

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

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

FIRST AMENDED 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 restricted 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. After Plaintiffs filed this lawsuit challenging that ordinance, the City amended the ordinance but maintained heavy restrictions on mural content and placement within the City.

4. This lawsuit challenges the amended City ordinance for unconstitutionally restricting Plaintiffs' right of free expression guaranteed by the First Amendment and due process protected by the Fourteenth Amendment.

JURISDICTION AND VENUE

5. 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).

6. 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

7. Tilt Vision Studios, LLC, d/b/a Tilt Vision Art (Tilt), is an art company owned by Plaintiffs Kay Ray and Brad Smith. 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.

8. 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.

9. 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

10. 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

11. On February 20, 2023, the City passed Ordinance 609, which placed restrictions on painting murals within the City.

12. After Plaintiffs filed this lawsuit challenging Ordinance 609 on October 12, 2023, the City passed Ordinance 635 on July 1, 2024, which amended Ordinance 609 (Amended Ordinance). The Amended Ordinance imposes registration requirements, placement limitations, and content restrictions for all new signs and most murals painted within the City.

13. The Amended Ordinance defines “Signs” as “an outdoor structure, sign, display, light device, figure, painting, drawing, message, plaque, poster, billboard, or other thing that is designed, intended, or used for purposes of advertisement, information, announcement, declaration, demonstration, display, identification, or expression.” Ordinance 635 § 58-2 (Definitions).

14. The Amended Ordinance defines a “Mural” as “painted graphics that are murals, mosaics or any type of graphics painted on a wall or fence whether or not it contains advertising.” *Id.*

15. The Amended Ordinance defines “Advertising” as “to seek the attraction of or to direct the attention of the public to any goods, services, business, activity, or merchandise of any kind of type.” *Id.*

16. Generally, individuals need a permit from the City to erect a new sign and the Ordinance administrator must approve them prior to installation (permitting requirement). *Id.* § 58-5. But the Amended Ordinance exempts certain “temporary signs,” “Government/public signs,” and murals that do not meet the Ordinance’s definition of “signs” from the permit requirement. *Id.* § 58-5(c).

17. The “temporary signs” that are automatically exempt from the permitting requirement include signs below a certain size “which advertise the sale, rental, or lease of the premises on which such signs are located,” *id.* § 58-5(a); signs below a certain size and that are located “upon the premises of a public, charitable, or religious organization,” *id.* § 58-12(b); signs below a certain size that have a “political and noncommercial purpose,” *id.* § 58-12(d); signs below certain size, height,

and setback requirements and that relate to “development or construction,” *id.* § 58-12(e); and signs below a certain size and height that advertise an “open house.” *Id.* § 58-12(f).

18. Obtaining a permit requires submitting an application to the City that complies with Section 58-6 of the Amended Ordinance. The application must include blueprints and drawings of the proposed sign and “[a]ny other information the sign administrator shall need to show full compliance with this and all laws and ordinances of the city.” *Id.* § 58-5(8).

19. The Amended Ordinance imposes several restrictions on signs that do not violate the First Amendment. For example, Plaintiffs do not challenge subsections (a), (b), (c), (d), (e), (f), (h), (i), (l), (n), or (p) of § 58-9 of the Amended Ordinance which ostensibly comply with constitutional norms.

20. However, the Amended Ordinance includes several provisions that individually and collectively burden free expression in violation of the First Amendment.

21. It prohibits signs from being “placed closer than six feet to the edge of a road surface,” but it exempts “temporary signs” from this restriction. *Id.* § 58-9(g).

22. It prohibits signs from being “painted or installed on any roof surface.” *Id.* § 58-9(j).

23. It prohibits signs from “[e]xtend[ing] above or beyond the building roofline, façade, or eaves when installed on a wall.” *Id.* § 58-9(k). It defines “a façade” as “a low wall built along one or more sides around the perimeter of a roof.” *Id.*

24. It prohibits signs from being “installed ... that ... face[] contiguous residential property.” *Id.* § 58-9(m).

25. It limits signs “to one sign affixed onto each side of a building with an allowable total sign area of 1.5 square feet of signate for each linear foot wall length to which the sign will be affixed.” *Id.* § 58-9(o). But it exempts “Murals” from this requirement. *Id.*

26. It also generally prohibits murals from being painted on the “primary façade” of a commercial building. *Id.* § 58-13(b). 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 primary customer entrance to the building.” *Id.* § 58-2.

27. The Amended Ordinance also limits signs in the Scenic Corridors to “one sign per lot, tract or parcel of land.” *Id.* § 58-10(b)(3). But if “multiple entities [are] located on a single lot, tract or parcel of land, such as shopping centers and other integrated business or commercial developments,” it allows one sign for every “five entities.” *Id.* The “maximum sign area” for multiple-entity signs “may be increased by not more than 50 square feet for each additional entity identified on each such sign, to a maximum sign face area per sign of 400 square feet.” *Id.*

28. It limits signs in the “Scenic Corridors” to “42 ½ feet” and their “sign face area” to “200 square feet.” *Id.* § 58-10(b).

29. The Amended Ordinance designates the following parts of town as the “Scenic Corridors”: State Highway 290 within the municipal boundaries and

extraterritorial jurisdiction of the City and extending 600 feet from the edge of the right-of-way, *id.* § 58-3(b)(1); Business 290 within the municipal boundaries and extraterritorial jurisdiction of the City and extending 600 feet from the edge of the right-of-way, *id.* § 58-3(b)(2); FM Road 2920 within the municipal boundaries and extraterritorial jurisdiction of the City and extending 600 feet from the edge of the right-of-way,” *id.* § 58-3(b)(3); and FM Road 362 where existing and proposed within the municipal boundaries and extraterritorial jurisdiction of the City and extending 600 feet from the edge of the right-of- way. *Id.* § 58-3(b)(4).

30. These scenic corridors are the parts of town that tourists are most likely to visit when visiting Waller.

31. These scenic corridors are the parts of town where businesses are most likely to ask Tilt and its artists to paint murals.

32. Most of the murals already painted by Plaintiffs prior to the passage of Ordinance 609 are within the scenic corridor.

33. The Amended Ordinance states that the City council may provide exemptions from the challenged restrictions for temporary signs if they “provide information about and/or direct the public to a special event of civic interest, including, but not limited to, parades, organized community holiday festivities or celebrations, and special events organized by charitable or nonprofit organization.” *Id.* § 58-5(c)(2).

34. The Amended Ordinance allows the City council to subject these signs to a different set of requirements and restrictions and direct the City council to

“consider, among other things, the limitations on size, locations, materials, and construction of such temporary signs.” *Id.*

35. Any person who violates the Amended Ordinance is guilty of a misdemeanor and, upon conviction, will be fined up to \$500. And “[e]ach day of violation shall constitute a separate offense.” *Id.* § 58-8(a).

Tilt

36. 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.

37. Plaintiff Brad Smith has been painting murals professionally for nearly 50 years—both as a solo artist and through Tilt contracts. Painting murals has allowed Mr. Smith to express his artistic ability and earn a living. Mr. 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.

38. Plaintiff Kay 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 food 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.

39. The murals Plaintiffs paint for their customers fall squarely within the Amended Ordinance’s definition of “signs.”

40. 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.

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

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

43. 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.

44. 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.

45. 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.

46. 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.

47. Tilt and its owners wish to bring these benefits to the City of Waller but the Amended Ordinance burdens their ability to do so.

Passage of the Ordinance and Amended Ordinance

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

49. 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.

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

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

52. 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.

53. 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.

54. 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.

55. 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.

56. 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."

57. 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."

58. The City Council voted to enact Ordinance No. 609 (the original ordinance) on the same day it was proposed and presented.

59. After the City adopted Ordinance No. 609, Finishes suspended its contract with Tilt, and Tilt has been unable to secure any additional commercial

contracts due to Ordinance No. 609's mural restrictions. Tilt and its artists have not painted any new murals in Waller since it passed Ordinance No. 609.

60. The Amended Ordinance's new restrictions will continue to burden Tilt and its artists' ability to paint murals in Waller.

61. An actual and substantial controversy currently exists between Plaintiffs and the City regarding the constitutionality of the Amended Ordinance's restrictions.

62. If this Court declares the City's Amended Ordinance unconstitutional and enjoins the City from enforcing it, Plaintiffs would resume mural painting within the City.

CLAIMS FOR RELIEF

First Cause of Action: Violation of the First Amendment's Free Speech Clause (U.S. Const. amend I)

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

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

65. The Amended Ordinance regulates murals as signs if they are "designed, intended, or used for purposes of advertisement, information, announcement, declaration, demonstration, display, identification, or expression." *Id.* § 58-2. Many,

if not all, of the murals that Tilt and its artists paint for its clients would fall under this definition of “signs.”

66. The Amended Ordinance imposes a content-based restriction on speech by subjecting murals to the permitting process and strict sign requirements depending on whether they are “designed, intended, or used for purposes of advertisement, information, announcement, declaration, demonstration, display, identification, or expression.” This draws a distinction between different types of speech depending upon the message conveyed and the intent of the speaker. Enforcing officers must examine the contents and function of a mural to determine whether it must satisfy the Amended Ordinance’s strict requirements for signs.

67. The Amended Ordinance also discriminates based on content when it limits the size of signs, but exempts murals not meeting the definition for signs from the size limits. *Id.* § 58-9(o).

68. The Amended Ordinance further discriminates based on content and speaker when it allows the City council to provide exemptions for temporary signs if they “provide information about and/or direct the public to a special event of civic interest, including, but not limited to, parades, organized community holiday festivities or celebrations, and special events organized by charitable or nonprofit organization.” *Id.* § 58-12(b). The Amended Ordinance allows the City council to subject these categories to different restrictions than the general rules for signs in §§ 58-09 and 58-10.

69. The Amended Ordinance’s permitting requirement imposes content and speaker-based restrictions because it generally requires a permit to erect a sign but then exempts “government/public” signs from the permitting requirement. *Id.* § 58-5(c)(I).

70. The Amended Ordinance imposes a content-based restriction by making the content described in Section 58-12 a factor for exempting “temporary signs” from the permitting requirement.

71. The Amended Ordinance imposes a speaker-based restriction by exempting “temporary signs” from the permitting requirement if they are below a certain size and are located on the premises of a “public, charitable, or religious organization.” *Id.* § 58-12(b).

72. Because the City’s Amended Ordinance imposes content-based and speaker-based restrictions on free expression, it must satisfy strict scrutiny.

73. The permitting requirement and the challenged restrictions in the Amended Ordinance do not further any compelling government interests.

74. Additionally, the permitting requirement and the challenged restrictions are not narrowly tailored because they restrict more speech than necessary and there are less restrictive means at the City’s disposal.

75. The limitation to one sign per tract within the scenic corridor is essentially a ban on mural art in the area.

76. Most, if not all, murals will fall under the expansive definition of “sign” and most businesses within the corridor already meet the Amended Ordinance’s sign limitation by having a traditional sign identifying the business on the property.

77. Business owners within the corridor that wish to place a mural on their building must choose between a traditional sign identifying the business and the desired mural art. Most, if not all, will choose the traditional sign.

78. Even if the challenged restrictions do not regulate based on content or speaker, they are still unconstitutional.

79. The challenged restrictions do not advance any important government interests unrelated to the suppression of free speech.

80. Even if the challenged restrictions advanced important government interests, they are not narrowly tailored. They burden substantially more speech than necessary to further those interests.

81. The challenged restrictions do not leave open ample alternative channels of communication.

**Second Cause of Action: Violation of the Due Process Clause
(U.S. Const. amend XIV § 1)**

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

83. The Fourteenth Amendment’s Due Process Clause prohibits laws that are vague and laws that have prohibitions that are not clearly defined.

84. The Amended Ordinance’s distinction between “signs” and “murals” is vague, standardless, and gives Plaintiffs no notice of whether their murals will be regulated as “signs,” or as “murals.”

85. Plaintiffs have no notice of whether the permitting requirement, the challenged restrictions, or any of the other restrictions apply to their murals. They face criminal penalties for incorrect guesses on whether their murals qualify as a “mural,” or a “sign,” and which set of requirements and restrictions apply as a result.

86. Therefore, the Amended Ordinance violates the Fourteenth Amendment’s Due Process Clause.

REQUEST FOR RELIEF

1. A declaratory judgment that the permit requirement and challenged restrictions in the Amended Ordinance (Ordinance 635) are unconstitutional under the First Amendment to the U.S. Constitution, facially and as applied to Plaintiffs;

2. A declaratory judgment that the Amended Ordinance (Ordinance 635) is void in its entirety under the Fourteenth Amendment’s Due Process Clause;

3. A permanent injunction against Defendant, its officers, its employees, agents, assigns, and all persons acting in concert with it, from continuing to enforce the Amended Ordinance (Ordinance 635), 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;

4. An award of nominal damages;

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

Dated: July 26, 2024

/s/ Joshua W. Polk
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