

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’ RESPONSE TO PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

I. Introduction

Plaintiffs (collectively referred to as “Turning Point”) are correct that there are no material undisputed facts, but Plaintiffs are not entitled to summary judgment. The undisputed facts presented by Turning Point failed to take into consideration the undisputed facts that are unfavorable to Turning Point and failed to draw reasonable inferences in favor of the Defendants. When the facts are viewed as a whole, and all inferences are construed in favor of the party against whom the motion under consideration is made,¹ the undisputed facts and reasonable inferences

¹ Cross-motions for summary judgment have been filed. The cross-motions were not anticipated at the time of the Case Management Plan and Plaintiffs’ intent to file was not known to Defendants

show there was no violation of Turning Point’s rights under the First Amendment to the United States Constitution. Additionally, although Plaintiffs request a “final judgment,” their brief does not address the claims asserted under the Indiana Constitution or the Fourteenth Amendment of the United States Constitution.

As shown by the undisputed evidence, all three 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, complied with this Court’s order dated November 18, 2022. The Policy is content-neutral on its face. It provides a time, place, manner restriction on public art in the right of way. It addresses a significant government interest and is narrowly tailored.

Application of the law to the undisputed facts shows that Defendants, not Plaintiffs, are entitled to judgment as a matter of law on each of the claims raised in Plaintiffs’ Second Amended Complaint. Plaintiffs’ motion for summary judgment should be denied and Defendants’ Motion should be granted.

II. Statement of Material Facts Not in Dispute²

PLAINTIFFS’ STATEMENT NO. 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.)]

until Plaintiffs filed their motion. No schedule for filing cross-motions was requested or established by the Court.

² This section is titled consistent with Local Rule 56-1(b). This section contains information consistent with Local Rule 56-1(f)(1)(C) that show “the facts [offered by Turning Point], alone or in conjunction with other admissible evidence, allow the court to draw reasonable inferences in the non-movant’s favor sufficient to preclude summary judgment.”

RESPONSE: This is an inaccurate statement, not supported by the cited evidence. The Master Plan does not “provide” these things to create public art. The Master Plan is a document created by the City’s Arts Commission stating the Commission’s “principles and guidelines for those public art activities with which [the Art Commission] has direct connection,” and creating “a blueprint for the ideal public art environment for the city.” [Dkt. 32-2, p. 2]

PLAINTIFFS’ STATEMENT NO. 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”).

RESPONSE: This is an inaccurate statement, not supported by the cited evidence. The Master Plan “did not encourage the general public to develop art to display in the City’s rights-of way.” The Master Plan is a document that identified areas where *the City* wanted to prioritize *its* placement of public art, and some of those locations included, high-traffic transportation corridors and pedestrian areas, such as transportation hubs and shelters, pedestrian and bicycle priority areas, the City’s trail network, roundabouts and intersections. [Dkt. 32-2, p. 6]

PLAINTIFFS’ STATEMENT NO. 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.]

RESPONSE: This is an inaccurate statement, not supported by the cited evidence. The testimony on point to this issue shows there was a process for accepting and approving activities – expressive or otherwise – in the public right-of-way. Specifically, when asked, “So prior to December of 2022, was there a policy in place for approving those [referring to the prior question that specifically asked about “artwork or murals painted in a roadway]?” The witness, Board of Public Works President Kyla Cox Deckard answered, “There was not a policy to my awareness regarding specifically approving street murals. There was an application process for people who were requesting use of the right-of-way in some way, and submitting requests that affected the right-of-way.” [Dkt. 79-18, at 6:8-14] Additionally, the evidence Plaintiffs previously placed in the record shows the application process was used in 2017 and 2018 for neighborhood street painting projects. [Dkt. 22-3 at 6-12; Dkt 22-5, at 7-14]

PLAINTIFFS’ STATEMENT NO. 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.]

RESPONSE: This is an accurate, but incomplete statement of the facts. The additional undisputed, material facts relevant to this statement are: On July 29, 2021, Kyle

Reynolds sent an email to the general email account/mailbox 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. [Dkt 7-1; Dkt 7-2; Dkt 7-3; Dkt 7-4]

PLAINTIFFS' STATEMENT NO. 37: On July 29, 2021, Wason informed City employees that he would handle any communications with Reynolds. [Exhibit 5.]

RESPONSE: This is an accurate, but incomplete statement of the facts. The additional undisputed, material facts relevant to this statement are: Kyle Reynolds July 29, 2022, email was sent to the general email account for the Public Works Department. [Dkt. 77-4, p. 42-43] 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. [Dkt. 77-4, p. 42-43] Mr. Reynolds' 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. [Dkt. 77-4, p. 44:2-6] Adam Wason did not usually handle requests for mural paintings, but given the staff vacancy, Mr. Wason stepped in to facilitate Mr. Reynolds' request. [Dkt. 77-4, p. 43-44]

PLAINTIFFS' STATEMENT NO. 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.]

RESPONSE: This contention is not supported by the evidence cited. The City did not approve the concept and location of the ALM mural. The paragraph of the Answer cited as evidence shows that Reynolds emailed Adam Wason stating, "Our concept for a 15' x 145' "All Lives Matter" mural was approved by the IUB President's Office, specifically by IU

Vice President for Capital Planning and Facilities Thomas Morrison, for placement on E Kirkwood Ave in front of the Von Lee building.” That is not approval by the City.

PLAINTIFFS’ STATEMENT NO. 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.]

RESPONSE: This is an inaccurate, and incomplete statement of the facts. The additional undisputed, material facts relevant to this statement are: 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 before Wason responded to the email. [Dkt. 77-4, p. 45-46] During the same time (when Adam Wason was handling these communications because Sean Starowitz was transitioning out of his position as the Assistant Arts Director for the City), the City continued working on the third and final Black Lives Matter street mural. [Dkt. 18-14, ¶ 6-8] 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 mural (Jordan Avenue/Eagleson Avenue) prior to the mural's installation. [Dkt. 18-14, ¶ 13-14] In Starowitz's absence, Adam Wason learned that the report had not been prepared and Adam Wason prepared the staff report and presented it to the Board of Works on August 3, 2021. [Dkt. 18-12]

PLAINTIFFS' STATEMENT NO. 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.]

RESPONSE: This is an accurate, but incomplete statement of the facts. The additional undisputed, material facts relevant to this statement are: On or about August 10, 2021, Kyle Reynolds sent Mike Rouker an email stating that he represented The Crimson Post and Turning Point USA. [Dkt. 77-6 at ¶ 13] Mr. Reynolds' email 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." [Dkt. 77-6 at ¶ 14]

PLAINTIFFS' STATEMENT NO. 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.]

RESPONSE: This is an accurate, but incomplete statement of the facts. The additional undisputed, material facts relevant to this statement are: 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. [Dkt. 77-6 at ¶ 15] Mr. Rouker responded to Mr. Reynolds' email, specifically thinking about the Black Lives Matter mural project that was a city initiative and thinking that Mr. Reynolds' request related to that initiative. [Dkt. 77-6 at ¶16 & 19] 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. [Dkt. 77-6 at ¶ 17]

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. [Dkt. 77-6 at ¶ 18 & 21]

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. [Dkt. 77-6 at ¶ 22 & 23] 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. [Dkt. 77-6 at ¶ 32-33]

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. [Dkt. 77-6 at ¶ 24]

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. [Dkt. 77-6 at ¶ 28] 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. [Dkt. 77-6 at ¶ 29-39] The All Lives Matter Mural was not part of a grant process, did not use City funds, and was not a part of a City initiative or project. [Dkt. 77-6 at ¶ 31]

PLAINTIFFS' STATEMENT NO. 46: Defendants did not request the Court to release them from any aspect of the Preliminary Injunction. [Answer ¶ 97.]

RESPONSE: This is an accurate, but incomplete or misleading statement of the facts. The additional undisputed, material facts relevant to this statement are: The City took the actions required by the Order and did not need to request to be released. 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" and to do so by January 2, 2023. [Dkt. 35] On December 20, 2022, the Board of Public Works adopted the City of Bloomington's Policy and

Procedures on Private Art Installations within the Public Right of Way (the “Policy”). The Policy authorized two processes for requests by individuals and external groups: (1) the Neighborhood Improvement Grant Program or (2) a Special Event Application. [Dkt. 77-6 at ¶ 36] 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. [Dkt. 77-6 at ¶ 37]

PLAINTIFFS’ STATEMENT NO. 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.]

RESPONSE: This is an accurate, but incomplete statement of the facts. The additional undisputed, material facts relevant to this statement are: The Policy included a definition for “speech” as that term related to the art requested under either of the two processes. [Dkt. 77-6 at ¶ 38] The definition for the term “speech” was consistent with what the City had applied to prior neighborhood street paintings. [Dkt. 77-6 at ¶ 38; 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 the criteria as an official policy. [Dkt 35, FN 8] To address the Court’s footnote, 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. [Dkt. 77-6 at ¶ 42; Dkt. 77-7]

PLAINTIFFS' STATEMENT NO. 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).]

RESPONSE: This is an inaccurate, and incomplete statement of the facts. This statement seeks to draw the inference that the only part of the Policy that addresses public safety concerns is contained in Section III, subsection C. However, Section III of the Policy identifies criteria “applicable to any private Art Installation proposed within Bloomington’s right of way, whether the Art Installation is Temporary Art, Semi-Permanent Art, or Permanent Art.” [Dkt. 77-7, at 2] Neither the language of the Policy, nor the reasonable inference drawn in favor of the City, support Plaintiffs’ suggested inference that only Section III, subpart C of the Policy addressed public safety concerns. The Policy states that it (as a whole) was designed “to reduce the risks to public safety and burden on public resources that private Art Installations within the right of way may impose.” [Dkt. 77-7, at 1] The evidence, and all reasonable inferences in favor of the City (as the non-moving party, here) shows that the Policy as a whole was designed to address public safety.

PLAINTIFFS' STATEMENT NO. 51: The City disagrees with the message “All Lives Matter.” [Answer ¶ 119.]

RESPONSE: This is an accurate, but incomplete statement of the facts and seeks to draw an inference that is contrary to other material, undisputed facts. The administration of the City of Bloomington disagrees with the statement, but Plaintiffs seek an inference that the application was denied because of that disagreement. That is not a reasonable inference

and ignores other undisputed facts that show the reason Reynolds' application was denied.

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.

[Dkt. 77-6 at ¶ 50; Dkt. 77-8]

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. [Dkt. 77-6 ¶ 53] Mr. Reynolds was given the option to submit an alternative design without words prior to submission of his 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. [Dkt. 77-6 at ¶ 54-56]

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. [Dkt. 77-6 at ¶ 57-58] 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. [Dkt. 77-10]

III. Additional Undisputed Material Facts not contained in Plaintiffs' Statement³

³ Defendants assert that these additional facts are relevant for purposes of conducting "a holistic inquiry [] to determine whether the government intends to speak for itself or to regulate private

1. 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]

2. 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 BCCAC⁴, met to discuss the feasibility of developing Black Lives Matter street murals at the Banneker Community Center⁵ and other locations in the City. [Dkt. 18-15, ¶ 4-5]

3. The July 10, 2020, group discussion was based on a suggestion that came from BCCAC members. [Dkt 18-15, ¶ 7]

4. 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]

5. 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]

expression” as required by *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 252, 142 S. Ct. 1583, 1589, 212 L. Ed. 2d 621 (2022).

⁴ The members of the BCCAC are appointed by the City of Bloomington Board of Park Commissioners.

⁵ 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.

6. The Advisory Council 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]

7. 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]

8. 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]

9. 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 Avenue⁶. [Dkt. 18-15, ¶14]

⁶ 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]

10. 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]

11. 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]

12. 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]

13. 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; Dkt. 18-4; Dkt 18-5, p. 4-5]

14. 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]

15. 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]

16. 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]

17. After the detailed discussion, the Parks Board unanimously approved the Black Lives Matter street mural project. [Dkt 18-5, p. 6]

18. 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]

19. 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]

20. 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 7th and 8th Streets. [Dkt 18-7, p. 2]

21. 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]

22. 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]

23. Starowitz 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]

24. 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]

25. The Board of Works unanimously approved Resolution 2020-50 allowing for the encroachment for the first BLM street mural. [Dkt. 18-7, p. 3]

26. 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]

27. 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].

28. 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]

29. 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]

30. In June and July 2021, the City continued working on the third and final Black Lives Matter street mural. [Dkt. 18-14, ¶ 8]

31. 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].

32. 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]

33. 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]

34. In Starowitz's absence, Adam Wason prepared the staff report and presented it to the Board of Works on August 3, 2021, which report noted the oversight in not presenting the project to the Board of Works for approval prior to the completion of the project; 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;" 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;" 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. 18-12; 18-13; 18-5 at 5]

35. The Staff Report was approved 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]

36. 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]

37. 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].

III. Argument

A. Plaintiffs make no argument as to the Individual Defendants yet seek judgment against all Defendants.

Throughout its brief, Plaintiffs refer to “Defendants” collectively as if the actions of one are the actions of the others. Plaintiffs’ argument fails to acknowledge that they have sued the four individual Defendants in addition to the City of Bloomington. Plaintiffs make no arguments against the individual capacity Defendants they have sued, namely Adam Wason, Kyla Cox Deckard, Beth H. Hollingsworth, Dana Heke, and Mike Rouker. Plaintiffs have offered no evidence that they are entitled to any judgment against them. Plaintiffs’ motion for summary judgment against the individual Defendants should be denied.

B. Plaintiffs have abandoned their Fourteenth Amendment and State Constitutional Claims.

Plaintiffs’ brief seeks the entry of final judgment in their favor. Yet, they make no argument addressing their claims under the Fourteenth Amendment to the United States Constitution or

Article I, Sections 9 and 23 of the Indiana State Constitution. Plaintiffs have abandoned those claims.

C. Defendants did not violate the Court's Order.

Plaintiffs ask this Court to find that Defendants violated the Court's Preliminary Injunction Order. Plaintiffs argue the Order was violated because the Board of Public Works adopted a Policy that contains in it all procedures, processes, and criteria related to private installations of art in the public right of way. Plaintiffs' argument is based on at least three false assumptions. Without those assumptions, their argument fails.

First, Plaintiffs assume that the Court's Order restricted the City from doing anything other than promulgating and disseminating to the public, including to Plaintiffs, the procedural steps. Whereby, private individuals and groups can seek approval for an encroachment on the City's rights-of-way for the purpose of displaying public art. It did not. The order directed the City to do those things, but it did not state the City was restricted from taking other needed actions at the same time.

During the briefing of this case the City showed that it had applied specific rules or criteria providing that street paintings could not contain "speech," including words, letters, numbers, or universally recognized symbols like a peace sign; depictions of traffic control devices; or copyright material. [Dkt. 32-3; Dkt. 22-1, at 4 of 8; Dkt. 22-3, at 11-12; Dkt 32-1, at 21-34 (showing no mural considered by the City contained words, letters, or numbers)] Even though the City had been applying those rules since at least as early as 2017, this Court noted that the City had not "officially adopted" the rules it was applying. [Dkt. 35, Fn. 8] The City addressed that comment of the Court at the same time it promulgated and disseminated the procedural steps. Nothing in the Court's order prohibited the City from doing both things at the same time. The decision to approve the

related policies and procedures, at one time, and to make them accessible to the public in one document is not a violation of the Court's order.

Second, Plaintiffs assume the restrictions on content for street murals were "new" and not previously applied by the City. That assumption is incorrect. As noted above, the rules and criteria were applied, even though they had not been officially adopted. There is documentary evidence that the City applied that same criteria as far a back as 2017 and that none of the street murals at issue (other than the City's Black Lives Matter murals) contained letters, words, numbers, universally recognized symbols or copyrighted material.

Third, Plaintiffs assume the rules were adopted "for the sole purpose of excluding Plaintiffs' ALM mural" or that they "were intended to delay" Plaintiffs application to paint the ALM mural. Neither statement in Plaintiffs' brief is supported by any citation to evidence. They are bald assumptions without evidentiary support. More significantly, they are contrary to the evidence in the record that shows the criteria was applied to prior street murals.

As Plaintiffs acknowledge, the Order prohibited the City from "denying Plaintiffs' access to or otherwise unduly delaying the application process." Plaintiffs were given access to the application process. To the extent Plaintiffs, believe the application was "unduly delay[ed]" because it had to be evaluated and approved, there is no evidence that such delay was undue or unusual. To the contrary, the evidence shows that the application moved through the process with on-going communications between the City and Kyle Reynolds. Reynolds may wish for a speedier process but approving special event applications takes time, and the process applied to all applications, even the BLM murals that Plaintiffs take issue with had the same process and [Dkt 18-5, p. 5 (showing 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.”)]

The adoption of the policy was consistent with the Court’s order. Additionally, the City did not deny Plaintiffs access to or otherwise unduly delay the application process.

D. The City did not engage in viewpoint discrimination.

Plaintiffs ask this Court to find that the City engaged in viewpoint discrimination when it denied Plaintiffs’ request to paint its proposed All Lives Matter mural on a city street. The foundation of Plaintiffs’ argument is four-fold: (1) that the city streets are a public forum, (2) that the City applied no restrictions to expressive content on public streets, (3) the third Black Lives Matter Mural was not government speech, and (4) the City denied Plaintiffs’ mural because of the viewpoint expressed in it. For Plaintiffs’ argument to succeed, all four must be true. They are not, and Plaintiffs’ argument fails.

First, in support of that argument, Plaintiffs rely on their assertion that the City “created a designated public forum through their [sic] 2015 Master Plan that encouraged citizens to express themselves on public property, including public rights-of-way.” As shown above, in response to number 6 of Plaintiffs’ Statement of Undisputed Material Facts, The Master Plan “did not encourage the general public to develop art to display in the City’s rights-of way.” The Master Plan identified areas where the City wanted to prioritize its placement of public art. [Dkt. 32-2, p. 6] Creating a Master Plan for *the City* to develop, prioritize, create, and display public art does not create a public forum for private citizens to freely “express themselves on public property.” The assertion that the City adoption of the 2015 Master Plan for the Arts Commission has somehow created an unlimited open public forum on its streets without any restrictions is unfounded. The

City does not deny that public streets can be a public forum, but the suggestion that any and all expressive content must be allowed on public streets is not legally or factually supported.

Second, Plaintiffs' argument relies on the assertion that the City has approved "privately created art in rights-of-way without restrictions regarding expressive content." In support of that argument, Plaintiffs cite to the neighborhood street murals. Plaintiffs' contention that there was no "restrictions regarding expressive content" on those murals is contrary to the evidence in the record. The record contains discussion of the neighborhood murals, and that discussion specifically addressed restriction on content, including restrictions from containing words, letter, numbers, universally recognized symbols, copyrighted material, or aspects that emulate traffic control devices. [Dkt. 32-3] There is no evidence to support the existence of a public form without restrictions.

Third, Plaintiffs' argument relies on the contention that the third Black Lives Matter Mural is not government speech. As the Court noted in Dkt 35, all three Black Lives Matter murals were government speech, not private speech. The record before the Court regarding the BLM murals has not changed since the preliminary injunction briefing. Rather, Plaintiffs ask the Court to look at one of the three murals out of context. That request is contrary to the Supreme Court's decision in *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 142 S. Ct. 1583, 212 L. Ed. 2d 621 (2022), which advised the courts to "conduct a holistic inquiry" to determine whether the government intends to speak for itself or to regulate private expression; to consider the "case's context rather than the rote application of rigid factors"; and to not engage in a "mechanical" review or consideration. *Id.* at 252. 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."

[Dkt 35, at 20] Plaintiffs' brief offers no reason for the Court to single out the third mural and find otherwise now.

Finally, Plaintiffs' argument assumes that Plaintiffs' mural was denied because of the content of the message expressed therein. Their reliance on the BLM murals is misplaced as they were government speech, and thus, not comparable for viewpoint analysis. Moreover, Plaintiffs offer no evidence to support the assertion that Plaintiffs' mural was denied because of the viewpoint expressed. The evidence in the record shows that assertion has no factual support. As discussed in detail in Section IV. B. of Defendants' Brief in Support of Summary Judgment, [Dkt. 77], Plaintiffs' request was not denied because of the content of the message. The initial denial of Reynolds' email request in 2021 was done by City Attorney Mike Rouker. Mike Rouker's response was not based on the viewpoint expressed in the proposed ALM mural. [Dkt. 132-6 at ¶ 33] He was responding based on his understanding of Kyle Reynolds' request and the process that applied to the BLM murals. [Dkt. 132-6 at ¶ 19] 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.

Likewise, the 2023 denial of Plaintiff's Application was not based on the viewpoint expressed. It was denied based on the criteria that restricts any temporary or semi-permanent art containing words or letters. It is undeniable that Plaintiffs' request contained words and letters, and Kyle Reynolds opted to not submit an alternative design without words and letters. [Dkt. 77-9, at p. 12]

E. The Policy is content-neutral and not subject to strict scrutiny.

Plaintiffs argue that the Policy on Art in the Public Right of Way is content-based and thus, subject to strict scrutiny. It is not. Plaintiffs' brief advocates for finding that the policy is content-based because one must look at what the speaker is saying in order to apply the Policy. But that is not the proper standard to apply.

As the Supreme Court has explained, “[a] regulation of speech is facially content based under the First Amendment if it targets speech based on its communicative content – that is, if it “applies to particular speech because of the topic discussed or the idea or message expressed.” *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69, 142 S. Ct. 1464, 1471, 212 L. Ed. 2d 418 (2022) (internal quotations omitted). The court further explained a policy is not content-based simply because a “reader must ask: who is the speaker and what is the speaker saying” to apply a regulation.” *Id.* Such an interpretation “is too extreme.” *Id.* A policy is content-neutral even if application of it requires an examination of speech to apply neutral lines or conclusions. *Id.* “[A]bsent a content-based purpose or justification, the City’s distinction is content neutral and does not warrant the application of strict scrutiny.” *Id.*

Plaintiffs claim that the Policy provides differential treatment based on content because it allows “expressive content on neighborliness and sense of place but not on political or cultural issues.” [Dk. 79, at 33] That is not accurate. Regardless of what message is to be conveyed, it cannot contain letters or words.⁷ There is no evidence in the record that any private street mural (i.e. non-government speech mural) has ever contained letters or words.

⁷ The policy also addressed universally recognized symbols and copyrighted material. But those rules are not relevant to the case before the court. No party contends that Plaintiffs' proposed mural contained universally recognized symbols or copyrighted material.

Here, the policy only requires the City to look at whether the proposed public art contains words or letters. The Policy does not single out any specific subject matter. Since the City treats any private individuals' or groups' proposed public art with letters or words equally, regardless of its content, the ordinance is content-neutral under the standards established in *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*. As such, strict scrutiny does not apply.

F. The Policy is a reasonable time, place, and manner regulation.

The Policy is a reasonable time, place and manner regulation allowed by the First Amendment. The City may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 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, 109 S. Ct. 2746, 2753, 105 L. Ed. 2d 661 (1989).

At the time of its adoption, the City advised the Policy was “designed to reduce the risks to public safety and burden on public resources that private Art Installations within the right of way may impose while simultaneously recognizing the importance of private as well as public art to Bloomington’s culture, community, and economy.” [Dkt. 77-7] Plaintiffs do not contend that public safety and the burden on public resources are not significant governmental interests. Rather, Plaintiffs suggest that words and letters in street murals do not “jeopardize[] public safety in any respect.” [Dkt. 70, at 34]

Plaintiffs’ brief ignores that words and letters on public streets are usually reserved for transportation-related guidance for drivers and pedestrians and similar government messages. Limiting additional words and letters on public streets serves the purpose of limiting non-transportation and non-government related messages for drivers and pedestrians to read and

process. Thus, limiting words and letters on public streets is narrowly tailored to reducing the risks of public safety created by drivers and pedestrians having to read and process non-transportation or non-government related messages.

Plaintiffs seem to argue that the Policy’s restriction on words and letters is not narrowly tailored because it is not restrictive enough. [Dkt. 79 at 34] Plaintiffs take issue with the fact that words and letters are allowed in temporary art that is designed to last less than seven days. Plaintiff’s argument essentially asks the Court to find that because the regulation is not “perfectly tailored” to address the public safety concern, it is unconstitutional. But that is not the standard.

Time, place, or manner regulations need only be “narrowly tailored in order to survive First Amendment challenge.” *Ward v. Rock Against Racism*, 491 U.S. 781, Fn. 6, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). They do not need to pass a strict scrutiny test, nor do they need to be the least-restrictive. *Id.* “The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest. If these standards are met, courts should defer to the government’s reasonable determination.” *Ward*, 491 U.S. at 782–83.

The concern addressed by the narrowly tailored test is whether the restriction is too broad; not whether it is not broad enough. Plaintiffs claim the Policy is “unreasonable” because temporary art – such as chalk art or art made of other substances designed to last fewer than seven days – may contain words, while more permanent substances cannot. [Dkt. 79, at 34] But those more temporary substances (such as chalk) are not commonly used to convey transportation-related messages to drivers and pedestrians. That distinction does not cause the Policy to fail the “narrowly tailored” test.

Here, the restriction on words and letters is narrowly tailored to serve the government interest. Limiting additional words and letters painted on public right of ways for drivers and pedestrians to read and process. The government's interest in reducing public safety risks would be less effectively achieved if no such limitation on words and letters on the public right of way existed.

G. No permanent injunction is required.

Plaintiffs ask the Court to convert the preliminary injunction to a permanent injunction. Such action is not necessary. The preliminary injunction directed the City to promulgate and disseminate its procedures for public art in the right of way within a set amount of time. That has been done. Converting that to a permanent injunction is pointless. There is no need for further injunctive action as the action at issue was a one-time issue. Additionally, the preliminary injunction directed the City to not deny Plaintiffs access to the application process. That, too, has been done. Plaintiffs have used the application process and there is no evidence or indication that their access to the application process would be denied in the future.

Plaintiffs also ask the Court to broaden the injunction to provide the "full injunctive relief requested in the Second Amended Complaint." That relief is improper as there is no legal basis to support the relief sought. Plaintiffs' Second Amended Complaint seeks a permanent injunction "requiring Defendants to permit Plaintiffs to paint a street mural depicting "All Lives Matter" in Bloomington, Indiana, on East Kirkwood Avenue in front of the Von Lee building on the Indiana University campus as approved by Indiana University officials; and "enjoining Defendants from enforcing their policies, including, but not limited to, the Encroachment Policy and the CARWP in a content- and viewpoint-discriminatory manner." As shown above, the Policy is content-neutral and the ALM mural was not denied because of the viewpoint expressed therein.

Additionally, the rules applied to the ALM mural, which caused its denial, were reasonable time, place, and manner restrictions. Plaintiffs are not entitled to paint their requested mural as it is contrary to the City's reasonable time, place, and manner regulation on private art installations in the public right of way.

V. Conclusion

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 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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