

“BLACK LIVES MATTER” MURALS STIR CONSTITUTIONAL CONTROVERSY

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In the case of *Indiana University Chapter of Turning Point USA v. City of Bloomington*, U.S. Dist. LEXIS 209341 (S.D. Ind. 11/18/2022), plaintiffs filed a motion for preliminary injunction to enjoin the defendants from enforcing the City of Bloomington’s “right of way art policy” against the plaintiffs. In so doing, plaintiffs alleged the City’s policy violated their rights secured by the First Amendment by prohibiting them from painting their proposed “All Lives Matter” mural on a public street.

FACTS OF THE CASE

On May 6, 2020, the City of Bloomington, Indiana adopted a resolution "denouncing and condemning hate based on racial, social, and cultural bias and holding up values of peace, respect, inclusivity, and equity." In furtherance of this resolution, on July 10, 2020, a group of City employees and appointees to a City advisory council known as the Banneker Community Center Advisory Committee (BCCAC) met to discuss the feasibility of developing Black Lives Matter (BLM) street murals at the Banneker Community Center and other locations within the City.

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

Prior to the July 10th meeting, several City 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 expressed support for and endorsement of a BLM street mural project.

On July 28, 2020, the BLM street mural project was presented to the City's Parks Department and the Board of Parks Commissioners at their regular meeting. The minutes from that meeting show that the Board found the City "needs to take the onus of funding the project to show the Bloomington community its commitment to equality and justice." Following this discussion, the Parks Board unanimously approved the BCCAC's recommendation to proceed with the BLM street mural project.

Although the possibility of three BLM street murals had arisen during the Parks Board meeting, the City passed Resolution 20-16 on September 23, 2020 officially "endorsing the painting of two Black Lives Matter murals." Resolution 20-16 "called on the Board of Public Works to permit the use of a public right of way and join in the public display of support for Black and Brown residents who have been fighting for justice and equality for far too long."

THREE “BLACK LIVES MATTER” MURALS

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On September 29, 2020, the Board of Public Works was presented with Resolution 2020-50 requesting approval of a right-of-way encroachment for the painting of a BLM mural on a city street. 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." The City was "also planning an additional mural somewhere downtown, pending public engagement."

The Board of Public Works unanimously approved Resolution 2020-50 allowing for the encroachment for the first BLM street mural; this mural was painted on October 24, 2020. A few weeks later, on December 1, 2020, the City issued a press release announcing that "the City's second Black Lives Matter street mural would be installed in downtown Bloomington.

On April 13, 2021, the Board of Public Works considered the painting of the second BLM mural. As with the first BLM mural, the second mural was identified as an "interdepartmental project" whose purpose was to display support for "our Black and Brown residents who have been fighting for justice and equality for far too long." Without further discussion, the Board of Public Works approved Resolution 2021-10 authorizing the encroachment for the second BLM street mural.

INDIANA UNIVERSITY MURAL

In June 2021, the City was working with Indiana University and the Black Collegians on the approval and installation of the third and final Black Lives Matter street mural. The third BLM street mural was funded in part by Indiana University's funding board and painted on July 3-5, 2021. Those funds came from mandatory student fees as well as donations from individual community members and the Division of Student Affairs.

On August 3, 2021, the Board retroactively approved the third BLM street mural which had been described as a "community project" to display "support for our Black and Brown residents who have been fighting for justice." Several 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 Indiana University's campus and the students' involvement with the University in choosing the mural's location.

"ALL LIVES MATTER" MURAL REQUEST

Near the end of July 2021, after the third BLM street mural had been installed, Plaintiffs Kyle Reynolds and Indiana University Chapter of Turning Point USA began sending emails to Indiana University and City officials requesting approval for a street mural stating "All Lives Matter." Indiana University Chapter of Turning Point USA described itself as an organization that seeks to "identify, educate, train, and organize students to promote principles of freedom, free markets, and limited government. "

Plaintiffs stated their belief that the "Black Lives Matter" statement was "contradictory to their core principles." Accordingly, plaintiffs wished to express their own view that "All Lives

Matter" by creating a mural setting out that message that would be similar in size and scope to the BLM mural.

On July 20, 2021, Plaintiff Reynolds reached out to Indiana University via email requesting permission to create an "All Lives Matter" mural on campus "ideally on a large street, such as the one utilized for the BLM mural, however, any large space with high visibility on campus should be adequate."

On July 26, 2021, Indiana University officials replied that the "BLM mural was created on a street owned by the City of Bloomington." Since "the City was the entity that ultimately approved the mural," Plaintiff Reynolds was instructed to contact the City with his request.

On July 29, 2021, Reynolds emailed the City with his request for a permit to create an "All Lives Matter" mural. On August 2, 2021, Reynolds was told he needed to work with the Indiana University officials to "get the concept for any murals approved for placement on any streets on campus." Reynolds then responded to IU's request to "send location ideas and a proposed graphic for the All Lives Matter mural."

Upon review of the proposed mural design, featuring the phrase "All Lives Matter" with blue and red lines to represent support for first responders, an IU official emailed Reynolds indicating "the graphic and sizing look good on my end." The official recommended Reynolds "relay to the City that IU is ok" with the location of an "All Lives Matter mural on the Indiana University campus." Reynolds was told, however, that the City's ultimate approval was required.

In an August 3, 2021 email, Reynolds informed the City that the proposed "All Lives Matter" mural had been approved by the IU President's Office. Reynolds was then told to speak with "City Legal" about the mural. On August 23, 2021, the City attorney told Reynolds "the City of Bloomington's Board of Public Works approves the placement of art in the public right of way," but the City "does not take recommendations for art in its right of way from individuals." Moreover, at this time, Reynolds was told "the City is not considering adding additional art within its right of way."

In response, Plaintiffs petitioned the federal district court to issue a preliminary injunction reversing the City's decision to withhold authorization and approval of their request for an "All Lives Matter" mural.

FIRST AMENDMENT VIEWPOINT DISCRIMINATION

As noted by the federal district court, a preliminary injunction would require Plaintiffs to demonstrate a reasonable likelihood of success on the merits of their claim. In this case, Plaintiffs maintained a reasonable likelihood of success existed on their claim because the City had "engaged in viewpoint discrimination in violation of their First Amendment rights" by "withholding approval for their proposed mural."

In so doing, Plaintiffs claimed their request to paint an "All Lives Matter" street mural on a City-owned street was unconstitutionally denied "while permitting other private individuals and

groups to display public art on the surface of City-owned streets and other rights-of-way within the City, including the ‘Black Lives Matter’ street mural.”

GOVERNMENT SPEECH DOCTRINE

In response, the City maintained the “government speech doctrine” was applicable because “the three Black Lives Matter murals painted on City-owned streets were all messages expressed by the City itself.” As a result, the City contended these government messages “did not render the street surfaces designated or limited public fora subject to First Amendment scrutiny.”

As described by the federal district court, “the government speech doctrine permits viewpoint discrimination when the government speaks for itself”:

When the government wishes to state an opinion, to speak for the community, to formulate politics, or to implement programs, it naturally chooses what to say and what not to say. When a government actor speaks directly, it is not difficult to conclude that such speech is attributable to the government.

That being said, the court noted that "the boundary between government speech and private expression can blur when a government invites the people to participate in a program." Under such circumstances, the court acknowledged the difficulty in determining whether "government-public engagement transmits the government's own message and when it instead creates a forum for the expression of private speakers' views."

As cited by the federal district court, the U.S. Supreme Court had identified the following three primary factors in determining whether challenged speech is government or private:

(1) whether the medium has historically been used to communicate messages from the States; (2) whether the medium is often closely identified in the public mind with the State, or can reasonably be interpreted as conveying some message on the government's behalf; and (3) whether the government maintains direct, editorial control over the message's content.

Further, in determining whether the government intends to speak for itself or to regulate private expression, the court would make a "holistic inquiry" into the context of a given case to ascertain “whether the Government has purposefully communicated a message of its own choosing.”

In this particular instance, the federal district court found: “on the admittedly limited record before us, the City has shown that the three BLM street murals were government, not private, speech”:

Here, when viewed holistically and in context with the City's overall plan for its BLM street murals, the evidence supports a finding that all three BLM murals constituted government speech.

The evidence designated by Defendants discloses that a group of City employees and officially-selected appointees to the City's Banneker Advisory Council initiated the BLM street mural project, specifically choosing to express the "Black Lives Matter" message in furtherance of the City's May 2020 resolution "condemning racism in order to demonstrate the City's "animosity to all forms of racism."

While acknowledging "the City accepted submissions from private artists for the mural designs," the court noted "the City dictated the message to be displayed, to wit, 'Black Lives Matter,' and also paid for the creation of the first two BLM murals with public funds." Accordingly, in the opinion of the federal district court, it was "more likely than not that the City was speaking on its own behalf and purposefully communicating a message of its own choosing with the installation of all three BLM street murals."

Having found the BLM street murals constituted government speech, the federal district court held Plaintiffs had failed to demonstrate that the City had engaged in viewpoint discrimination in violation of their First Amendment rights by not permitting a similar "All Lives Matter" mural on City streets:

When the government puts forth its own message, it is entitled to say what it wishes, and to select the views it wants to express... when the government is speaking for itself, the First Amendment forum analysis simply does not apply.

PUBLIC ART APPLICATION PROCESS?

Assuming "all three BLM street murals are deemed government speech," Plaintiffs claimed they were "still likely to succeed on the merits of their viewpoint discrimination claim" because the City had permitted "private individuals and groups to encroach upon public rights-of-way to paint street murals and to display other forms of art." In so doing, plaintiffs claimed the City's expressed policy of "prioritizing public art" created "a limited public forum for expressive activity on the surface of its streets and/or in its rights-of-way." As a result, plaintiffs argued "the City cannot exclude Plaintiffs from that forum based on Plaintiffs' viewpoint."

In particular, Plaintiffs cited evidence of prior occasions when the City has granted requests from private neighborhood associations to encroach on public rights-of-way for community block parties at which participants painted street murals. Plaintiffs, however, claimed the City had denied a "comparable request to paint their ALM mural for a pretextual reason, namely, that the City does not accept recommendations for public art in its rights-of-way from private individuals."

According to Plaintiffs, the City had claimed "no application form or process exists for the City to grant authority for a private individual or group to place a mural on the street or other public rights-of-way." Plaintiffs, however, produced evidence indicating "the City does in fact have such a process, pursuant to which it has approved on at least three prior occasions applications from private neighborhood associations to paint murals directly on City streets."

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The federal district court found “the details of the application process” had “not been clearly developed.” As characterized by the court, the process involved private individuals or groups initially submitting an application with a special event proposal to the City's Economic and Sustainable Development Department and/or the Arts Commission. Once approved, “the request for an encroachment on a right-of-way for the purpose of displaying public art is then presented to the City's Public Works Department for final approval.”

LIMITED PUBLIC FORUM?

The City claimed this approval process did not create a “limited public forum” for First Amendment expressive activity on City streets. According to the City, “none of the approved murals contained words or otherwise conveyed any particularized message and were painted not by private individuals or organizations.” Instead, the City maintained these murals were “part of City-sponsored community-building projects in furtherance of the City's stated goals as set forth in its Public Arts Master Plan ‘of prioritizing public art’ and ‘encouraging community-based works of public art and performance that support neighborhood cohesion and vitality’.”

While “the City worked closely with the neighborhood associations and their residents to develop the designs that were painted on the street,” the City argued it “retained final approval authority over each of those designs.” As a result, the City contended “the City's efforts to involve its residents in these neighborhood revitalization projects does not open the pavement of all City streets as a public forum for any painted message.”

The federal district court rejected the argument that the City had not created a limited public forum for acts of expression and speech protected by the First Amendment because non-BLM murals did not “contain words, letters, or universally recognized symbols to convey an idea or message.”

While “the government need not permit all forms of speech on property that it owns and controls,” the federal district court noted the government “cannot discriminate based on viewpoint... once the government creates a forum for private speech on its property, regardless of the type of forum it has created”:

Viewpoint discrimination is an egregious form of content discrimination, and governments may not regulate speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Likewise, when a government program's very concept contemplates presenting a diversity of views from participating private speakers, the government may not then single out a particular idea for suppression because it is dangerous or disfavored.

NO PUBLIC ART GUIDELINES

In this particular instance, the federal district court found “no evidence that the City has promulgated any criteria or guidelines, content-based or otherwise, that it applies in regulating

the display of public art in its rights-of-way.” Instead, the court found the City's Public Art Master Plan had simply defined "public art" very broadly to include "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."

As cited by the court, the City's Public Art Master Plan had prioritized "art created for the public sphere" that gives "form to core values of the community, such as freedom of speech and expression, alongside respect for diverse viewers and users." In addition, the court found the Master Plan had indicated the City's public art should reflect "the history of the community, including the evolution of taste, values, and formal expressions as well as challenge previously held views."

Despite the City's clearly expressed intent to encourage all members of the general public to develop art to be displayed in City rights-of-way, the federal district court found the City had "peremptorily denied Plaintiffs' access to the application process on grounds that the City does not take recommendations for art in its right of way from individuals."

In the opinion of the federal district court, the reason given for the City's denial of plaintiff's request was "inaccurate" because "Plaintiffs' chosen message is plainly in tension with the City's publicly-espoused view." As a result, the federal district court found Plaintiffs had demonstrated at least some likelihood of success in establishing their claim of viewpoint discrimination:

the City's failure to permit them to submit a public art proposal in the same way other private groups have presented public art proposals for display in City rights-of-way was based on the viewpoint they sought to convey.

In the absence of established guidelines to govern "the expressive content of art which the City would approve," the federal district court found the City had indeed created a limited public forum for expressive activity by approving applications initiated by private individuals and/or organizations to display painted murals on City rights-of-way.

Since the City had failed to permit Plaintiffs to similarly access the limited public forum the City had created for expressive activity on City rights-of-way, the federal district court held Plaintiffs had demonstrated some likelihood of success on the merits of their First Amendment viewpoint discrimination claim.

CONCLUSION

Accordingly, the federal district court held Plaintiffs were entitled to preliminary injunctive relief on their First Amendment claim. The court, therefore, concluded Plaintiffs "must be permitted to engage in the process afforded to other private individuals and groups to seek approval for an encroachment on a City right-of-way to display public art."

As a result, the federal district court ordered Defendants 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.”

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