

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
WESTERN DIVISION**

BRIAN BERUBE AND LONESOME DOVE, INC.	)	
	)	
Plaintiffs,	)	
	)	Civil No. _____
v.	)	
	)	
THE CITY OF MANDAN,	)	<b>VERIFIED COMPLAINT</b>
	)	
Defendants.	)	
	)	

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Plaintiffs Brian Berube and his business, Lonesome Dove, bring this civil-rights lawsuit against the Defendant City of Mandan, North Dakota (“the City”).

**INTRODUCTION**

1. This lawsuit seeks to vindicate the free-speech rights of a local business owner, Plaintiff Brian Berube, to display a mural on the front of his 28-year old dance hall and saloon, Plaintiff Lonesome Dove. Lonesome Dove’s mural shows the sun setting over the mountains, with a ranch and cowboys scattered across the landscape. Artistically rendered across the top of the mural are the words, “Lonesome Dove.”

2. Lonesome Dove’s mural is now under threat due to Mandan’s sign code. For years, the City has used that code to act like the “mural police,” developing a litany of arbitrary regulations that allow it to carefully control the content of murals throughout Mandan. These regulations include banning murals it believes convey a “commercial message,” even if that message just consists of a business’s name. The City also bans murals in the front of buildings because—as the City has admitted—it wants to hide murals that may be “political,” “controversial,” or “provoke thought.” Finally, the City requires all murals to undergo a permit

process that allows the City to play art critic by demanding changes to murals' artistic details and color schemes. This process is a bureaucratic nightmare that can take months to complete.

Several Mandan individuals and businesses have already suffered due to this process, with some being forced to alter their murals, and others being forced to remove them completely.

3. The City is now using its unconstitutional mural regulations against Lonesome Dove. It has threatened to take Lonesome Dove to court and fine it thousands of dollars if it does not remove its mural by March 23, 2019. According to the City, Lonesome Dove's mural is illegal for three reasons: (1) it is commercial (2) it is placed on the front of its building, and (3) the City decided to deny the mural a permit. But Lonesome Dove's mural is little different than those displayed nearby by multiple other businesses and residents. And none of the City's proffered reasons passes muster under long-standing U.S. Supreme Court precedent.

4. Plaintiffs thus request that this Court grant Lonesome Dove injunctive relief to protect its mural from removal, as well as declaratory relief that the City's mural regulations are unconstitutional, both on their face and as applied to Lonesome Dove.

### **JURISDICTION**

5. Plaintiffs bring this civil-rights lawsuit pursuant to the First and Fourteenth Amendments to the United States Constitution; the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiffs seek a declaration that the City's mural regulations and enforcement against Plaintiffs' mural violate the First Amendment.

Plaintiffs also seek injunctive relief to protect their mural from forced removal.

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

### **VENUE**

7. Venue lies in this Court pursuant to 28 U.S.C. § 1391(b).

### **PARTIES**

8. Plaintiff Brian Berube is a U.S. citizen and resident of the City. He owns Lonesome Dove with his business partner, August Kersten.

9. Lonesome Dove is a North Dakota Corporation in good standing.

10. Defendant City of Mandan is a municipal corporation located in Mandan, North Dakota.

### **STATEMENT OF FACTS**

11. Below, Plaintiffs allege the facts leading up to this lawsuit. They include facts concerning Plaintiff Lonesome Dove, its mural, the City's mural regulations, and how the City has enforced those regulations against Lonesome Dove and other murals.

#### **Lonesome Dove and its mural**

12. Plaintiff Lonesome Dove is an old-school saloon and dance hall that has existed in Mandan, North Dakota for the last 28 years. It offers live music, bingo, and country dancing. As one customer puts it, “[t]he Dove is filled with cowboys and music almost every night.”

13. Those passing by Lonesome Dove's building, however, would never know it. From the outside, Lonesome Dove seems isolated and uninteresting, located in a quasi-industrial area on Memorial Highway. It is surrounded by car dealerships, farm equipment companies, and flat open space.

14. Until recently, the building's only decorations were alcohol ads, including a painted “Coors Light” logo on its front wall.

15. But last fall, Lonesome Dove's co-owner, Plaintiff Brian Berube, had the idea to

paint a mural to brighten up the building and attract new customers. He got that idea after noticing multiple murals throughout Mandan.

16. Brian paid a local artist \$2,600 to paint a 200-square foot mural on the front of his building. That mural shows the sun setting over the mountains, with a ranch and three cowboys scattered across the landscape. Artistically rendered across the top of the mural are the words, “Lonesome Dove.”

17. The below picture, which is also attached as Exhibit 1, is an accurate representation of Lonesome Dove’s mural.

[insert]

18. Brian chose the mural’s theme to express his businesses’ long history of catering to the area’s farmers and cowboys.

19. Lonesome Dove’s mural has received many compliments from members of the community. Brian was also pleased that the mural brought in new customers, who also said they loved the mural.

### **The City sends Lonesome Dove a citation**

20. Shortly after the mural was complete, however, Brian was surprised to receive a “notice of violation” from the City on October 22, 2018.

21. The notice said that Lonesome Dove was “in violation of the City of Mandan Ordinances” because it had “an unpermitted mural.” The notice further stated that “either the mural can be removed or an application may be submitted for a mural permit . . . .There is no guarantee that it will be approved.”

22. Brian had no idea he had to secure permission from the City before putting up a mural.

23. Brian had never sought permission for the painted Coors light logo that had been displayed on Lonesome Dove's wall for a decade without incident.

24. Brian was also perplexed why the City never contacted him about the mural during the 2 ½ months it took to paint because of extreme weather.

25. Nevertheless, Brian paid \$50 to submit an application for a mural permit, as the City had instructed on the notice of violation.

26. Little did Brian know that he was about to be drawn into a long, complicated bureaucratic process that would ultimately result with the City ordering him to remove his mural at the threat of thousands of dollars in fines.

### **The City's mural regulations and enforcement**

27. The City severely restricts the free expression and content of murals. This is evident in how the City defines the term "murals," how it regulates and approves them, and in how it has arbitrarily used its discretion to restrict murals throughout Mandan.

28. The City's code of ordinances defines a "figurative wall mural" as "an illustration, diagram or design, not intended to sell a product or to advertise an establishment, that is used for aesthetic purposes or to enhance architectural features of a building." Mandan City Code, § 105-1-15(b) (Relevant portions of the City's Code are attached as Exhibit 2).

29. Thus, the City's code prohibits murals that the City views as having the purpose of advertising. There are no other provisions that would allow such murals.

30. The code also requires that all those wishing to display a mural first secure pre-approval from the Mandan Architectural Review Commission ("MARC"). *Id.* at § 105-1-15(j)(9).

31. MARC has broad discretion to restrict and prohibit murals.

32. The code even allows the City to regulate a mural's colors and design. Specifically, the code requires murals to have a "[h]armonious relationship with existing and proposed adjoining developments," including in "materials, colors and composition." *Id.* at § 111-1-6(2), (4) & (5).

33. In addition to the code's restrictions, the City adopted seven additional "Building Mural Guidelines" in August 2018 for MARC to administer. (Attached as Exhibit 3).

34. These guidelines give the City further power to restrict content. Those guidelines prohibit murals that (1) "convey a commercial message," (2) use words that are a "dominant feature of the art," or (3) have "political messages."

35. In addition, the guidelines ban murals "on the front of buildings as determined by the property's street address." Instead murals should be located on building "sides or alleyways."

36. Even this "front-building ban" is designed to control content.

37. For example, during a Planning and Zoning Commission meeting on Feb. 25, 2019, the City Planner, John Van Dyke, explained that the purpose of the front-building ban is to prevent the prominent display of murals that may be "controversial" or "provoke thought." To safeguard the populace from having their thoughts provoked, he said the City should "push" murals to "the side of the structures or in the alleyway themselves."

38. The City's attempt to control the content of murals is evident not just in the law, but also in practice.

39. For example, a military veteran wanted to paint a mural on his garage that would

include an American flag, eagle, and the Air Force logo. MARC told the veteran in January 2019 that it would grant the permit only if the mural did not include the logo, but instead showed Air Force planes. (Attached as Exhibit 4 are minutes from this MARC meeting).

40. In addition, the City has ordered businesses to remove their murals after they were already painted. In [REDACTED], for example, the City forced a business to cover a mural on the side of its building that showed a wizard, a castle, and the mythical horse, Pegasus.

41. Just recently, the City ordered a clothing store to remove its mural because it was on the front of the building and, in the City's eyes, lacked "harmony with the rest of the buildings around it."

42. Meanwhile, multiple other murals exist throughout Mandan, some of which are on the front of buildings or otherwise seem to violate the murals restrictions.

43. Thus, the City's regulation of murals in Mandan is arbitrary and unpredictable.

44. Nevertheless, Lonesome Dove attempted to obtain a permit for his mural.

**The City took five months to reach a final decision on Lonesome Dove's mural.**

45. Lonesome Dove submitted its mural permit application on October 31, 2018. Over the next five months, its mural would undergo three separate hearings and be threatened with thousands of dollars in fines.

46. On November 13, 2018, MARC considered Lonesome Dove's application and unanimously voted to reject the permit. In statements at that meeting, MARC members reasoned that the mural improperly (1) conveyed a commercial message, (2) was on the front of the building, and (3) was painted without a permit. (Meeting minutes attached as Exhibit \_\_).

47. Lonesome Dove **did not receive notice** of this decision until a month later, in a

second “notice of violation” dated December 3, 2018. This notice informed Lonesome Dove that the application was denied and cited the three rationales.

48. The notice also stated that because Lonesome Dove’s mural conveyed a commercial message, it was technically not a “mural” under the code, but a “sign.” As a result, the second notice of violation stated that “Application permit was for a mural, application needs to be for a sign. Please resubmit sign application.” [Notice attached as Exhibit \_\_\_].

49. Finally, the notice stated that “if compliance is not made this violation is an infraction with up to [sic] \$1,000 fine.” The City explained to Brian that the \$1,000 would accrue monthly.

50. Once again, Lonesome Dove jumped into action and submitted another application to MARC, this time for a sign, on December 13, 2018.

51. MARC considered the sign application on January 8, 2019, and again unanimously rejected it. According to MARC, the code prohibits signs from being printed directly on the building. Mandan City Code, § 105-1-15(z)(4). (Meeting minutes attached as Exhibit \_\_\_).

52. Once again, Lonesome Dove did not receive notice of this decision for a month. In a letter dated January 29, the City wrote that the sign permit was denied. Oddly, the letter stated that the mural was too big to be allowed as a sign, which differed from the rationale MARC members expressed at the January 8 meeting.

53. Lonesome Dove felt frustrated, disrespected, and degraded by this entire process. But it was willing to try one more time to get permission to keep its mural.

54. Lonesome Dove appealed the denial of its sign permit application to the City Board of Commissioners. The Board rejected the appeal in a 4-1 vote on March 19.



55. After the failed appeal, the City told Lonesome Dove to wait to hear from the City on a firm deadline for when it would need to paint over the mural.

56. Once again, Lonesome Dove then did not hear from the city for several weeks.

57. In the meantime, the undersigned attorney (now Lonesome' Dove's attorney) sent the City a letter on March 29 explaining that its permit scheme and discrimination against commercial speech ran afoul of U.S. Supreme Court precedent. The letter further informed the City that its enforcement against Lonesome Dove was "unconstitutional" and requested that the City allow the mural to remain. (Letter attached as Exhibit \_\_\_).

58. The City refused the request. (Refusal attached as Exhibit \_\_\_).

59. Instead, the City sent Lonesome Dove a letter on April 18 stating that its mural be removed by May 23, 2019. It further stated that "[f]ailure to comply . . . will result in a court appearance where fines and penalties will be assessed by a Municipal Judge." (Letter attached as Exhibit \_\_\_).

60. In the meantime, the City was drafting amendments to change both its code provisions for murals and its mural guidelines.

61. When Lonesome Dove learned about these potential amendments, it hoped they would allow its mural. Lonesome Dove's attorney requested an extension for Lonesome Dove to take down the mural until after the City completed making changes to the sign code and mural guidelines.

62. The City again refused. According to the City, any changes to the code would still restrict commercial murals and ban murals from being located on the front of buildings. Specifically, the City noted that the amendments it was currently considering would restrict "commercial" murals to just six square feet (while still allowing noncommercial murals to be of

unlimited size), as well as banning murals on *any* side of a building that faces a street. Thus, Lonesome Dove's mural would still be prohibited under the City's proposed changes to its code. (Email correspondence and latest draft changes to the mural regulations attached as Exhibit \_\_).

63. Lonesome Dove filed this Complaint and its motion for a temporary restraining order as a last resort to save its mural.

**The City Has Injured Lonesome Dove and Continues to Do So**

64. The City's code, mural guidelines, and policies and practices regarding murals violate Lonesome Dove's right to free speech as protected by the First Amendment to the U.S. Constitution.

65. The City has ordered Lonesome Dove to remove its mural by May 23 or face municipal court proceedings and thousands of dollars in fines.

66. The mural is an expression of Plaintiffs' free speech.

67. Plaintiffs want to continue displaying its mural.

68. Plaintiffs paid \$2,600 to have the mural painted on their property.

69. The mural improves the appearance of Lonesome Dove's building, gains Lonesome Dove admiration from the community, and helps attract new customers.

70. Under the City's law, policy, and practice, however, the mural is not allowed because, in the City's view, it contains a commercial message. Thus, Lonesome Dove cannot have a mural containing the words Lonesome Dove or otherwise advertising its business, but it could have a mural with different content.

71. Under the City's law, policy, and practice, the mural is also not allowed because it

is located on the front of Lonesome Dove's building. Thus, Lonesome Dove cannot have its mural on the front of its building. Instead, it could only have a (noncommercial) mural on the side or back of its building, even though that would make it significantly less visible.

72. Thus, the City's unconstitutional laws, policies, and practices mean that Plaintiffs can only continue to display their mural at great risk to themselves and their business.

73. If Plaintiffs were forced to remove their mural, they would wish to paint a new mural on their building.

74. However, the City will not give Plaintiffs permission for a new mural unless they pay to undergo a lengthy and content-restrictive administrative permit process.

75. Even if Plaintiffs were to undergo this process for the second time, the City would not allow them to display a mural that was commercial (even by just including Lonesome Dove's name) or to display a mural that was located on the front of Lonesome Dove's building.

76. The City has already injured Plaintiffs by forcing them to pay to undergo this process once, which took five months and was both stressful and burdensome. The City had instructed Plaintiffs to undergo this process even though it was futile.

77. Thus the City has injured Plaintiffs and continues to do so.

## **CLAIMS FOR RELIEF**

### **Count One:**

***The City's restriction of murals with a "commercial" message violates free speech, both as applied and on its face.***

78. The City's law, policy, and practice restrict murals that the City perceives to promote a business or otherwise convey a commercial message.

79. The City's code defines "mural" so as to ban murals that are "intended to sell a product or to advertise an establishment." Mandan City Code, § 105-1-15.

80. In addition, the City’s mural guidelines state that murals “may not convey a commercial message.”

81. Because the City determined that Lonesome Dove’s mural was commercial, it said that the mural violated these restrictions and must be removed.

82. Thus, under the City’s law, policy, and practice, Lonesome Dove can display a mural on its building only if it is deemed “noncommercial.” Such a noncommercial mural could be of unlimited size. In contrast, Lonesome Dove is restricted from having a mural that is deemed commercial.

83. Restricting speech because of its subject matter or message is a content-based restriction on free speech.

84. Under the First Amendment, content-based restrictions on speech are subject to strict scrutiny. In order to survive this scrutiny, the City must show that its content-based restriction is narrowly tailored to further a compelling government interest.

85. The City cannot meet this burden.

86. Even if the City’s restriction on murals containing a commercial message was not content-based, it still could not meet its burden to justify this restriction.

87. Thus, the City’s restriction of commercial murals is an unconstitutional restriction on speech under the First Amendment both as applied to Plaintiffs and on its face.

88. Although the City is currently considering changes to its mural regulations, the latest draft of those proposed changes still restricts commercial murals and treats commercial murals differently than murals with other content. If passed, these new guidelines would neither allow Lonesome Dove’s mural, nor remedy the City’s unconstitutional discrimination against commercial speech.

**Count Two:**

***The City's ban on murals on the front of buildings violates free speech, both as applied and on its face.***

89. It is the City' law, policy, and practice to prohibit murals that are located on the front of a building.

90. The City's mural guidelines state that murals "must not be installed on the front of the building as determined by the property's street address. Sides or alleys are most appropriate."

91. A few months after this guideline was enacted, the City Planner explained the content-based reason for this restriction. He stated that murals may be "controversial" or designed to "provoke thought," and the City should thus "push" murals to "the side of the structures or in the alleyway themselves."

92. Government cannot constitutionally restrict the location of speech so as to make its message less visible and therefore less effective and "thought provoking."

93. Restricting speech out of concern about its potential subject matter or message is a content-based restriction on free speech.

94. Under the First Amendment, content-based restrictions on speech are subject to strict scrutiny. In order to survive this scrutiny, the City must show that its content-based restriction is narrowly tailored to further a compelling government interest.

95. The City cannot meet this burden.

96. Even if the City's building front restriction was deemed content-neutral, the City could still not meet its burden to justify this restriction.

97. The City has allowed other murals and wall paintings in Mandan to be located on the front of buildings so that they face the street, with no ill effect.

98. If Lonesome Dove were to place a mural on the side of its building, it would be

significantly less visible, than its current mural on the front of its building.

99. Moreover, many individuals and entities lack a visible side wall or access to an alley and would thus be prohibited from having any mural whatsoever.

100. Thus, the City's ban on murals in the front of buildings is unconstitutional both as applied and on its face.

101. Although the City is currently considering changes to its mural regulations, the latest draft of those proposed changes still bans murals on the front of buildings. Moreover, that ban is motivated by the same content-based concerns as the current ban. Thus, if passed, these new guidelines would neither allow Lonesome Dove's mural, nor remedy the constitutional violation alleged by this claim.

### **Count Three**

***The City's mural approval process is a prior restraint that violates free speech both as applied and on its face.***

102. The City requires that all murals obtain a permit before they can be painted.

103. The City's law, policy, and practice regarding this permit requirement is to use broad, subjective, vague, unclear, and content-based standards in deciding whether to grant a permit.

104. As alleged above, the City denied Lonesome Dove's mural a permit based on its content.

105. In addition, the City's law, policy, and practice regarding this permit requirement results in a lengthy and burdensome permit process, with the City sometimes taking several weeks or months to notify applicants as to whether they will receive a permit.

106. The City also has no law, policy, or practice imposing a deadline on when the

City must make a decision on the permit application or when the City must notify applicants of this decision.

107. The City took weeks to notify Lonesome Dove every time it made a decision on its permit applications. In addition, the City took five months to make a final decision on whether to permit Lonesome Dove's mural.

108. The First Amendment imposes strict rules on government mural- and sign-permit schemes to prevent the government from unnecessarily chilling and restricting speech.

109. These rules include that the government must use narrow, objective, definite, and content-neutral standards in deciding whether to grant a permit. In addition, the government must have strict and short time limits to make a permit decision and notify permit applicants on whether they will receive a permit. Otherwise, the permit process is an unconstitutional "prior restraint."

110. Here, the City cannot meet its burden to show that its permit requirement or process is constitutional.

111. Thus, the City's mural permit requirement is an unconstitutional prior restraint both as applied and on its face.

112. Although the City is currently considering changes to its mural regulations, the latest draft of these proposed changes does not remedy these problems or resolve this claim.

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs pray for judgment as follows:

A. An entry of judgment declaring that the City's mural regulations, specifically its (1) restriction on commercial murals, (2) its restrictions on murals on the front of buildings, and

(3) its mural permit scheme are unconstitutional both as applied to Plaintiffs' mural and on their face;

B. A temporary restraining order and preliminary injunction prohibiting Defendant from enforcing its mural regulations against Plaintiffs' mural specifically, or from enforcing the challenged mural regulations generally;

C. A permanent injunction prohibiting Defendant from enforcing its mural regulations against Plaintiffs' mural specifically, or from enforcing the challenged mural regulations generally;

D. An award of nominal damages in the amount of \$1.00 for the violation of Plaintiffs' constitutional rights;

E. An award of attorneys' fees, costs, and expenses in this action pursuant to 42 U.S.C. § 1988; and

F. All further legal and equitable relief as the Court may deem just and proper.

Dated: May 20, 2019

RESPECTFULLY SUBMITTED,

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\*Application for Admission *Pro Hac Vice* to be filed