Mike Rouker. Adam Wason did not deny that request, and it was never presented to the Board of Public Works for Defendants Deckard, Henke, or Hollingsworth to take action.

Defendant Mike Rouker took action regarding Plaintiffs’ August 2021 email request, but he did not treat Plaintiffs differently than a similarly situated individual or group in violation of the Fourteenth Amendment. No other individual or external group received approval to paint words or its own message on a public street.

Defendants Deckard and Rouker are the only individual Defendants who took action on Plaintiffs’ Special Events Application. [[Exhibit 136 - Resolution 2023-11 signed by Board of Public Works members Kyla Cox Deckard, Elizabeth Karon, and Jennifer Lloyd.](#)] Adam Wason, Dana Henke, and Beth Hollingsworth had no personal involvement in the decisions related to Mr. Reynolds’ Special Events Application.

Defendant Rouker recommended denial of the Special Events Application. That recommendation was because the painting requested in the Application was inconsistent with the City’s Policy prohibiting words in semi-permanent and permanent art installations in the public right of way. Similarly, Defendant Deckard voted to deny the Special Events Application for the same reason.

When the Special Events Application was denied, Plaintiffs were not treated differently from similarly situated individuals or groups. As discussed above, Plaintiffs were not similarly situated to the BLM group. Moreover, to the extent Plaintiffs claim they were similarly situated to the neighborhood street painting groups, Plaintiffs were not treated differently than those groups. None of the neighborhood street painting groups was (1) approved via an email request without working with the relevant City departments on location, design, concept, materials, and other significant details; and (2) allowed to paint words on the City street.

Regarding the claim against the City, there is no evidence of any unconstitutional policy or wide-spread custom that caused a violation of Plaintiffs' equal protection rights. The Policy at issue is not unconstitutional on its face and there is no evidence that the policy was applied in an unconstitutional way to Plaintiffs. As such, no claim against the City exists as a matter of law.

#### **V. Conclusion**

Defendants request that the Court enter judgment in favor of Defendants on all claims in Plaintiff's Second Amended Complaint [Dkt. 62].

Respectfully submitted,

Liberty L. Roberts

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<b>Exhibit</b>	<b>Description</b>
128	December 21, 2021, BPW Minutes
129	Deposition Transcript of Beth Hollingsworth
130	Deposition Transcript of Kyla Deckard
131	Deposition of Adam Wason (Part 1 of 2/pages 1-50)
131	Deposition of Adam Wason (Part 2 of 2/pages 51 – conclusion)
132	Affidavit of Mike Rouker
133	City of Bloomington’s Policy and Procedures on Private Art Installations within the Public Right of Way
134	Reynolds’ Special Event Application
135	Emails from Mike Rouker to Kyle Reynolds
136	BOW Resolution 2023-11

**CERTIFICATE OF SERVICE**

I hereby certify that on July 22, 2024, 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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