

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

AUGUST KERSTEN, BRIAN BERUBE, AND)
LONESOME DOVE, INC.,)
)
Plaintiffs,)
)
v.)
)
THE CITY OF MANDAN,)
)
Defendant.)

Civil No. _____

VERIFIED COMPLAINT

Plaintiffs bring this civil-rights lawsuit against the Defendant City of Mandan, North Dakota (“the City”).

INTRODUCTION

This lawsuit seeks to vindicate the free-speech rights of local business owners, Plaintiffs August “Augie” Kersten and Brian Berube, to display a mural on the front of their 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.”

Lonesome Dove’s mural is now under threat due to Mandan’s city 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. This process is a bureaucratic nightmare that can take months to complete. Other Mandan individuals and businesses have already suffered due to this process, with some being forced to alter their murals, or ordered to remove them completely.

The City is now using its unconstitutional mural regulations against Lonesome Dove. It has threatened to take Lonesome Dove to court and immediately fine it up to a thousand dollars if it does not remove its mural by May 23, 2019. The City can seek more fines for every additional day the mural is displayed. 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 other businesses. And none of the City's proffered reasons pass muster under long-standing U.S. Supreme Court precedent.

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

1. 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.

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

VENUE

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

PARTIES

4. Plaintiff August “Augie” Kersten is a U.S. citizen and resident of Bismarck, N.D. He owns Lonesome Dove with his business partner, Brian Berube.

5. Plaintiff Brian Berube is a U.S. citizen and resident of the City. He is the co-owner of Lonesome Dove.

6. Lonesome Dove is a North Dakota corporation in good standing.

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

STATEMENT OF FACTS

8. 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

9. 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.”

10. 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 a livestock auction barn.

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

12. But last summer, Lonesome Dove's co-owner, August "Augie" Kersten, wanted to brighten up the building and attract new customers. His employees suggested painting a mural and told Augie that one of the waitresses, Adrienne, was an artist who could do it.

13. So Augie and his co-owner Brian paid Adrienne \$2,600 to paint a 208-square foot mural on the front of their building, over the Coors Light logo. 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."

14. The below pictures, which are also attached as Exhibit 1, are accurate representations of Lonesome Dove's mural.





15. Augie, Brian, and their employees chose the mural's theme as tribute to their customers' love of country music and the country scene.

16. Augie and Brian were also happy that the mural brought in new customers, who said they loved the mural.

The City sends Lonesome Dove a citation

17. Shortly after the mural was complete, however, Augie and Brian were surprised to receive a "notice of violation" from the City on October 22, 2018.

18. 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." (Notice of violation attached as Exhibit 2).

19. Augie and Brian had no idea they had to secure permission from the City before putting up a mural.

20. Augie and Brian had never sought permission for the painted Coors Light logo that had been displayed on Lonesome Dove's wall for over a decade without incident.

21. Augie and Brian were also perplexed why the City never contacted them about the mural during the three months it took to paint because of weather and other delays.

22. Nevertheless, they paid \$50 to submit an application for a mural permit, as the City had instructed on the notice of violation. Augie and Brian assumed they would get permission for the mural with no problem.

23. Little did they know that they were about to be drawn into a long, complicated bureaucratic process that would ultimately result in the City ordering them to remove the mural at the threat of thousands of dollars in fines.

The City's mural regulations and enforcement

24. 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.

25. 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 3).

26. 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.

27. 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).

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

29. The code even allows the City to regulate a mural's colors and design.

Specifically, the code requires murals to have "a sense of harmony within the area [and] the colors and materials used should generally be compatible with or complementary to those used for buildings on adjoining parcels." *Id.* at 105-4-2.1(d)(3)(c). *See also id.* at § 111-1-6(2), (4) & (5) (requiring "[h]armonious relationship with existing and proposed adjoining developments," including in "materials, colors and composition.").

30. 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 4).

31. 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."

32. The guidelines also 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."

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

34. For example, during a City Planning and Zoning Commission meeting on February 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." According to him, "[i]f we allow murals on the front of buildings, we can't control the content." Thus, to safeguard the populace from having their thoughts provoked, Mr.

Van Dyke said the City should “push” murals to “the side of the structures or in the alleyway themselves.”¹

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

36. For example, upon information and belief, local business Bearscat Bakehouse wanted to paint a mural on its building showing cowboys and bears eating donuts out of Bearscat donut boxes in front of a campfire. MARC told Bearscat in May 2018 that it would grant the permit only if the mural did not include Bearscat donut boxes. (Attached as Exhibit 5 are minutes from this MARC meeting and attached as Exhibit 6 are photos of the current mural).

37. Also upon information and belief, 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 not grant the permit if the mural included the logo. (Attached as Exhibit 7 are minutes from this MARC meeting). This mural seems to not yet be painted.

38. And just recently, the City ordered a clothing store to remove its mural because it was on the front of its building and, in the City’s eyes, lacked “harmony with the rest of the buildings around it.” (Attached as Exhibit 8 are minutes from the MARC meeting ordering removal and attached as Exhibit 9 are photos of the mural in front of the clothing store).

39. Meanwhile, two other murals exist in Mandan, one of which is on the front of a building. (Attached as Exhibit 10 are photos of these other two murals).

40. Thus, the City’s regulation of murals in Mandan is arbitrary and unpredictable. Nevertheless, Lonesome Dove attempted to obtain a permit for its mural.

¹ A video of this meeting and Mr. Van Dyke’s comments are available at <http://24.111.15.98:8100/CablecastPublicSite/show/5699?channel=2>. The relevant comments start at 6:52.

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

41. 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 up to a thousand dollars in fines.

42. 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. *See* Ex. 8.

43. Lonesome Dove did not receive notice of this decision until a month later, in a second "notice of violation" dated December 3, 2018. (Notice attached as Exhibit 11). This notice informed Lonesome Dove that the application was denied and cited the three rationales.

44. 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."

45. Finally, the notice stated that "if compliance is not made this violation is an infraction with up to [sic] \$1,000 fine." *See also* Mandan City Code, § 1-9(c)(3). The City Code allows these fines to accrue daily. *Id.* at § 1-9(c)(5) ("With respect to violations of this Code that are continuous with respect to time, each day the violation continues is a separate offense.").

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

47. MARC considered the sign application on January 8, 2019, and Augie attended

the hearing. For the second time, MARC unanimously rejected the permit. *See* Exhibit 7.

According to MARC, the code prohibits signs from being printed directly on the building. *Id.*; Mandan City Code, § 105-1-15(z)(4).

48. Once again, Lonesome Dove did not receive notice of this decision for a month. In a letter dated January 28, the City wrote that the sign permit was denied. (Letter attached as Exhibit 12).

49. Augie and Brian felt frustrated, disrespected, and degraded by this entire process. They couldn't understand how the City could keep them from having a painting on their own building. But they were willing to try one more time to get permission to keep their mural.

50. Lonesome Dove appealed the denial of its sign permit application to the City Board of Commissioners. Augie and Brian both attended the hearing. The Board rejected the appeal in a 4-1 vote on March 19.

51. After the failed appeal, the City told Augie and Brian to wait to hear from the City on a firm deadline for when they would need to paint over the mural.

52. Once again, they did not hear from the City for several weeks.

53. In the meantime, the undersigned attorney, who works for the national nonprofit law firm, the Institute for Justice, sent the City a letter on March 29. The letter explained that the City's 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 13).

54. The City refused the request. (Refusal attached as Exhibit 14).

55. Instead, the City sent Lonesome Dove a letter on April 18 stating that its mural

must 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 15).

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

57. When Lonesome Dove learned about these potential amendments, it hoped they would allow its mural. The undersigned 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.²

58. The City again refused. According to the City, “these amendments [would] not make the Lonesome Dove sign conforming, or omit the requirements/violations cited.” Specifically, the amendments the City is currently considering would restrict “commercial” murals to just six square feet (while still allowing noncommercial murals to be of unlimited size), as well as ban 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 16). Moreover, these proposed changes would not remedy the constitutional violations at issue in this suit.

59. 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.

60. The City’s code, mural guidelines, and policies and practices regarding murals

² Subsequent to the City’s denial of the extension, Lonesome Dove retained the undersigned attorney.

violate Plaintiffs' right to free speech as protected by the First Amendment to the U.S. Constitution.

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

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

63. Plaintiffs want to continue displaying their mural.

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

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

66. 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.

67. 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.

68. 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.

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

70. 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.

71. 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.

72. 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.

73. 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.

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

75. The City 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.

76. In addition, the City's mural guidelines state that murals "may not convey a commercial message."

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

78. 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.

79. Restricting speech because of its subject matter or message is a content-based

restriction on free speech.

80. 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.

81. The City cannot meet this burden.

82. 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.

83. 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.

84. 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, those new guidelines would neither allow Lonesome Dove's mural, nor remedy the City's unconstitutional discrimination against commercial speech alleged by this claim.

Count Two:

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

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

86. 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."

87. 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.”

88. Government cannot constitutionally restrict the location of speech so as to make its content less visible and therefore less effective and “thought provoking.”

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

90. 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.

91. The City cannot meet this burden.

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

93. 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.

94. 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.

95. 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.

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

97. 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, those new guidelines would neither allow Lonesome Dove's mural, nor remedy the constitutional violations 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.

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

99. 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.

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

101. 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.

102. 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.

103. 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.

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

105. 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 to notify permit applicants of whether they will receive a permit. Otherwise, the permit process is an unconstitutional “prior restraint.”

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

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

108. Although the City is currently considering changes to its mural regulations, the latest draft of these proposed changes do not remedy the constitutional violations alleged by 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 restriction 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 the challenged mural regulations against Plaintiffs’ mural specifically, or from enforcing the challenged mural regulations generally;

C. A permanent injunction prohibiting Defendant from enforcing its challenged 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,

/s/ Erica Smith

Erica Smith*

Institute for Justice

901 N. Glebe Road, Suite 900

Arlington, VA 22203

Phone: 703-682-9320

Fax: 703-682-9321

Email: esmith@ij.org

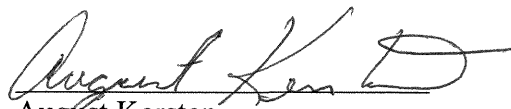
*Application for Admission *Pro Hac Vice* to be filed

VERIFICATION

I, August Kersten, declare as follows:

1. I am a named Plaintiff in the above captioned civil action known as *August Kersten, Brian Berube, and Lonesome Dove, Inc. v. City of Mandan*.
2. I have personal knowledge regarding my business, Plaintiff Lonesome Dove, Inc.; Lonesome Dove's mural; Lonesome Dove's attempts to secure City permission to keep displaying the mural; Lonesome Dove's other interactions and communications with the City regarding the mural; and Lonesome Dove's desire to display another mural on its building if the current mural is removed.
3. I have read the foregoing Complaint and know the contents thereof.
4. The statements and matter alleged therein are true of my own personal knowledge, except as to those matters stated upon information and belief and, as to such matters, I reasonably believe them to be true.
5. I verify under penalty of perjury under the laws of the United States of America that these factual statements are true. If called upon, I would competently testify as to them.

Executed on May 15, 2019.


August Kersten

VERIFICATION

I, Brian Berube, declare as follows:

1. I am a named Plaintiff in the above captioned civil action known as *August Kersten, Brian Berube, and Lonesome Dove, Inc. v. City of Mandan*.
2. I have personal knowledge regarding my business, Plaintiff Lonesome Dove, Inc.; Lonesome Dove's mural; Lonesome Dove's attempts to secure City permission to keep displaying the mural; Lonesome Dove's other interactions and communications with the City regarding the mural; and Lonesome Dove's desire to display another mural on its building if the current mural is removed.
3. I have read the foregoing Complaint and know the contents thereof.
4. The statements and matter alleged therein are true of my own personal knowledge, except as to those matters stated upon information and belief and, as to such matters, I reasonably believe them to be true.
5. I verify under penalty of perjury under the laws of the United States of America that these factual statements are true. If called upon, I would competently testify as to them.

Executed on May 15, 2019.


Brian Berube