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

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs acknowledge that judgment should be entered in favor of Dana Henke and Beth Hollingsworth, but this acknowledgment does not go far enough. It should have extended to all individual Defendants. Plaintiffs' Response Brief offers no evidence to support judgment against the remaining individual defendants: Kyla Cox Deckard, Adam Wason, or Mike Rouker.

For Kyla Cox Deckard, Plaintiffs Brief is devoid of any argument that would support a claim against Deckard, in her individual capacity. Plaintiffs identify no actions she engaged in that is an alleged violation of Plaintiffs' First Amendment rights. [Dkt. 91] At most, Deckard voted to accept the staff recommendation to deny Plaintiffs' 2023 Special Events Application because it did not comply with the City's Policy for Public Art in the Right of Way (the "Policy"). Her vote

does not violate the First Amendment. Deckard was one of three votes to deny the application. Plaintiffs offer no evidence that Deckard engaged in any viewpoint discrimination with her vote.

For Adam Wason, Plaintiffs argue only that Wason "participated in the drafting process of the [Policy], attended the meeting where the [Policy] was approved and received Plaintiffs' December 2022 Special Events Application by email." [Dkt. 81 at 4.] None of those actions support a claim against Wason, in his individual capacity, for an alleged violation of Plaintiffs' First Amendment right.

For Mike Rouker, Plaintiffs argue that Mike Rouker's affidavit is a "legal argument and *post hoc* rationalization by the City's attorney about a legal conclusion on an ultimate fact." [Dkt. 81 at 7] It is not. It is Rouker's sworn testimony about what he did and why he did it. He puts his actions in context by showing that Reynolds' request came to the City through an unusual path; during a vacancy in the role that would normally address such requests; and referred to the BLM mural, thus, making Rouker think about Reynolds' request in the context of the government speech context that was used for the BLM murals. Rouker explains that he denied Plaintiffs' request based on his understanding of the request, and that he did not deny the request based on the viewpoint expressed in Plaintiffs proposed mural. Mr. Rouker's testimony is based on his personal knowledge and supported by and consistent with the facts in the record. Plaintiffs offered no evidence to support their claim that Mr. Rouker, in his individual capacity, violated the Free Speech Clause of the First Amendment.

There is no evidence that any individual defendant engaged in viewpoint discrimination in violation of the First Amendment. Additionally, there is no evidence that the City engaged in viewpoint discrimination. The government speech doctrine had been analyzed and appropriately applied. Plaintiffs' Response Brief offers no grounds for re-analyzing that or changing the result

of the analysis. At most Plaintiffs argue only to look at the third BLM mural in isolation, which is an argument they also made at the preliminary injunction stage. That is a request that ignores the direction of *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 142 S. Ct. 1583, 212 L. Ed. 2d 621 (2022), which directs the courts to "conduct a holistic inquiry."

Plaintiffs did not move for summary judgment on their Indiana Constitutional claims, or even refence them in their Motion for Summary Judgment and supporting Brief [Dkt. 78 and Dkt. 79] But in their Brief in response to Defendants' Motion for Summary Judgment, Plaintiffs seek to keep those claims alive. First, Plaintiffs seek to keep alive their Section 9 claim by arguing that by denying the right to paint on a public street, the City imposed a "direct and significant burden" on Plaintiffs "because it stymied the protected expression entirely." [Dkt. 81 at 21] It did not. The City told Plaintiffs they could not paint on City property. The City did not stop Plaintiffs from speaking or otherwise expressing their message in a way that did not involve painting on City property. Thus, Plaintiffs were not significantly burdened in expressing their desired message, and there is no evidence of a violation of Article 1, Section 9.

Second, Plaintiffs seek to keep alive their Section 23 claim by arguing that the City did not treat Plaintiffs the same as it treated the BLM Group. Plaintiffs claim the "City argues that the BLM and ALM Groups are not similarly situated because they don't equally support the City's Resolution or Black and Brown residents." [Dkt. 81 at 32] That is incorrect. The City did not deny Plaintiffs' mural because Plaintiffs did not support the City's Resolution. The City denied the Plaintiffs' mural because the only time it had ever let anyone paint words or a message on a City street was part of a City project. Plaintiffs were not seeking to paint a mural as part of that City project. The inherent characteristics make the two groups distinct – one proposed to paint the City property in the way the City sought to have it painted (with the City's own message); the other

group did not. This is like the City seeking proposals to paint City Hall red and white. One group submits a proposal to paint City Hall red and white, but the Plaintiffs submit a proposal to paint City Hall black and gold. The City is not required to treat the two proposals the same. The two groups are not seeking the privilege of painting the city property "on the same terms." That is what is required by the explicit language of Section 23. Thus, treating those two groups differently (either the two groups in the hypothetical or the two groups at issue in this case) does not violate Section 23.

Application of the law to the undisputed facts shows that Defendants, not Plaintiffs, are entitled to judgment as a matter of law on each claim raised in Plaintiffs' Second Amended Complaint. Defendants request the Court enter judgment for 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 September 3, 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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