IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

Plaintiffs,

vs.

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.

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT

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SUMMARY OF ARGUMENT

The government cannot discriminate against the speech of private actors based on a speaker's viewpoint. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995). Viewpoint neutrality applies whether the speech takes place in a street, sidewalk, park, or even on "public property which is . . . open only for selective access." *John K. MacIver Inst. for Pub. Pol'y, Inc. v. Evers*, 994 F.3d 602, 609 (7th Cir. 2021). The Defendants did just that in 2021 when for years before it had granted permission for numerous street murals without regard to expressive content, including an Indiana University student-led "Black Lives Matter" street mural but denied permission to another student group for an "All Lives Matter" mural – falsely claiming the City did not permit individuals to place art in public rights-of-way. The Defendants discriminated again in 2023 when it refused to approve installation of the same proposed mural under the pretext of enforcing a new, content-based policy that violates both the Court's Preliminary Injunction and the First Amendment of the United States Constitution.

There are no disputed issues of material fact. Plaintiffs are entitled to a permanent injunction enjoining Defendants from enforcing the new right-of-way art policy against Plaintiffs, permitting them to paint their "All Lives Matter" mural.

STATEMENT OF UNDISPUTED FACTS

A. Public Art in the City of Bloomington's Rights-of-Way

1. In January 2015, the City of Bloomington ("City") adopted, through the Bloomington Common Council, a Public Art Master Plan (the "Master Plan"), which defined "public art" as "any mode of temporary or permanent artistic expression or

process that is funded through any source and is produced with the intention of making it available to the public." [Dkt. 32-2 at 3.]

2. To create public art, the Master Plan "[p]rovide[s] resources, training and mentorship for public art project development and management to organizations, collectives, neighborhoods, students, individual artists and the general public." [Dkt. 32-2 at 6; Dkt. 65 at 6 (Answer to Second Amended Complaint ("Answer") ¶ 79.]

3. The Master Plan states as follows:

> Art created for the public sphere can give form to core values of the community, such as freedom of speech and expression, alongside respect for diverse viewers and users. It can create a stimulating environment and aspire to the highest quality possible. Art can … seek to balance issues of originality, artistic quality and intellectual provocation with a respect for the diverse activities that take place in the public domain. Public art … can reflect the history of the community, including the evolution of taste, values, and formal expressions as well as challenge previously held views. In doing so, public art can reflect the community's unique engagement with the world.

[Dkt. 32-2 at 3.] The "Objectives & Aspirations" for the City in establishing the Master Plan included creating "bold, innovative works of public art," having an "impact on city image and pride," and promoting a "higher level of community engagement." [Dkt. No. 32-2 at 5.]

4. The Master Plan encouraged the general public to develop art for display in the City's rights-of-way, including "transportation corridors" and "roundabouts and intersections." [Dkt. 32-2 at 6.] Public art includes murals painted on public rights-of-way. [Deposition Transcript of Kyla Deckard ("Deckard Dep.") at 6:5–7:4; Deposition Transcript of Adam Wason ("Wason Dep.") at 12:14–

17, 13:1–16, 16:16–19; July 11, 2017 Board of Public Works Proceeding Video at 22:17–22:26, *available at* https://catstv.net/m.php?q=4320 (last accessed July 22, 2024) (referencing "the change in orientation by the City encouraging neighborhoods to put in art pieces").

5. The chief administrative body of the City is the Board of Public Works ("Board"), which has control of the day-to-day operations of the City's Department of Public Works. [Answer ¶ 17.] The Department of Public Works is responsible for street maintenance. [*Id.* ¶19.] Adam Wason ("Wason") was at all relevant times the City's Director of Public Works. [*Id.* ¶ 21.]

6. Since 2015, and consistent with the Master Plan, the City, through the Board, accepted and approved requests by private entities and individuals to engage in expressive activity in public rights-of-way, including painting murals, in public rights-of-way. [Answer ¶¶ 23-24, 27–29, 79; Dkt. 22-12 at 4–5 (Defendants' Answers to Preliminary Injunction Interrogatory No. 3); Wason Dep. 13:1-13; *e.g.*, Dkt. 22-3 at 2–5 (July 11, 2017, Resolution 2017-53); Dkt. 22-4 at 6 (approving Resolution 2017-53); Deckard Dep. at 7:10–18].

7. This process for accepting and approving expressive activity in public rights-of-way (hereinafter the "Encroachment Policy") was not written down in formal written guideline. [Deckard Dep. at 6:8–22; Deposition Transcript of Holly Warren ("Warren Dep.") at 6:23–7:5; Wason Dep. at 16:16–17:3; Deposition Transcript of Beth Hollingsworth ("Hollingsworth Dep.") at 7:3–20; Deposition Transcript of Dana Henke ("Henke Dep.") Dep. at 6:20–7:6; Deposition Transcript of

Elizabeth Karon ("Karon Dep.") at 6:15–19.]

8. The unwritten Encroachment Policy did not include any policy or guidelines restricting the content or speech of art painted in rights-of-way. [Wason Dep. at 17:11–24; Hollingsworth Dep. at 7:21–8:4; Deckard Dep. at 7:5–9, 18:11–14.]

B. The City Approved Private Expression in Public Rights-of-Way, Including at Least Four Murals

2017 Near Westside Neighborhood Association Block Party and Mural Painting Project

9. On May 2, 2017, the Board approved a request from the Westside Neighborhood Association ("Westside") in collaboration with the Department of Economic and Sustainable Development ("ESD") to hold "a neighborhood block party and traffic calming mural painting," on 7th Street Between Adams and Waldron Streets. [Answer ¶ 29; Dkt. 22-1 at 5-6 (Resolution 2017-34); Dkt. 22-2 at 6 (Minutes approving Resolution 2017-34).] The "traffic calming" devices are concrete circles that surround planters located in the middle of intersections on 7th Street – they are essentially small roundabouts. [Dkt. 22-1 at 8.]

10. The City was responsible for the posting of signs, developing a traffic plan, placing barricades it funded, obtaining all permits and licenses, notifying the public, public transit, and public safety of the event, and cleaning the street before and after the block party. [Dkt. 22-1 at 5.]

11. The public art painted in the public rights-of-way pursuant to the Westside application was expressive content. [Dkt. 22-1 at 7–8]. It was a painting of blue and yellow colored petals that made the traffic circle in the middle of the street look like a yellow and blue flower. [*Id.*]

2017 McDoel Neighborhood Street Painting Party

12. On July 11, 2017, the Board approved a Special Event Application from the McDoel Neighborhood Association ("McDoel") to "partially close the intersection of Fairview and Dodds Street" for "a neighborhood block party and street mural painting." [Answer ¶ 29; Dkt. 22-3 at 4–5 (Resolution 2017-53); Dkt. 22-4 at 6 (approving Resolution 2017-53).]

13. McDoel was responsible for posting "no parking signs," developing a traffic plan, obtaining, paying for any barricades, financing and obtaining all required permits and licenses, and notifying the public, public transit, and public safety agencies of the street closing. [Dkt. 22-3 at 4–5.]

14. The McDoel application included a proposed design for the street mural. [Dkt. 22-3 at 6–12.] The approved design that was painted on the intersection consisted of colorful spiraling sections with a turtle in the middle. [Dkt. 22-3 at 11–12; Answer ¶ 29.]

15. The project was funded by McDoel. [*See* July 11, 2017 Video at 22:58–23:37, 24:45–25:20.] McDoel would also be "responsive to needing to touch up [the mural] as it needs it" after it was painted. [*Id.* at 25:53–26:11.]

16. The mural painted pursuant to the McDoel application was expressive content. [Dkt. 22-3 at 11–12; Answer ¶ 29; July 11, 2017, Video at 21:45–26:31).]

2018 Prospect Hill Neighborhood Street Painting Party

17. On July 10, 2018, the Board approved a Special Event Application from the Prospect Hill Neighborhood Association ("Prospect Hill") to host a "Street Mural Painting Party" that involved "paint[ing] and clos[ing] the intersection of

Fairview and Howe Street to install a public art project in the street." [Answer ¶ 29; Dkt. 22-5 at 4–6 (Resolution 2018-69); Dkt. 22-6 at 4–5 (approving Resolution 2018-69).] Prospect Hill noted that "[a]t least one intersection mural has been painted in Bloomington before (at Fairview & Dodds St in McDoel Gardens)" – that is, the 2017 McDoel Neighborhood Association mural. [Dkt. No. 32-1 at 8.]

18. Prospect Hill would be responsible for posting "no parking signs," developing traffic plan, obtaining and paying for any barricades, financing and obtaining all required permits and licenses, and notifying the public, public transit, and public safety agencies of the street closing. [Dkt. 22-5 at 5–6.]

19. The Prospect Hill application did not include any proposed design. [*See* Dkt. 22-5 at 7–14.] A July 10, 2018, resolution approving the application established no requirements on what was painted during the mural painting party. [Dkt. 22-5 at 5.] The design ultimately selected and used was called "Common Pollen" and suggested "the radiating petals of an actual sunflower, and the sun itself." [Dkt. 32-1 at 5 (Declaration of Angela Van Rooy ("Rooy Decl.") ¶ 29); Dkt. 32-1 at 27–28; Dkt. 32-1 at 23.]

20. The mural painted pursuant to the Prospect Hill application was expressive content. [*Id.*]

July 3-5, 2021 Black Collegians and Indiana University Black Lives Matter Mural on Eagleston Avenue

21. The Black Collegians is an Indiana University ("University" or "IU") Student Group, whose members included Tiera Howleit and Joa'Quinn Griffin. [*See* Answer ¶¶ 41, 43.]

22. In early June, Howleit and Griffin approached Public Works Director Wason about painting a Black Lives Matter mural (hereinafter the "BLM mural" or "Black Collegians' BLM mural"). [Answer ¶¶ 21, 43; Exhibit 1 at 2–3.] On June 4, 2021, Wason told Adam Theis ("Theis"), an employee of IU, that "we'd certainly be supportive." [Exhibit 1 at 2–3; Wason Dep. at 25:19–23.]

23. Theis responded with various requirements that the group would need to do to get approvals including review of the design, installation methods, type of paint, and approval from IU as the adjacent landowner. [*Id.* at 1–2.]

24. On June 11, 2021, an employee of the City, Shatoyia Moss, stated "Absolutely!" in response to an email request from Gloria Howell, the Director of the Neal-Marchall Black Culture Center, that "Tiera [Howleit] and Joa'Quinn [Griffin]" contact Moss regarding "IU student leaders … facilitating the creation of a BLM mural on campus" on Jordan Avenue. [Exhibit 2 at 1.] Ms. Moss agreed to meet with Howleit and Griffin to discuss the project. [*Id.*]

25. Volunteers from the Black Collegians painted their BLM mural on Jordan Street (now Eagleson Avenue) from July 3 to July 5, 2021. [Answer ¶¶ 50–55; Dkt. 7-12.]

26. The BLM mural was more than just letters that spelled "Black Lives Matter," but was "inclusive of other marginalized communities" that "speaks to intersections and allies and each letter tells its own story;" "each letter represents a different marginalized community." [Dkt. 7-12 at 2.] "From body positivity to Islamophobia, anyone can walk up to the mural and identify with at least one of the

letters and feel seen." [*Id.*] For example, the L in "Black" depicts an adult holding the hand of a child. The A in "Black" includes a rainbow-colored infinity symbol. The K is in the form of a K in American Sign Language. The L of "Lives" incorporates the pride flag at its base. The M incorporates the Jewish star of David, the Muslim crescent moon, the Christian cross, and the yin and yang symbol. [*See* Answer ¶¶ 51-53 (photos of the mural); Dkt. 7-13 at 2 (discussing different letters).]

27. The BLM mural was funded in part by IU's funding board; those funds come from mandatory student fees, donations from individual community members, and the Division of Student Affairs. [Dkt. 22-13 at 2 (Second Kyle Reynolds Declaration ("Reynolds Decl.") ¶ 4); Dkt. 7-12; Dkt. 7-10 at 2 (approving BLM mural with no mention of any City funding).]

28. Social media postings attributed the BLM mural to the Black Collegians and students of IU. On July 5, 2021, the Black Collegians posted on Facebook "Construction begins for *our* Black Lives Matter Street Mural on Jordan Avenue this Morning. What an exciting time! #BlackCollegiansInc… ." [Dkt. 7-16 (emphasis added).] Following completion of the mural, IU referenced the mural on its official Twitter feed, publicly thanking "the Black Collegians group for bringing this mural to life on our campus." [Answer ¶ 55.] The University's Provost tweeted, "[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 ¶ 54.] News articles published at the time the street mural was painted detailed the efforts of the Black Collegians group to bring

the BLM mural to IU's campus. [Dkts. 7-12, 7-13.]

29. On August 3, 2021, the Board retroactively approved this mural as part of its consent agenda. [Answer ¶¶ 71–72; Dkt. 7-9 at 29 (Staff Report); 7-10 at 1–2 (approving BLM Mural via consent agenda).]

30. On August 5, 2021, Tiera Howleit of the Black Collegians applied for and obtained a permit to touch up the paint in the BLM mural installed by the Black Collegians. [Exhibit 3, Exhibit 4.] By May 2022, the paint for the BLM mural had deteriorated. [Reynolds Decl. ¶ 5.]

Additional Public Art Displays on Rights-of-Way

31. Since January 1, 2019, the City has approved at least seven (7) additional public art displays in public rights-of-way besides the displays discussed above. [Dkt. No. 22-12 at 4–5 (Answer to Interrogatory No. 3); Answer ¶¶ 27–29.]

32. For example, on August 3, 2021, the City approved a Special Event Application submitted by Middle Way House for its "Wrapped in Love" public art display, which included wrapping trees in Bloomington with tree sweaters and wrapping lampposts around the square with yarn. The City approved the Application to allow for the public art display to begin on October 1, 2021, and end on March 1, 2022. [Answer ¶ 28.]

C. Plaintiffs and Their Viewpoint That "All Lives Matter"

33. Plaintiff Indiana University Chapter of Turning Point USA ("TPUSA-IU") is a local student chapter of this organization. It is an organization that "seeks to identify, educate, train, and organize students to promote principles of freedom, free markets, and limited government." [Dkt. 7-24 at 2 (First Kyle Reynolds

Declaration ¶¶ 4–5, 7–8).]

34. From at least June 2021, through March 14, 2023, Plaintiff Kyle Reynolds ("Reynolds") was a student of IU and resided in Bloomington, Indiana. [Reynolds Decl. ¶ 4.] At all relevant times, Reynolds was an authorized agent of TPUSA-IU. [*Id.* ¶ 6.]

35. Plaintiffs believe that the phrase "Black Lives Matter" is contrary to their "core principles from the standpoint that it is connected to a political ideology that ultimately seeks to divide and alienate individuals based on characteristics such as skin color." [*Id.* ¶ 10.]

D. August 23, 2021, The City Denied Plaintiffs' Proposal to Paint an "All Lives Matter" Mural in a Right-of-Way

36. On July 29, 2021, Reynolds, on behalf of TPUSA-IU and The Crimson Post, emailed the City requesting a permit to install a mural on IU's Campus that said "All Lives Matter" with a thin blue line running through "All Lives" and a thin red line running through "Matter" (hereinafter the "ALM mural"). [Answer ¶¶ 61, 62, 69; Dkt. 7-5; Dkt. 7-6.]

37. On July 29, 2021, Wason informed City employees that he would handle any communications with Reynolds. [Exhibit 5.]

38. On August 2, 2021, Wason emailed Reynolds that he "need[ed] to work with the IU President's Office, as did the other group" to get approval for installing a mural on the IU campus. [Answer ¶ 62; Dkt. 7-4.]

39. Reynolds worked with IU, and on August 3, 2021, Vice President for Capital Planning and Facilities of IU, Thomas Morrison, told Reynolds "[t]he

graphic and sizing [of the mural] look good on my end" and that "IU is ok with the East Kirkwood location" for the mural on the IU Campus. [Dkt. 7-2 at 4–5.]

40. On August 3, 2021, Reynolds informed Wason by email that the City had approved the concept and location of the ALM mural. [Answer ¶ 68.]

41. Wason did not respond to Reynolds until August 10, 2021, directing Reynolds to speak to "City Legal." [Answer ¶¶ 73–74; Dkt. 7-4.] In between Reynold's August 2, 2021, request and Wason's August 10, 2021, response, Wason recommended on August 3, 2021, that the Board retroactively approve the BLM mural that the Black Collegians requested and painted. [Answer ¶¶ 70–72; Dkt. 7-9 at 29; Dkt. 7-10 at 2.]

42. Reynolds emailed Mike Rouker ("Rouker"), City Attorney, on August 10, 17, 18, and 19, 2021 per the direction of Wason. [Answer ¶¶ 75–76; Dkt. 7-5.] He did not receive any immediate response from Rouker. [Answer ¶ 76; Dkt. 7-5.]

43. On August 23, 2021, Rouker finally responded to Reynolds saying "[t]he City does not take recommendations for art in its rights of way from individuals, and at this time, the City is not considering adding additional art within its right of way." [Answer ¶ 77; Dkt. 7-5.]

E. The Court's Preliminary Injunction Order

44. On November 18, 2022, the Court ordered the following:

> Defendants are hereby ORDERED 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. Compliance with this requirement must occur within forty-five (45) days of the date of this Order.

> Defendants, as well as their officers, agents, employees, attorneys, and all persons in active concert or participation with them, are hereby PRELIMINARILY ENJOINED, until further order of this Court, from denying Plaintiffs access to or otherwise unduly delaying 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. 36; Dkt. 35 at 32–33; Answer ¶ 86.]

45. Defendants knew about the Order. [Answer ¶¶ 89, 90.]

46. Defendants did not request the Court to release them from any aspect of the Preliminary Injunction. [Answer ¶ 97.]

F. December 20, 2022, The City Adopts a Policy that Goes Beyond "Procedural Steps" Guiding Applications for Placement of Public Art in Rights-of Way

47. On December 20, 2022, the Board approved "City of Bloomington Policy and Procedures on Private Art Installations within the Public Right of Way" (hereinafter "City's Art in Right of Way Policy" or "CARWP") [Exhibit 6; Exhibit 7; Exhibit 8; Answer ¶¶ 88–90; *see* December 20, 2022, Board of Public Works Proceeding Video at 7:05–32:31, *available at* https://catstv.net/m.php?q=11986 (last accessed July 22, 2024).]

48. The CARWP applies to murals. [Answer ¶ 92]. It distinguishes between "Temporary Art" and "Semi-permanent Art or Permanent Art" with temporary art meaning art expected to remain in place within the public right of way for seven (7) or fewer days and permanent or semi-permanent art expected to remain in the public right of way for more than seven (7) days. [Exhibit 8 at 1 (Section I.A.-I.C); Answer ¶ 101.]

49. The CARWP says: "Semi-Permanent Art Installations or Permanent

Art Installations may not contain Speech." [Answer ¶ 103; Exhibit 8 at 3 (Section IV.B).] It defines "speech" as "[w]ords, letters, numbers, universally recognized symbols, or logos of any kind." [Exhibit 8 at 2 (Section I.F); Answer ¶ 102.]

50. Under the CARWP, members of the City consider the content of applications for public art. [Exhibit 7 at 2–3 (Rouker stated that hate speech would not be permissible … [and] signs used in [American Sign Language] … would be impermissible"); Warren Dep. at 20:8–21:13 ("We always say, Okay, what do people want to see here, but also what qualities of the history of this place could it potentially represent."); Deckard Dep. at 22:15–22 ("And so we as citizens would have a perception as to what that might symbolize.").]

51. The CARWP also contains public safety provisions, including provisions mandating that the public art not mimic traffic control devices or cause drivers to alter their course [Exhibit 8 at 2 (Section III.C)], and provisions restricting where public art could be installed. [*Id.* at 3 (Section V).]

52. The Board approved the CARWP over public comment objecting to the Board's novel definition of "speech" and objecting to the competency of the Board to determine what constituted "universally recognized symbols." [December 20, 2022 Video at 12:48–18:32.]

G. March 14, 2023, The City Denied, Again, Plaintiffs' Proposal to Paint an "All Lives Matter" Mural in a Right-of-Way

53. On December 19, 2022, Plaintiffs, via a "Special Event Application" form, submitted their second request for the City to permit them to paint the ALM mural on East Kirkwood in front of the Von Lee Building and IU Parking Lot.

[Answer ¶ 87.] This mural fell under the definition of "Semi-Permanent or Permanent Art" in the CARWP. [Answer ¶ 101.]

54. City employee Myrick Williams ("Williams") sent an email to other City employees on December 30, 2022, stating: "Gents for your situational awareness and planning. This is the application by Turning Point USA to do an 'All Lives Matter' mural on Kirkwood. The city will probably have to approve this as they already lost one court case to them. If it is approved for those dates, staffing is restricted those two days on all three shifts" [Exhibit 9.]

55. In response to Williams, City employee Lucas Tate emailed "Cody and Mike - I have marked these days as nobody off. … I suspect we will be doing intel gathering and surveillance. … We will need to track this as much as possible as we anticipate protests. Start digging on it now." [Exhibit 10.]

56. Between January 3, 2023, and March 14, 2023, Plaintiffs worked with City Attorney Rouker to address questions or comments on the proposal prior to the issuance of a staff report recommending approval or denial of the proposal based on the provisions of the CARWP. [Answer ¶¶ 107–108, 111.]

57. By the March 14, 2023, meeting of the Board, the Plaintiffs had satisfied all of Defendants' criteria save one: the Defendants' demand that Plaintiffs' mural not include, "Words, letters, numbers, universally recognized symbols, or logos of any kind." [Answer ¶¶ 111, 113–114; Exhibit 11.].

58. At its Board meeting on March 14, 2023, the Board determined that authorizing an event to permit the painting of an "All Lives Matter" street mural

was inconsistent with Section IV(B) of the CARWP because it contained "speech," and, after hearing public comment, it denied the request. [Exhibit 11, Exhibit 12; Answer ¶¶ 98, 113–116, 118; March 14, 2023, Board of Public Works Proceeding Video at 24:55–48:25, *available at* https://catstv.net/m.php?q=12211 (last accessed July 22, 2024).]

59. The City disagrees with the message "All Lives Matter." [Answer ¶ 119.]

STANDARD OF REVIEW

Summary judgment is proper if materials in the record show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The non-movant, however, may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires a trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986); *Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7th Cir. 1994); Fed. R. Civ. P. 56(e). The non-moving party must present the Court with specific, admissible evidence on which a reasonable jury could rely to find in his favor. *Weaver v. Speedway, LLC*, 28 F.4th 816, 820 (7th Cir. 2022) (citations omitted); *Cehovic-Dixneuf v. Wong*, 895 F.3d 927, 931 (7th Cir. 2018). That is, the party opposing summary judgment must "marshal and present the court with the evidence she contends will prove her case." *Goodman v. Nat'l Sec. Agency, Inc.*, 621 F.3d 651, 654 (7th Cir. 2010). "[I]nferences relying on mere speculation or conjecture will not suffice." *Trade Fin. Partners, LLC v. AAR Corp.*, 573 F.3d 401, 407 (7th Cir. 2009) (citation omitted). "[T]he mere existence of some

alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *FKFJ, Inc. v. Vill. of Worth*, 11 F.4th 574, 584 (7th Cir. 2021) (quotations omitted).

ARGUMENT

Between 2015 and the date the Complaint was filed, the City operated a limited public forum for public art created by private citizens and placed in public rights-of-way that "give[s] form to core values of the community, such as freedom of speech and expression, alongside respect for diverse viewers and users." The public forum was created with no limitations upon the expressive content that could be placed in City rights-of-way. Until the TPUSA-IU students requested to paint a mural, no placement of art had been denied based on expressive content. That all changed when the Plaintiffs sought to paint a street mural. The City denied Plaintiffs access to the forum the City created because it disagreed with the viewpoint that "All Lives Matter."

Defendants first committed viewpoint discrimination when it summarily denied Plaintiffs the opportunity to access the public art forum on August 23, 2021, by refusing to consider their application to install an "All Lives Matter" mural. Plaintiffs are entitled to Summary Judgment as to this initial First Amendment violation because there is no reasonable explanation for the denial other than the message Plaintiffs sought to convey through their proposed artwork. Defendants discriminated a second time when it denied Plaintiffs' application again on March 14, 2023, through the pretextual enforcement of a new, unreasonable and

content-based policy that (1) violates the letter and spirit of this Court's Order, (2) was adopted specifically to prevent the paining of an All Lives Matter mural, (3) allows for the exercise of standardless discretion by City employees, and (4) fails the Supreme Court's standards for content-neutral and reasonable time, place, and manner restrictions. Each of these reasons independently support Summary Judgment against all Defendants.

A. Defendants Violated the Court's Order (COUNT VI)

Defendants admit that they "did not request the Court to release them from any aspect of the Preliminary Injunction before the Board adopted" the CARWP. [Answer ¶ 97.] However, the Court's Order expressly forbade Defendants "from denying Plaintiffs access to or otherwise unduly delaying [Plaintiffs'] application process." [Dkt. 36.] Defendants did just that, imposing new substantive, content and viewpoint based, criteria, *see infra* at Section C., that did not exist before under the Encroachment Policy. These new criteria were intended to delay, and did delay, Plaintiffs' application to paint its ALM mural. Defendants adopted them with the intent to block, and did block, Plaintiffs' opportunity to paint the mural altogether.

Multiple City employees confirmed the Encroachment Policy – which is "the application process" referenced in the Court's Order before the City adopted the CARWP – did not restrict the content of any public art created by private entities in rights-of-way. [Wason Dep. at 17:11–24; Warren Dep. at 7:21–8:4; Deckard Dep. at 7:5–9, 18:11–14.] But now, the City does restrict the content of public art, saying in Section IV(B) of the CARWP (the "anti-speech provision") that art cannot contain p/ 19 any "[w]ords, letters, numbers, universally recognized symbols, or logos of any

kind." [Answer ¶¶ 102–103.] These criteria were never recited to Plaintiffs in 2021 as the basis for the denial of their first request to install their ALM mural. [Answer ¶ 77; Dkt. 7-5]. But it is now undisputed that these new, substantive criteria were the only basis for the City denying Plaintiffs their ALM mural when they re-applied in 2023. [Answer ¶¶ 111, 113.] Thus, Defendants changed their process for the sole purpose of excluding Plaintiffs' ALM mural from the public forum.

The Order is clear: Defendants were to make "the application process" available to Plaintiffs. They refused to do so. Instead, they invented new content-based limits on expressive content that violated the Court's Order.

B. Viewpoint Discrimination in 2021 (COUNT I)

1. The City Created a Designated Public Forum for Private Artists to Install Public Art in Rights-of-Way

(a) Legal Standard for Forum Analysis

"Courts recognize three types of forums: 1) the traditional public forum, 2) the public forum created by government designation, and 3) the non-public forum. *Educators' Ass'n*, 460 U.S. 37, 44 (1983)). Traditional public forums include "[s]treets, sidewalks, and parks, and the quintessential soap box in the public square." *Id.* Designated public forums are "public property that the state has opened for members of the public to use as a place of expressive activity" based on the governments "inten[t] to designate a place not traditionally open to assembly and debate as a public forum." *Id.* at 565-66. Non-public forums are neither. *Id.* Regardless of the forum, the government may not engage in viewpoint discrimination: "regulating speech when the specific motivating ideology or the

opinion or the perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

Forum analysis does not apply, however, when "the government speaks for itself." *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 247 (2022). As the Supreme Court recently recognized in *Shurtleff*, "[t]he boundary between government speech and private expression can blur when … a government invites the people to participate in a program." *Id.* In such situations, the Supreme Court requires a holistic, non-mechanical inquiry "driven by a case's context." *Id.* at 252. Relevant indicia – not strict elements – include "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id.*

(b) The City Created a Designated Public Forum for Private Entities and Individuals to Place Art Containing Expressive Content in City Rights-of-Way

Here, Defendants created a designated public forum through their 2015 Master Plan that encouraged citizens to express themselves on public property, including public rights-of-way [Dkt. 32-2], and through the City's repeated approvals of privately created art in rights-of-way without restrictions regarding expressive content. *See supra* at Fact Section B. As the Master Plan states, public art "give[s] form to core values of the community, such as freedom of speech and expression, alongside respect for diverse viewers and users." [Dkt. 32-2 at 3.] The unwritten process by which the City implemented the Master Plan – the Encroachment Policy – was successfully executed by the City multiple times from

2017 to 2021 to approve murals in rights-of-way. [Answer ¶¶ 29, 79.]

The designated evidence shows that street murals approved by the City from 2015 to 2021 contained expressive content. Whether it was the yellow and blue paintings that transformed pavement into flowers [Dkt. 22-1 at 7–8], colorful spiraling sections that formed a turtle in the middle [Dkt. 22-3 at 11–12; Answer ¶ 29], a large pollen grain suggestive of a sunflower and the sun [Dkt. 32-1 at 5 (Rooy Decl. ¶ 29); Dkt. 32-1 at 27–28], trees wrapped in tree sweaters [Answer ¶ 28], or the one-of-a-kind BLM mural painted by the Black Collegians, [Answer ¶¶ 51–53; Dkt. 7-13 at 2], the City created a designated forum that included street murals with expressive content without limitation on that content.

(c) Multiple Murals Painted by Neighborhood Groups Were Not Government Speech

None of the murals painted on rights-of-way by various neighborhood groups were government speech. *Shurtleff*, 596 U.S. at 247. First, the history of the expressive content of the approved murals shows that the City was successful in encouraging private individuals and entities to bring their unique perspective and forms of expression to the City streets. Second, the public's perception of who was speaking for each of these projects was that it was the private citizens, not the City. Every project was initiated by private citizens. The applications by private citizens are consistent with the Master Plan's goal to "reflect the history of the community" and "reflect the community's unique engagement with the world." [Dkt. 32-2 at 3.] Third, the City did not shape the unique messages of the individuals who came forward with their own ideas, but simply shepherded the various groups through

the necessary details, such as where their murals should be installed and all the logistics involved. [*See* Statement of Undisputed Fact ¶ 19 (approving application that did not attach a proposed design).]

(d) The Black Collegian's Black Lives Matter Mural Was Not Government Speech

When considered alongside the other murals the City approved since 2015, the Black Collegians' BLM mural was simply one more mural in a series of public art installations that fulfilled the Master Plan's goal of encouraging public art that expressed diverse viewpoints. The mural did not transform into government speech because it does not meet the context-specific analysis in *Shurtleff*, 596 U.S. at 247.

First, the City's close cooperation with the University and Black Collegians is not evidence that the mural was the City's speech when considered in light of the history of the City's approval of previous street art under the Encroachment Policy. Close cooperation between the City and private artists and groups was standard operating procedure for many private murals painted in the City's right-of-way since the Master Plan was adopted. Again, the City committed in 2015 to providing training and resources to the general public to develop their own public art that expressed their own diverse viewpoints. [Dkt. 32-2 at 6; Answer ¶ 79.]

Second, the public's perception of who was speaking is not reasonably disputed: the students of IU. Press releases, social media posts, and the City's own resolution retroactively approving the mural give credit to the Black Collegians and IU students, not the City staff or elected leaderships.

Third, the government did not shape or control the message the Black

Collegians wished to communicate or how they communicated it. Critically, the Black Collegian's message was more than just "Black Lives Matter." Each letter of the Black Collegian's mural is unique and incorporates many different symbols and images that speak to "intersections and allies" – from "body positivity to Islamophobia," [Dkt. 7-12 at 2], to "the Deaf community," and "indigenous peoples." [Dkt. 7-13 at 2.] But the only message the City endorsed was "its animosity to all forms of racism." [Answer ¶ 50.] There is no evidence in this case that the City adopted the message in "each letter [that] tells its own story." [Dkt. 7-12 at 2.] Accordingly, the City's support of the BLM mural did not transform the entire mural and all of its expressive content into government speech or eliminate the designated public forum that had existed on public right of ways since at least 2015.

Accordingly, the Court should apply the forum analysis to the City's decision to approve the Black Collegian's BLM mural while exercising viewpoint discrimination to deny Plaintiffs' ALM mural.

2. Defendants' Engaged in Viewpoint Discrimination in 2021 When They Denied Plaintiffs' First Request for an ALM Mural

(a) Legal Standard for Viewpoint Discrimination

The government cannot discriminate against the speech of private actors based on a speaker's viewpoint. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995). Viewpoint neutrality applies whether the speech takes place in a street, sidewalk, park, or even on non-public forums. *John K. MacIver Inst. for Pub. Pol'y, Inc. v. Evers*, 994 F.3d 602, 609 (7th Cir. 2021).

Viewpoint-neutrality also requires Defendants to restrain the discretion of

officials through "narrow, objective, and definite standards." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969). Once a forum is created the government may not exercise "unbridled discretion" over who speaks in that forum. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 (1988); *Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 574 (7th Cir. 2001).

(b) Defendants' Engaged in Viewpoint Discrimination in 2021

Defendants violated the First Amendment in 2021 when they denied Plaintiffs' access to the City's forum for public art created by private entities. First, Defendants treated the Black Collegians' BLM mural and Plaintiffs' ALM mural with clear inconsistency. Defendants have admitted that they disagree with the message of "All Lives Matter." [Answer ¶ 119.] They acted upon that disagreement when they approved the mural they agreed with and denied the other they disagreed with even though both sets of speakers were students, sought access to similar city streets running through the IU campus, sought to paint murals of similar size and design, sought to express their viewpoints on racism, and had the approval of the IU administration. [Dkt. 7-2.]

Even if we remove the Black Collegians' BLM mural from the analysis (the Court should not), Defendants favored the viewpoint of various neighborhoods who installed paintings of flowers, turtles, and pollen and disfavored the viewpoint of the Plaintiffs who wanted to paint the phrase "All Lives Matter" that incorporated the thin blue and red lines.

Second, the City exercised standardless discretion when it cut off the

application process for Plaintiffs in August 23, 2021, telling Reynolds "The City does not take recommendations for art in its rights of way from individuals." [Answer ¶ 77; Dkt. 7-5.] *Shuttlesworth*, 394 U.S. at 151. With that statement, the City invented a new, arbitrary standard that the City had never exercised toward any other entity or individual who sought to paint a mural in public rights-of-way. Nothing in the record suggests that the City could have halted or ever did halt the applications of the various neighborhood associations solely because the City had decided it was "not tak[ing] recommendations" anymore.

The First Amendment does not tolerate this. The City opened a forum for the public to engage in expressive content [*e.g.*, Ex. 32-2; Statement of Undisputed Fact ¶ 6], so it did not have the right to discriminate based on content. As *Rosenberger* explained, "[i]f the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one." 515 U.S. at 832.

C. Viewpoint Discrimination in 2023 (COUNT II)

1. The City Did Not Close Its Designated Public Forum When it Adopted the New Policy

The City admits that there is still a forum in Bloomington for public art, including murals, installed in public rights-of-way. [Answer ¶¶ 92-93, 95.] The City did not close the forum. In a designated public forum "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest,

and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, (1989) (quotation marks omitted). Here, the undisputed facts show that the CARWP was used by the City as a pretext for viewpoint discrimination against Plaintiffs. Further, the CARWP is not a constitutional time, place, and manner restriction because it is neither content-neutral nor reasonable on its face.

2. Defendants' Engaged in Viewpoint Discrimination in 2023

When the City adopted and then enforced the anti-speech provision in the CARWP against Plaintiffs, it clarified the discriminatory intent it has had toward Plaintiffs all along: when forced by the Court to make its "application process" available to Plaintiffs, the City created the anti-speech provision that appears nowhere in the 2015 Master Plan, in the Board minutes and staff reports approving other murals, or in City employees' correspondence with Plaintiffs in 2021. [*See* Deckard Dep. at 18:11–14 (there was not "any prohibition on speech" prior to the CARWP).] The necessary inference is the City did not think it could continue to exclude Plaintiffs' ALM mural from the forum it had created unless it invented a new pretext for its viewpoint discrimination. So that's what it did.

Further, the staff report and depositions show that the City used the CARWP to continue engaging in standardless discretion. *Shuttlesworth*, 394 U.S. at 151. Rouker, the City Attorney, said "there will be close cases on universally recognized symbols" but wasn't comfortable answering specific questions "without further discussion with the legal team." [Exhibit 7 at 1–2.] The president of the Board, Kyla Cox Deckard ("Deckard"), testified that "special event applications" – one of

the ways to obtain a permit for installing *any* art under the CARWP – has "a lot of factors" and "it would be hard for [her] to guarantee something would be approved." [Deckard Dep. at 20:3–11.] The Assistant Director for the Arts, Holly Warren, with whom the Board consults when reviewing applications under the CARWP, testified that "there are no rules" in the CARWP, "only guidelines that we follow." [Warren Dep. 18:15–18.] Warren went on to testify that applying the CARWP meant asking "what is appropriate to our city? … does this reflect our community?" [*Id.* at 18:21–19:2.] In other words, the CARWP invites viewpoint discrimination because it is not "narrow, objective, and definite," *Shuttlesworth*, 394 U.S. at 151.

3. The New Policy is Not a Content-Neutral or Reasonable Time, Place, and Manner Restriction

The CARWP also fails to comply with the Constitutional standards for time, place, and manner restrictions. *Ward*, 491 U.S. at 791. As applied to Plaintiffs, this constitutes a separate basis to grant Summary Judgment under Count II.

(a) The New Policy is Not Content-Neutral

The CARWP discriminates based on content. Whether a restriction is "'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Reed v. Town of Gilbert, Ariz.,* 576 U.S. 155, 169 (2015). "[L]aws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the

message it conveys'" are content based. *Id.* (quoting *Ward*, 491 U.S. at 791).

First, the CARWP is content-based because City employees consider the content of the proposed public art. [*e.g.*, Exhibit 7 at 2–3 ("Rouker stated that hate speech would not be permissible … [and] signs used in [American Sign Language] … would be impermissible"); Warren Dep. at 20:8–21:13 ("We always say, Okay, what do people want to see here, but also what qualities of the history of this place could it potentially represent."); Deckard Dep. at 22:15–22 ("And so we as citizens would have a perception as to what that might symbolize.").]

Second, the CARWP is content-based because the City cannot evaluate a proposed mural without considering its message and contents – namely whether it has words and universally recognized symbols or not under the anti-speech provision. The City necessarily discriminates between expressive content that uses words and symbols and content that does not.

Third, the CARWP allows the City to limit discourse based on the subject-matter of the public art. *Reed,* 576 U.S. at 169; *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1297 (7th Cir. 1996) (content neutrality "prevents the government from even limiting discussion in public fora to specific subjects. A content-neutral regulation is thus both viewpoint-neutral and subject-neutral." (citations omitted)). The CARWP's anti-speech provision permits the murals it has approved in the past, which included paintings of flowers, pollen and turtles. The City says these paintings convey a message regarding the "subject matter" of neighborliness and sense of place. [Dkt. 32 (Surreply) at 4-5.] But the undisputed

facts show that the City does not permit murals on the "subject matter" of robust cultural and political discourse that necessarily requires the use of words and symbols. This is subject-matter discrimination. According to the Supreme Court, "the [CARWP] singles out specific subject matter for differential treatment," namely expressive content on neighborliness and sense of place but not on political or cultural issues, "even if it does not target viewpoints within that subject matter" on its face. *Reed*, 576 U.S. at 169.

As a content-based restriction on speech, the CARWP must satisfy strict scrutiny and be narrowly tailored to advance compelling ends. *Reed*, 567 U.S. at 163. The City cannot satisfy that standard here. The City's denial of Plaintiffs' ALM mural on March 10, 2023 proves it. The undisputed facts show that the ALM mural satisfied every requirement of the CARWP except the anti-speech provision. [Answer ¶¶ 111, 113, 114; Exhibit 11.] That means Plaintiffs satisfied all the safety provisions, including those meant to address the "heightened probability of conflicts with traffic control devices and driver distraction." [Exhibit 8 at 2–3 (Section III.C, V).] This proves the anti-speech provision is not about public safety, and the record does not identify any other potential compelling interest that could support it.

(b) The New Policy is Unreasonable

The CARWP provisions are also unreasonable. As Warren testified, "there are no rules." [Warren Dep. 18:15-18.] For example, City employees could not define a "universally recognized symbol" in a definite manner. The president of the Board of Public Works said as much when she testified that to define a universally recognized symbol "each of the board members would be reviewing this item. And so

we as citizens would have a perception as to what that might symbolize." [Deckard Dep. at 22:15–22.; *see also* Warren Dep. 20:8–21:13; Karon Dep. 14:17–24.]

Additionally, as alluded to above, the anti-speech provision does not materially impact public safety in light of the several other provisions that expressly address public safety. [Exhibit 8 at 3–4 (Sections III.C and V.).] There is no plausible explanation for how a street mural that satisfies the explicit public safety regulations in Sections III and V of the CARWP, but still contains speech, somehow jeopardizes public safety in any respect.

Finally, the CARWP's application of the anti-speech provision to semi-permanent and permanent art, but not temporary art, is also unreasonable. As the designated evidence shows, semi-permanent art can deteriorate rather quickly. The BLM mural needed touch up paint just a few weeks after it was installed. [Exhibits 11 & 12.] And if the City is trying to promote safety by eliminating painted words on the street, it fails to achieve that objective by allowing local artists to write whatever they want on the street as long as it's only "temporary." If words are hazards, then temporary words are just as hazardous as semi-permanent words. The different rules for temporary and semi-permanent art make little sense.

All told, the content restrictions and unreasonableness of the CARWP highlight what the new policy is really about – enabling viewpoint discrimination.

D. The Court Should Enter a Permanent Injunction and Declaratory Relief

The City's First Amendment violations are clear. The Court should therefore convert its preliminary injunction [Dkt. 35] into a permanent injunction under Rule

65 and 28 U.S.C. § 1343. The permanent injunction should be broadened to the full injunctive relief requested in the Second Amended Complaint. [Dkt. 62-1 at 51–52.] *See, e.g.*, *Planned Parenthood Great Nw., Hawaii, Alaska, Indiana, Kentucky, Inc. v. Comm'r, Indiana State Dep't of Health*, No. 1:17-CV-01636-SEB-MG, 2024 WL 1908110, at *8 (S.D. Ind. May 1, 2024) (granting summary judgment and permanent injunction). The Court should also enter a declaratory judgment against all Defendants under 28 U.S.C. § 2201 because the First Amendment rights of the Plaintiffs are clear and the material facts undisputed.

CONCLUSION

For the foregoing reasons, the Court should grant the Plaintiffs' Motion for Summary Judgment, enter final judgment for the Plaintiffs, grant the injunctive relief requested in the Second Amended Complaint, enter a declaratory judgment under 28 U.S.C. § 2201, award attorneys' fees under Section 1988, and award all other relief that is just and appropriate.

Date: July 22, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2024, I filed the foregoing *Memorandum in Support of Plaintiffs' Motion for Summary Judgment* electronically with the Clerk of the Court. Notice of this filing will be sent to the following by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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