

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS**

TILT VISION STUDIOS, LLC, KAY)	
RAY, and BRAD SMITH,)	Civil Action No. <u>4:23-cv-03864</u>
)	
Plaintiffs,)	
v.)	
)	
CITY OF WALLER, TEXAS,)	
)	
Defendant.)	
)	

COMPLAINT

INTRODUCTION

1. For decades, Plaintiff Brad Smith has painted murals for businesses and local governments across the country. In 2020, he and his wife, Plaintiff Kay Ray, founded Tilt Vision Studios, LLC to bring mural art to more towns and make fine art accessible to the public.

2. Plaintiffs moved their home and studio to Waller in December 2022 with the hope that their art business would flourish in the City. There, they could paint murals while remaining close to family in the area and caring for their four rescue horses. They secured a mural-painting contract worth \$225,000 and received inquiries from other interested businesses. But soon after they started fulfilling their first mural contract, the City adopted an ordinance that heavily restricts the production and placement of murals on private property within Waller— bringing Plaintiffs’ work to a complete halt. Tilt’s contract was cancelled, and Plaintiffs have been unable to find new work in the City.

3. This lawsuit challenges that city ordinance for unconstitutionally restricting Plaintiffs' right of free expression guaranteed by the First Amendment.

JURISDICTION AND VENUE

4. Plaintiffs bring this civil rights lawsuit pursuant to 42 U.S.C. § 1983, for violation of rights under the First and Fourteenth Amendments to the U.S. Constitution. This Court has jurisdiction over this action for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction), 1343 (civil rights jurisdiction), and 2201–2202 (the Declaratory Judgment Act).

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), on the grounds that all or a substantial part of the acts giving rise to Plaintiffs' claims have occurred or will occur in the Southern District of Texas.

PARTIES

Plaintiffs

6. Tilt Vision Studios, LLC, d/b/a Tilt Vision Art (Tilt), is an art company that Plaintiffs Kay Ray and Brad Smith own. It creates mural art for businesses across the country and in partnership with local governments. Tilt and its artists would provide mural art to clients in Waller absent the challenged restrictions.

7. Plaintiff Kay Ray is a United States citizen and a resident of Waller, Texas. Ray is an entrepreneur and part owner of Tilt Vision Studios, LLC, d/b/a Tilt Vision Art. She wishes to provide mural art to clients and would do so absent the challenged restrictions.

8. Plaintiff Brad Smith is a United States citizen and a resident of Waller, Texas. Smith is a mural artist and part owner of Tilt Vision Studios, LLC, d/b/a Tilt Vision Art. He wishes to provide mural art to clients in Waller and would do so absent the challenged restrictions.

Defendant

9. Defendant City of Waller is a municipality of the State of Texas. A municipality is a “person” subject to civil rights liability pursuant to 42 U.S.C. § 1983. The City and its employees and agents are responsible for implementing and enforcing the mural ordinance at issue.

FACTUAL ALLEGATIONS

The Challenged Law

10. Waller, Texas Ordinance 609 (the Ordinance) imposes registration requirements, placement limitations, and content restrictions for all new murals painted within the City.

11. Under the Ordinance, new murals must be registered with the City and the Ordinance administrator must approve them prior to installation. Ordinance 609 § 58-6-1.

12. To secure registration, the Ordinance requires the muralist and the building owner to submit a joint application and pay a \$500 fee for each mural. § 58-6-1(b).

13. The application must include the following nine elements: (1) Name and address of the building on which the mural will be installed; (2) Name, address, and

contact information of the building owner providing the written consent to the artist for the installation of the mural; (3) Name, address, and contact information of the artists who will create the mural; (4) Notarized written consent of the building owner that the named artists has the consent of the building owner to create and install the mural on the owner's building; (5) Notarized written statement of the artists acknowledging that the mural is such person's work, that the mural may be registered with the City and that the City may remove the mural following notice thereof if the mural violates the Ordinance; (6) Site plan showing the lot on which the mural is to be located and the building dimensions; (7) Photos of the building elevations on which the mural is to be located; (8) A scale drawing and color photo of the building elevation showing the proposed size and placement of the mural; and (9) A description of the proposed maintenance schedule for the mural that includes the timeframe for the useful life for the mural and method for removal. § 58-6.1(b).

14. An "incomplete application" will be denied. § 58-6-1(d).

15. The Ordinance does not require the administrator to set forth the grounds for denial or to propose measures to cure defects in an application. The City may deny a mural application for "incompleteness" without an explanation regarding which of the nine criteria the applicant failed to satisfy.

16. The Ordinance does not provide applicants with an avenue to appeal the Ordinance administrator's decision.

17. The Ordinance imposes content restrictions for new murals. § 58-6.4(a).

18. Among these content prohibitions is a ban on murals containing any commercial message or advertising.¹ Advertising is not defined in the Ordinance.

19. A commercial message is defined as a civic, political, religious, seasonal, or personal message that is not displayed for a fee or for compensation on property not owned or occupied by the person displaying the message. Under this definition, the Ordinance prohibits Tilt, its clients, and other mural artists from paying to have a mural painted on a building they do not own, even if the message is purely personal, civic, or religious.

20. The definition of “mural” excludes murals that contain a logo, advertising symbols, lettering, trademarks, business name, or other written references to the business on the premises, products, or services that are provided within or at the premises where the mural is being painted.

21. Murals may not be placed on the “primary façade” of a commercial building. § 58-6.2.

22. The Ordinance defines “primary façade” as the elevation of a building that faces the adjacent street right-of-way and contains the door or other entrance that serves as the building’s primary customer entrance.

23. Any person who violates the Ordinance is guilty of a misdemeanor and, upon conviction, will be fined up to \$2,000 per day that the violation persists.

¹ Plaintiffs do not challenge the prohibitions on murals designed to imitate official traffic signs or those that physically obstruct the view of motorists approaching, merging, or intersecting traffic. Ordinance 609 § 58-6.4(a)(1).

Tilt

24. Through their murals, Tilt and its owners seek to make fine art accessible to the public. They believe the ability to express oneself through painted art is important to culture and free expression.

25. Smith has been painting murals professionally for nearly 50 years—both as a solo artist and through Tilt contracts. Painting murals has allowed Smith to express his artistic ability and earn a living. Smith’s mural art has garnered significant media attention over the past several decades and he is widely regarded as a master of his craft.

26. Ray has been an entrepreneur from a young age. She has founded and operated a flag and flagpole manufacturing company, owned and operated a health foods store, she has delivered talks at business seminars, and she currently trains artists on the business aspects of professional artistry. In her capacity as part owner of Tilt, she secures mural contracts for the company, paints and designs murals, helps manage the business, and oversees Tilt’s employees and contractors.

27. Tilt and its owners produce mural art primarily for businesses and in partnership with local governments. For its business clients, Tilt often includes a logo, lettering, or at least some visual reference to the product that the business sells.

28. In addition to aiding clients with attracting visitors, Tilt’s art allows its clients to express cultural, personal, or religious views.

29. Tilt and its proprietors often work with fellow artists, musicians, multi-media producers, and artists to promote their work and elevate its cultural impact.

30. Outside of promoting culturally meaningful art, Tilt's murals assist municipalities and local businesses with economic revitalization. Smith has been conducting art-based economic development for over thirty years.

31. The purpose of art-based economic development is to promote tourism, elevate the economic status of local businesses, and increase recognition for small towns and neighborhoods. In addition, art-based economic development can attract new residents and workers to a city or neighborhood.

32. Examples of successful art-based development include the economically depressed Deep Ellum neighborhood of Dallas, Texas and the City of Burleson, Texas—both of which partnered with Tilt.

33. Tilt, Smith, and Ray have received multiple letters of recommendation from town administrators whose cities and neighborhoods have reaped the benefits of Tilt's work.

34. Tilt and its owners wish to bring these benefits to the City of Waller but the Ordinance prohibits them.

Passage of the Ordinance

35. Prior to December 2022, Tilt and its artists had been painting murals across Texas and neighboring states.

36. In December 2022, Smith and Ray purchased a home in Waller. They relocated Tilt to the City after entering a contract to create murals on property that a local real estate developer called Finishes Solutions (Finishes) owned. Other

businesses and individuals in Waller also inquired about Tilt's murals causing Smith and Ray to believe that Waller would be a lucrative location for the business.

37. The contract with Finishes was worth \$225,000 and called for the creation of thirteen murals to be painted on commercial buildings.

38. It would be typical for other potential contracts to materialize once Waller residents and business owners observed their work.

39. Prior to starting work on any of the contracted murals, Smith, Ray, and a representative from Finishes met with the City Mayor to inform him that the murals would be forthcoming. At this meeting, the Mayor expressed concern that the content of any potential murals could be inconsistent with the cultural values and aesthetics of the City.

40. Shortly after the meeting, the Mayor contacted Finishes to let the company know that the City Council would likely be considering an ordinance to restrict murals in response to Tilt's current and prospective work.

41. After Smith and Ray had completed three of the murals for Finishes, the City reached out to Finishes informing the company that murals were likely to be heavily restricted and that a registration scheme would soon be established by the City Council.

42. At its next meeting on February 20, 2023, the City Council held a hearing on the City's plan to restrict mural production in the City. Smith and Ray along with other Waller residents appeared before the Council to voice their objections.

43. The City's mayor said that prior to the City Council's vote on the Ordinance he hadn't "talked to anyone that's totally against them." But he continued that, "we need something to regulate ... no different than we have speed limits to regulate speed."

44. During the Council's deliberations, the City attorney suggested that the Ordinance's purpose is to allow City residents to avoid seeing art they do not like: "It allows for those people who may not care for public art not to have to see it every day ... because you're on a public road and people may not think that it's appropriate, even though you may believe it's appropriate, they may believe it's not appropriate and they may not want that on the front of the business every day."

45. The City Council voted to enact Ordinance No. 609 on the same day it was proposed and presented.

46. After the City adopted the Ordinance, Finishes suspended its contract with Tilt, and Tilt has been unable to secure any additional commercial contracts due to the mural restrictions.

47. Because the murals Tilt paints are now illegal, Tilt and its artists have not painted any new murals in Waller.

48. An actual and substantial controversy currently exists between Plaintiffs and the City regarding the constitutionality of the mural restrictions and registration requirements.

49. If this Court declared the City's mural Ordinance unconstitutional and enjoined the City from enforcing it, Plaintiffs would resume mural painting within the City.

FIRST CAUSE OF ACTION

Content-Based Restriction on Speech in Violation of the First Amendment's Free Speech Clause

50. Plaintiffs allege and incorporate by reference every allegation set forth in the preceding paragraphs.

51. The First Amendment protects the Plaintiffs' artistic activities, consisting of painting murals for clients in the City. Ordinance 609 unconstitutionally restricts Plaintiffs' right to free expression in public places and on private property.

52. The Ordinance forbids murals with advertising, commercial messaging, lettering, business logos, business names, or references to products or services provided within or at the premises where the mural is painted. The Ordinance also gives wide discretion to City officials regarding what constitutes prohibited "advertising."

53. These prohibitions impose a content-based restriction on speech. They draw a distinction between different types of speech depending upon the message conveyed. Enforcing officers must examine the contents and function of a mural to determine whether it violates the Ordinance.

54. Because the City's mural Ordinance imposes a content-based restriction on free expression, it must satisfy strict scrutiny.

55. The mural Ordinance does not further any compelling government interest nor does it further any significant government interest.

56. There is no evidence that allowing murals with commercial messaging or advertising would create hazards to public health or safety. There is no evidence that banning murals on the primary façade of commercial buildings promotes public health or safety.

57. Even if the restrictions were aimed at a compelling government purpose, they restrict more speech than necessary and there are less restrictive means at the City's disposal.

SECOND CAUSE OF ACTION

Prior Restraint on Free Expression in Violation of the First Amendment's Free Speech Clause

58. The City's registration requirements impose an unlawful prior restraint on Plaintiffs' speech. The Ordinance fails to provide necessary procedural protections to applicants and does not provide any means to appeal City officials' decisions.

59. There is no timeline for the City to reach a decision on a mural permit application. As such, the Ordinance allows the City to indefinitely defer any decision on a pending application.

60. The City is not required to clearly set forth the grounds for denial or to propose measures to cure any defects in a denied application. The City may deny a mural permit application for "incompleteness" without providing an explanation of which of the nine criteria the applicant failed to satisfy.

61. The registration requirements do not further any compelling government interest nor do they further any significant government interest. The registration requirements allow City officials to censor mural art they do not like and deny registration to muralists they do not like.

62. The \$500 registration fee for murals is an unlawful tax on free expression. There is no link between the fee amount and the costs of implementing and enforcing the registration requirements.

63. The obligation to maintain a mural rests solely on the owner of the building on which the mural sits and noncompliance with the mural Ordinance is punished with a fine of up to \$2,000 per day. Thus, the City's costs are largely defrayed by other provisions of the Ordinance.

REQUEST FOR RELIEF

1. An entry of judgment declaring the mural content prohibitions, placement restrictions, and registration requirements of Waller, Tex. Ordinance 609 §§ 58-6.1, 6.4(a)(5) unconstitutional under the First Amendment to the U.S. Constitution, facially and as applied to Plaintiffs;

2. An entry of a permanent injunction against Defendant, its officers, its employees, agents, assigns, and all persons acting in concert with it, from continuing to enforce the challenged provisions of Ordinance 609, as well as any and all implementing administrative rules and regulations, and practices and policies by which Defendant enforces these provisions, against Plaintiffs or any other person;

3. An award of nominal damages;

4. An award of attorney fees and costs in this action pursuant to 42 U.S.C. § 1988; and
5. An award of any further legal or equitable relief this Court may deem just and proper.

Dated: October 12, 2023

/s/ Joshua W. Polk
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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
TILT VISION STUDIOS, LLC, KAY RAY, and BRAD SMITH
(b) County of Residence of First Listed Plaintiff Harris
(c) Attorneys (Firm Name, Address, and Telephone Number)
SEE ATTACHED SHEET

DEFENDANTS
CITY OF WALLER, TEXAS
County of Residence of First Listed Defendant Waller/Harris
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State 1 1
Citizen of Another State 2 2
Citizen or Subject of a Foreign Country 3 3
Incorporated or Principal Place of Business In This State 4 4
Incorporated and Principal Place of Business In Another State 5 5
Foreign Nation 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: Nature of Suit Code Descriptions.

Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes codes like 110 Insurance, 310 Airplane, 365 Personal Injury, etc.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation - Transfer
7 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. § 1983
Brief description of cause:
Free speech challenge to city ordinance regulating art murals painted on commercial buildings.

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
DEMAND \$
Nominal damages
CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY
(See instructions):
JUDGE
DOCKET NUMBER

DATE: 10/12/2023
SIGNATURE OF ATTORNEY OF RECORD: /s/ Joshua W. Polk

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Attachment to civil cover sheet

I. Plaintiffs

(c) Attorneys (Firm Name, Address, and Telephone Number)

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