IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE FREDERICK DOUGLASS FOUNDATION; STUDENTS FOR LIFE OF AMERICA; WILLIAM CLEVELAND; ROBERT L. GURLEY, JR.; and ANGELA WHITTINGTON, *Plaintiffs*, v. DISTRICT OF COLUMBIA, *Defendant.*	Case No.: 1:20-cv-03346

MOTION FOR PRELIMINARY INJUNCTION AND STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT

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PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 5, and Local Rule 65.1, Plaintiffs the Frederick Douglass Foundation, Students for Life of America, Angela "Tina" Whittington, Robert "J.R." Gurley, Jr., and William "Bill" Cleveland (the "Advocates") hereby move for a preliminary injunction for the reasons set forth below in the statement of points and authorities.

The Advocates need relief from this Court because they are prohibited from speaking on issues of public importance in their desired manner, now and in the future, in violation of their constitutional rights. This case raises essentially pure matters of law in which the only evidentiary items needed are the already verified allegations in Plaintiffs' declarations, which are attached as Exhibits A, B, and C. The relevant ordinance and the government's actions at issue speak for themselves.

The Advocates therefore request a hearing under LCvR 65.1(d) to present oral argument on this motion. Plaintiffs do not expect that the hearing will be evidentiary but, if the Court wishes, Plaintiffs would be

available to supplement the record. To prevent any burden on the Court, Plaintiffs would agree to scheduling the hearing beyond the strict 21-day timeframe indicated in LCvR 65.1 but request a hearing to occur far enough in advance of the scheduled event to allow timely entry of judgement related thereto.

INTRODUCTION

The District of Columbia erupted into massive protest activity in the wake of the high-profile death of George Floyd while in police custody. Individuals and organizations used D.C. streets, sidewalks, public buildings, and monuments as blank canvases to express messages like "Black Lives Matter" and "Defund the Police." Despite these apparent violations of District of Columbia Code § 22–3312.01, which prohibits the defacement of public property, the District chose not to enforce the law against any individual or organization. That is, until the Plaintiff Advocates gathered outside the Planned Parenthood Carole Whitehill Moses Center seeking to paint "Black Pre-Born Lives Matter" in a manner *identical* to the messages approved by the District.

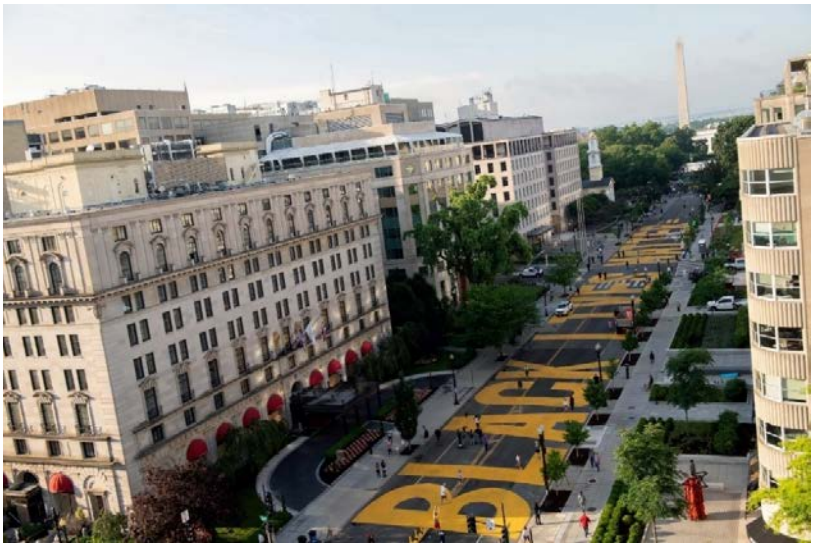
The District prevented the Advocates from speaking, threatened them with arrest under the Defacement Ordinance if they painted or

chalked their message on the street or sidewalk, and arrested two individuals when they dared use washable chalk on the public sidewalk. Thus, the District used the Defacement Ordinance as a tool to silence speech with which it disagrees. The First Amendment prohibits such discriminatory treatment.

This application of the Defacement Ordinance against only the Advocates' speech does not further any legitimate—much less compelling—government interest, only the District's "interest" in censoring speech with which it disagrees. Content and viewpoint-based application of the Defacement Ordinance is unconstitutional and must be preliminarily enjoined to avoid ongoing irreparable harm to core speech. The Advocates are currently planning to hold a substantially similar event on March 27, 2021. *See* Declaration of Angela "Tina" Whittington at ¶ 9 (Attached as Exhibit A). Plaintiffs therefore require relief prior to that date.

FACTUAL BACKGROUND

In June 2020, D.C. Mayor Muriel Bowser commissioned a mural declaring "Black Lives Matter" in permanent yellow paint, extending the length of an entire city block and covering the width of the street.[1]



Soon after, protestors painted "= Defund the Police" next to the first mural and in similar style.[2]

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[1] Nirappil, Fenit, et al, *'Black Lives Matter': In giant yellow letters, D.C. Mayor sends message to Trump*, THE WASHINGTON POST (June 5, 2020), https://perma.cc/XJ3P-Q9FT (last accessed Dec. 15, 2020). Photograph from: Wright, Robin, *The Secret Project That Led to Black Lives Matter Murals Coast to Coast*, THE NEW YORKER (June 9, 2020), https://www.newyorker.com/news/news-desk/the-secret-project-that-led-to-black-lives-matter-murals-coast-to-coast (last accessed Dec. 15, 2020)

[2] Tan, Rebecca, et al., *Protestors paint 'Defund the police" right next to D.C.'s 'Black Lives Matter' mural*, THE WASHINGTON POST (June 7, 2020), https://perma.cc/BU4S-ZF7F (last accessed Dec. 15, 2020). Photograph from: Carlson, Margaret, *Why 'defund the police' is deadly for democrats*, NEW YORK DAILY NEWS (June 8, 2020), https://www.nydailynews.com/opinion/ny-oped-why-defund-the-police-is-deadly-20200608-zeq554ejubfrlazrw2ysqzkoei-story.html (last accessed Dec. 15, 2020).

There has been no indication that a permit was obtained for the "Defund the Police" mural. Shortly after the mural was painted, "staff from the city's department of public works repainted the D.C. flag from the original mural but did not touch the 'defund the police' message."[3] The District therefore tacitly endorsed this message when it refused to remove it from the street. The "Defund the Police" mural remained on the street for over two months and was removed only because of previously planned road construction.[4]

Similar instances of protest art, street art, street chalking, and graffiti marked public sidewalks and streets across D.C. throughout the

[3] Tan, Rebecca, et al., *Protestors paint 'Defund the police" right next to D.C.'s 'Black Lives Matter' mural*, THE WASHINGTON POST (June 7, 2020), https://perma.cc/BU4S-ZF7F.

[4] Blitz, Matt, *City Says 'Defund The Police' Message At BLM Plaza Was Erased Due To Road Work*, DCIST (Aug. 17, 2020) https://dcist.com/story/20/08/17/dc-defund-police-black-lives-matter-plaza-mural/ (last accessed Dec. 15, 2020).

summer months. During the protests, construction scaffolding located on the southern side of the U.S. Chamber of Commerce headquarters had become a "gallery wall for a wide array of protest art."[5] Such "protest art" was permitted to remain until August 2020, when the U.S. Chamber of Commerce removed the "mosaic of signs comprised of words, photography, and painted murals" in order to preserve the work.[6]

After the "Defund the Police" message and the artwork near the U.S. Chamber of Commerce were removed, protestors organized an event entitled "Reclaim DC" for August 16, 2020, where individuals were called to "reclaim[] the H Street Art Tunnel at BLM Plaza" and "[c]ome create art in all forms."[7] On the evening of August 16, several pieces of graffiti were observed at 17th Street, NW and H Street, NW, near the U.S. Chamber of Commerce Building:

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[5] Blitz, Matt, *Protest Artists Come Out On A Rainy Sunday To 'Reclaim' H Street Art Tunnel Near BLM Plaza*, DCIST (Aug. 16, 2020) https://dcist.com/story/20/08/16/protest-artists-come-out-on-a-rainy-sunday-to-reclaim-h-street-art-tunnel-near-blm-plaza/ (last accessed Dec. 16, 2020).

[6] U.S. Chamber of Commerce, *U.S. Chamber to Preserve Historic Black Lives Matter Artwork in Partnership with Washington D.C.-based Institutions* (Aug. 10, 2020), https://www.uschamber.com/press-release/us-chamber-preserve-historic-black-lives-matter-artwork-partnership-washington-dc (last accessed Dec. 17, 2020).

[7] The Palm Collective, Instagram, https://www.instagram.com/p/CD7uEo_BYWK/ (last accessed Dec. 17, 2020).


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The District of Columbia's Defacement Ordinance prohibits, among other things, "writ[ing], mark[ing], draw[ing], or paint[ing]" on public streets and property. District of Columbia Code § 22–3312.01. While the District opened this forum for speech and did not enforce this ordinance against any protestor of police brutality or use it to silence their speech in anyway, they employed it only against Plaintiffs.

Seeking to protest the hundreds of thousands of unborn African-American children killed in the womb each year by the abortion industry, the Advocates held a joint rally to paint and proclaim that "Black Pre-Born Lives Matter." Whittington Decl. at ¶ 3–4; Declaration of Robert L. "J.R." Gurley at ¶ 3–4 (attached as Exhibit B); Declaration of William "Bill" Cleveland at ¶ 3–4 (attached as Exhibit C). Plaintiffs intended to paint their mural on the street outside of the Planned Parenthood Carole Whitehill Moses Center in D.C. and received a permit to gather and hold their rally there from the Metropolitan Police Department. Whittington Decl. at ¶ 5. They also received verbal confirmation from a police officer that they could paint their message on the street. *Id*. at ¶ 6. But when they gathered on August 1 to do so, the Advocates encountered law enforcement who instructed them that they faced arrest under the Defacement Ordinance should they paint or use washable sidewalk chalk on either the street or sidewalk to speak their message. Whittington Decl. at ¶ 8; Gurley Decl. at ¶ 5; Cleveland Decl. at ¶ 5. When two individuals at the demonstration began chalking on the sidewalk in washable chalk, this threat became a reality. Complaint at ¶ 65.

The District's application of the Defacement Ordinance restricts the Advocates from communicating their desired message, thereby violating their constitutional rights. Yet the District permitted similarly situated protestors to speak and paint their messages with no consequence. Indeed, the application of the Defacement Ordinance continues to target the Advocates based on the content and viewpoint of their message. The Advocates intend to hold another rally to paint their message on the streets of D.C. on March 27, 2021, but fear that Defendant will enforce the Defacement Ordinance against them, resulting in additional criminal liability. *See* Whittington Decl. at ¶ 9. Thus, the Advocates will suffer irreparable harm absent this Court's issuance of injunctive relief in Plaintiffs' favor.

ARGUMENT

In seeking a preliminary injunction, Plaintiffs must show that: (1) they are likely to succeed on the merits; (2) are likely to suffer irreparable harm in the absence of an injunction; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Dallas Safari Club v. Bernhardt*, 453 F. Supp. 3d 391, 398 (D.D.C. 2020). Courts typically consider these factors on a "sliding scale," *id.* (quoting *Davis v.*

Pension Benefit Guar. Corp., 571 F.3d 1288, 1291–1292 (D.C. Cir. 2009)).

The Advocates meet these requirements.

I. The Advocates are likely to succeed on the merits of their claims.

A. Enforcing the Ordinance against the Advocates violates the First Amendment guarantee of Free Speech.

1. The Advocates' speech on the public ways is entitled to protection.

The Advocates came together to declare that "Black Pre-Born Lives Matter," intending to draw attention to the pre-born African-American children killed by the abortion industry each year. "[C]ommenting on matters of public concern," such as this, is a "classic form[] of speech that lie[s] at the heart of the First Amendment." *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 377 (1997). The Advocates' speech is therefore entitled to constitutional protection.

Permissible regulation of protected speech depends largely on the location of the speech. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). Public speech "is at its most protected" in a traditional public forum, of which the public sidewalks and streets are the "prototypical example." *Schenck*, 519 U.S. at 358. Traditional public fora hold "a special position in terms

of First Amendment protection," *United States v. Grace*, 461 U.S. 171, 180 (1983), having "immemorially been held in trust for the use of the public and, time out of mind, … used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 152 (1969) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

Indeed, D.C.'s sidewalks and streets were used for these purposes throughout August. The District further transformed its streets into public forums when it permitted them to be used, along with sidewalks, as blank canvases for protest speech with which the District agreed, such as protestors' "Defund the Police" mural and several instances of protest art and graffiti.

The Advocates' chosen forum—the sidewalk and streets outside Planned Parenthood—is no less a public forum, and Plaintiffs' chosen speech is entitled to the highest protection under the Constitution.

2. Defendant's application of the Defacement Ordinance is both content and viewpoint discriminatory.

Under the First Amendment, the government lacks authority "to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). *See also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). Laws that regulate speech based on the content and viewpoint expressed—including enforcement of otherwise constitutional laws in a content or viewpoint-based manner—are presumptively unconstitutional. *See Rosenberger*, 515 U.S. at 828 ("Discrimination against speech because of its message is presumed to be unconstitutional.").

Laws that discriminate on the basis of content "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Laws that discriminate on the basis of viewpoint are presumptively unconstitutional. *See Hurley* v. *Irish-Am. Gay, Lesbian*

and Bisexual Group of Boston, 515 U.S. 557, at 579 (1995) ("The Speech Clause has no more certain antithesis" than to "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.").

The First Amendment prohibits the District from "grant[ing] the use of a forum to people whose views it finds acceptable, [while] deny[ing] use to those wishing to express less favored or more controversial views." *Mosley*, 408 U.S. at 96. "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Id.* Here, the District opened its streets and sidewalks to assembly and speech of protestors and therefore cannot deny the Advocates the right to speak their less favored views. In fact, the District permitted protestors to paint and chalk virtually identical words on D.C. streets and sidewalks with abandon throughout August. *See* Complaint at ¶ 3–4, ¶ 10–16.

One of the most prominent of these messages, the "Defund the Police" mural, was removed after 2 months only when necessitated by planned road construction. The Advocates intended to paint their

message in exactly the same way as this mural, but were prohibited from doing so. Both the Advocates and other protestors sought to promote respect for black lives; the Advocates' message is only distinguishable from others by one hyphenated word and a notable lack of support for its content by District officials. That the District applied the Defacement Ordinance against the Advocates but no other individual protestor or organization shows bald content and viewpoint discrimination. This kind of government action is particularly offensive to the First Amendment. *See Rosenberger*, 515 U.S. at 829 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

3. The application of the Defacement Ordinance to the Advocates cannot survive strict scrutiny.

i. The application of the Defacement Ordinance to the Advocates furthers no compelling government interest.

The District's blatant content and viewpoint discriminatory application of the Defacement Ordinance against the Advocates is presumptively unconstitutional and cannot withstand strict scrutiny. Applying the Defacement Ordinance to Plaintiffs serves no legitimate government interest, much less a compelling one. "Where government

restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993).

While keeping streets open and prohibiting the defacement and destruction of public property is generally a legitimate interest, *Shuttlesworth*, 394 U.S. at 152, the District plainly abandoned it after opening up D.C. public property, streets, and sidewalks throughout the summer months following the death of George Floyd to a variety of messages and street art.

Under strict scrutiny, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (cleaned up). Here, the District enforced the Defacement Ordinance *only* against the protected speech of the Advocates, but allowed many other instances of murals, street art, protest art, and graffiti to be painted and chalked on city streets, sidewalks, and other public property. "[U]nderinclusive" laws that "fail to prohibit" speech with a different

message "that endangers [the government's] interests in a similar or greater degree" than the speech of the Advocates undermines any compelling interest Defendant may allege. *See Lukumi*, 508 U.S. at 543. The District cannot plausibly argue that enforcing the Defacement Ordinance against the Advocates furthers a compelling interest when it did not enforce the Ordinance against substantially similar activities.

Content and viewpoint-based application of the Defacement Ordinance to the Advocates does not directly advance any *legitimate* District interest. Even if painting or chalking D.C. sidewalks or streets may generally be considered a harm to public property, once the District opened up its streets and sidewalks, it cannot rely on that justification only against speech with which it disagrees. The District allowed voluminous instances of protest art and street murals to cover D.C. streets, sidewalks, public buildings, and monuments when the District agreed with the content of the markings. Thus, the District cannot plausibly claim that enforcing the Defacement Ordinance against the Advocates alleviates any harm to the District in any compelling way.

ii. The application of the Defacement Ordinance to the Advocates is not narrowly tailored.

The least restrictive means test demanded by the narrow tailoring inquiry of strict scrutiny requires a "serious, good faith consideration of workable … alternatives that will achieve" the alleged interests. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

The District voluntarily chose to open its streets and sidewalks and not to enforce the Defacement Ordinance against similar speech that directly violates the terms of the Ordinance when it permitted the "Defund the Police" mural, and failed to act on the many instances of speech and protest art. The District should have equally permitted the speech of the Advocates; this is unquestionably a less restrictive alternative to prohibiting the Advocates' speech.

Moreover, the District's lack of enforcement against some speech demonstrated that street murals, sidewalk messages, and a governmental interest in clean and open streets can co-exist. This

government action—or inaction—shows that enforcement of the Defacement Ordinance is unnecessary to achieve any legitimate—much less *compelling*—government interest it has.

Application of the Defacement Ordinance to the speech of the Advocates is narrowly tailored only insofar as it is narrowly enforced: against the Advocates, to the exclusion of all others similarly situated. The District's application of the Defacement Ordinance against the speech of the Advocates is therefore meaningless and arbitrary, cannot survive strict scrutiny, and is unconstitutional.

B. Application of the Ordinance to the Advocates violates the Fifth Amendment guarantee of Due Process of Law.

"Standard analysis" of a Fifth Amendment Due Process claim "proceeds in two steps." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). Courts first "ask whether there exists a liberty or property interest of which a person has been deprived." *Id.* If so, courts then consider whether the deprivation procedures were "constitutionally sufficient." *Id.*

"The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *United States v. Windsor*, 570 U.S. 744,

774 (2013); *see also Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("[D]iscrimination may be so unjustifiable as to be violative of due process."). This protection—nearly identical to the right of equal protection protected by the Fourteenth Amendment, applicable to the states—applies to the District, *id.*, and requires that government treat all similarly situated individuals and organizations equally.

The Advocates thus have a liberty interest in being treated the same as similarly situated individuals in D.C. Distinctions among similarly-situated groups that affect fundamental rights "are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (dealing with the companion Fourteenth Amendment right to equal protection). Discriminatory intent is presumed, *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982) ("[W]e have treated as presumptively invidious those classifications that … impinge upon the exercise of a 'fundamental right.'").

The District deprived the Advocates of their liberty interest. Application of the Defacement Ordinance to the Advocates at all constitutes unequal treatment—unjustifiable discrimination—on its face. The District purposefully opened its streets and sidewalks to speech

and did not seek to prohibit any instance of speech, street art, mural, or assembly except Plaintiffs'. Thus, all individuals and organizations similarly situated to the Advocates, speaking nearly identical words (yet different political viewpoints), could speak as they wish. Only when the Advocates sought to speak a politically disfavored message did the District stop them and enforce the Defacement Ordinance, transforming it into a weapon of censorship. This plainly demonstrates unequal treatment and is thus a violation of the Fifth Amendment's Due Process Clause.

C. Application of the Ordinance to the Advocates violates the First Amendment guarantee of freedom of association.

The First Amendment protects the freedom to associate with others to advance common beliefs and ideas. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Kusper v. Pontikes*, 414 U.S. 51, 56-7 (1973). "A significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest." *Kusper*, 414 U.S. at 58. Infringements on the right to associate for expressive purposes "may be justified [only] by regulations adopted to serve compelling state interests, *unrelated to the suppression of ideas*, that cannot be achieved

through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623 (emphasis added). Here, the application of the Defacement Ordinance serves no government interest, is directly related to the suppression of ideas, and any legitimate interest the government does have must be applied evenly and can be achieved through less restrictive means.

As explained above, the District lacks any compelling interest in applying the Defacement Ordinance only to the Advocates under the circumstances. Indeed, the only interest the District has in applying the Defacement Ordinance to Plaintiffs is the suppression of ideas with which it disagrees. And the District "may not choose means [of doing so] that unnecessarily restrict constitutionally protected liberty." *See Kusper*, 414 U.S. at 59.

The District did not merely limit the size or noise level (or even allowing chalking and not painting) of the Advocates' assembly. It prohibited Plaintiffs' association and speech altogether. This unnecessarily severe burden on the Advocates' rights is unconstitutional.

D. Application of the Defacement Ordinance to the Plaintiffs violates the Religious Freedom Restoration Act.

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., "forbids the government from 'substantially burdening a person's exercise of religion' unless the government can 'demonstrate that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," *Jackson v. District of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (cleaned up) (quoting 42 U.S.C. § 2000bb-1). RFRA applies "even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The District of Columbia is bound by RFRA. *Potter v. District of Columbia*, 558 F.3d 542, 544 (D.C. Cir. 2009).

A burden on religious exercise can be "substantial" in several ways. The most straightforward scenario is where a government action "directly compel[s]" a religious adherent to violate her beliefs, *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), or "make[s] unlawful the religious practice itself," *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Government "pressure" may also constitute a substantial burden on the

free exercise of religion. For instance, *Sherbert* involved a challenge to a denial of unemployment benefits following the plaintiffs' firing for refusing to work on her Sabbath, though the plaintiff was not governmentally *required* to work on her Sabbath. 374 U.S. at 403. The "indirect" burden on her religious exercise caused by the state's denial of unemployment benefits constituted a substantial burden. *Id.* at 404; *see also Thomas v. Review Bd. of Ind. Employment. Security Div.*, 450 U.S. 707, 718 (1981) (recognizing that "compulsion may be indirect" and "nonetheless substantial").

In practical terms, this denial of benefits placed "pressure upon [the plaintiff] to forego" the "practice of her religion" in the same way that would result from a government "fine imposed against [her] for … Saturday worship." *Sherbert*, 374 U.S. at 404. Hence, "substantial pressure on an adherent to modify his behavior and to violate his beliefs" may also constitute a substantial burden on religious exercise. *Thomas*, 450 U.S. at 718.

The application of the Defacement Ordinance to Plaintiffs Whittington, Cleveland, and Gurley (hereinafter "the individual Plaintiffs") substantially burdens their religious exercise. The individual

Plaintiffs' pro-life advocacy is an exercise of their exercise their religious belief that all human beings, including unborn children, are made in the image of God, and that all such life is worthy of protection from conception until natural death. *See* Whittington Decl. at ¶ 10; Gurley Decl. at ¶ 6; Cleveland Decl. at ¶ 6. They also believe that abortion is a grave sin. *See* Whittington Decl. at ¶ 10; Gurley Decl. at ¶ 6; Cleveland Decl. at ¶ 6.

The application of the Defacement Ordinance to Plaintiffs unquestionably places substantial pressure on the individual Plaintiffs to forego engaging in their chosen religious exercise. Even more egregious, the application of the Defacement Ordinance subjects Plaintiffs to criminal penalties, forcing the individual Plaintiffs to choose between engaging in their protected religious exercise and facing criminal punishment, or foregoing their religious exercise. Such penalties are unquestionably a substantial burden on the individual Plaintiffs' religious exercise.

As discussed in section I.A.3, the Defacement Ordinance, as applied, cannot survive strict scrutiny. It therefore violates RFRA.

E. The application of the Defacement Ordinance against Plaintiffs Whittington, Cleveland, and Gurley violates the Free Exercise Clause of the First Amendment.

Burdens on religiously motivated conduct are subject to strict scrutiny under the Free Exercise Clause when a regulation lacks neutrality or general applicability. *Emp. Div. Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990). "Laws that are "underinclusive" to a government's asserted interests are not generally applicable. *Lukumi*, 508 U.S. at 543. Laws that are not neutral or generally applicable must be "justified by a compelling interest and" the law must be "narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533–34.

As discussed above in section D, the application of the Defacement Ordinance burdens the religious conduct of Plaintiffs Whittington, Whittington, and Gurley. The Defacement Ordinance has not been applied in a neutral or generally applicable manner, and is therefore subject to strict scrutiny, which it cannot survive.

The application of the Defacement Ordinance is not generally applicable. Laws that are "underinclusive" to a government's asserted interests are not generally applicable. *See Lukumi,* 508 U.S. at 543.

"[S]elective laws that fail to pursue legislative ends with equal vigor against both religious practice and analogous secular conduct are not governed by *Smith*; such underinclusive laws are subject to surpassingly strict scrutiny under the Free Exercise Clause and *Lukumi*." Duncan, Richard F., *Free Exercise is Dead, Long Live Free Exercise*, 3 U. PA. J. CONST. 850, 883 (2001). Here, the District enforced the Defacement Ordinance against the individual Plaintiffs, but did not enforce it against the "Defund the Police" mural or the myriad instances of speech and street art containing substantially similar messages. The Defacement Ordinance has therefore not been applied in a generally applicable manner.

Similarly, the application of the Defacement Ordinance against the individual Plaintiffs' message, but not similar messages, discriminates against the individual Plaintiffs' religious exercise, because such religious conduct was "undertaken for religious reasons." *Id.* at 532. It is therefore not neutral.

Because the application of the Defacement Ordinance against the individual Plaintiffs is neither neutral nor generally applicable, it is

subject to strict scrutiny, which it cannot meet. *See infra.* § I.A.3. It is therefore invalid under the Free Exercise Clause.

II. Plaintiffs will continue to suffer irreparable harm absent injunctive relief.

"It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (cleaned up). While all protestors speaking politically favored messages can associate and speak without consequence, Plaintiffs were prohibited from expressing their less favored message at all. This deprivation of First and Fifth Amendment rights constitutes irreparable harm.

The Advocates intend to hold another event on March 27, 2021, and the Advocates will suffer irreparable harm if the District applies the Defacement Ordinance to prohibit their painting "Black Pre-Born Lives Matter" on the streets of D.C. in a manner as prominent as the "Defund the Police" mural. The application of the Defacement Ordinance against Plaintiffs works continuing harm to their speech, association, and due process rights protected by the U.S. Constitution.

III. The balance of equities sharply favors Plaintiffs.

The Advocates' hardships if the injunction is not granted far outweigh the Defendants' if the injunction is granted. The Defendants will suffer little, if any, harm if the injunction is issued. As discussed above, the Advocates merely want to speak and associate in the same manner as other protestors, whose speech and association was encouraged, protected, and preserved by the District. Whatever interest the government has in protecting public property, keeping a clean city, and maintaining open streets, it was abandoned when it opened the public streets to expression by protestors. To the contrary, if the injunction is not granted, the Advocates will continue to suffer irreparable harm to their constitutional rights. Thus, the balance of equities weighs in favor of Plaintiffs.

IV. The public interest heavily supports an injunction.

An injunction is in the public interest. The government cannot claim any interest in a law that violates the U.S. Constitution and unconstitutional government action "is always contrary to the public interest." *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for preliminary injunction and enter permanent declaratory and injunctive relief in Plaintiffs' favor on all their claims.

Respectfully submitted this 18th day of December, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2020, the foregoing was filed electronically with the Clerk of the United States District Court for the District of Columbia through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/Elissa M. Graves
Elissa M. Graves