

Black Lives Matter as government speech

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"BLACK LIVES
MATTER" mural
installed by the
Washington, DC
Department of
Public Works



Courtesy of Nadia N. Aziz via Twitter.

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Courtesy of Benny Villarreal,
<https://cityofpetaluma.org/black-lives-matter-mural/>



https://www.smdailyjournal.com/news/local/half-moon-bay-city-hall-gets-a-black-lives-matter-mural/article_060bd44c-14b0-11ea-b09c-



Courtesy of Benny Villarreal,
<https://www.paloaltoonline.com/news/2020/11/10/black-lives-matter-mural-removed-as-palo-alto-plans-permanent-exhibit>

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"BLACK LIVES
 MATTER" mural
 installed under the
 direction of the Half
 Moon Bay City
 Manager at City Hall

Courtesy of Tara Hatcher, Administrative
 Assistant, City of Half Moon Bay.

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Government speech doctrine

- ▶ Allows cities to promote certain viewpoints without implicating the First Amendment.
- ▶ Two recent Supreme Court cases provide examples of agency action that qualifies as government speech and the factors the court weighs to determine what constitutes government speech.

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Summun/Walker factors

1. Traditional use of a medium to convey government messages;
2. The public's reasonable understanding that the message conveyed represents the government's viewpoint; and
3. Government's direct control over the message conveyed.

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Pleasant Grove City v. Summum, 555 U.S. 460 (2009)

Upheld City's right to control the selection of monuments at city park based on the government speech doctrine

- ▶ Government has historically used monuments to speak to public
- ▶ People reasonably understood the City was endorsing a specific perspective in choosing to display certain monuments
- ▶ City was selective about monuments displayed

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Walker v. Texas Div. Sons of Confederate Veterans, 576 U.S. 200 (2015)



Upheld state's rejection of designs displaying confederate flag under government speech doctrine

- ▶ History of license plates communicating state messages
- ▶ Public associates license plate design with issuing states
- ▶ States retained control of the license plates, i.e., typeface, design, color

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Agency Action that does not qualify as government speech

Mitchell v. Maryland Motor Vehicle Admin., 450 Md. 282 (Md. 2016):

- ▶ Message on license plate “MIERDA” was personalized and specific to the owner rather than the state.
- ▶ Private individuals submit plate designs.



<https://patch.com/maryland/towson/new-maryland-license-plate-features-state-flag>

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Agency Action that does not qualify as government speech

Matal v. Tam, 137 S.Ct. 1744 (2017):

- ▶ Trademarks are private speech not subject to the government speech doctrine.
- ▶ Government can't restrict trademark names.
- ▶ Trademarks have not been traditionally used to convey government message.



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Application to Murals/Public Art

Newton v. LePage, , 849 F.Supp.2d 82 (D. Maine 2012)

- ▶ Mural displayed in Maine's Department of Labor (MDOL) waiting room was government speech.
- ▶ Mural was main painting in room, funded by government, and supposed to be permanent.

Judy Taylor, History of Maine Labor Mural,
Maine State Museum, Bangor, Maine.
<https://artscopemagazine.com/2014/06/outsider-art-series-judy-taylors-maine-labor-history-mural-part-3/>



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Application to Murals/Public Art

Pulphus v. Ayers, 249 F.Supp.3d. 238
(D.D.C 2017)

- ▶ Art displayed in the Cannon Tunnel constituted government speech.
- ▶ Art selected by House members, located in government building, and Architect of the Capitol set rules about the size, medium, and content of the art.



<https://architectofthecapitol.org/posts/2016/9/10/origins-of-the-capitol-tunnel-system>

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Other relevant factors

- ▶ Location and duration
 - ▶ Permanency analysis only applies when speech occurs in a traditional public forum.
- ▶ Assistance from private groups
 - ▶ Government can still express its views when it receives private assistance for the purpose of delivering a government-controlled message.

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Case Studies: Flag Policies

Cities have displayed ceremonial flags as government speech by adopting clear guidelines and declaring that flagpoles are not public forums.

https://www.ttownmedia.com/tracy_press/news/tracy-council-agrees-to-fly-lgbt-pride-flag/article_3f919df8-88cf-11e9-ae99-e7f2319d0cf5.html



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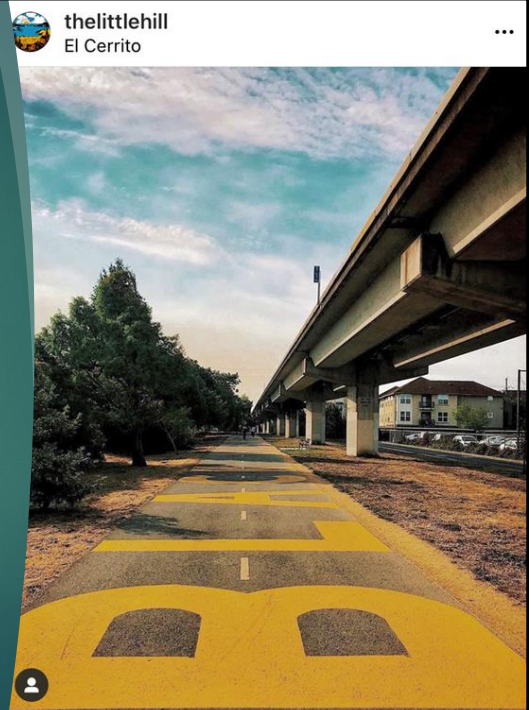
Case Studies: BLM Mural Resolutions

- ▶ Mural reflects the Council's viewpoint;
- ▶ Location of the mural is not a public forum;
- ▶ Solicits assistance but retains control over content/design;
- ▶ Stipend to cover supplies;
- ▶ Mural is consistent with Council priorities and/or a prior resolution in support of BLM.

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Key Takeaways/Best Practices

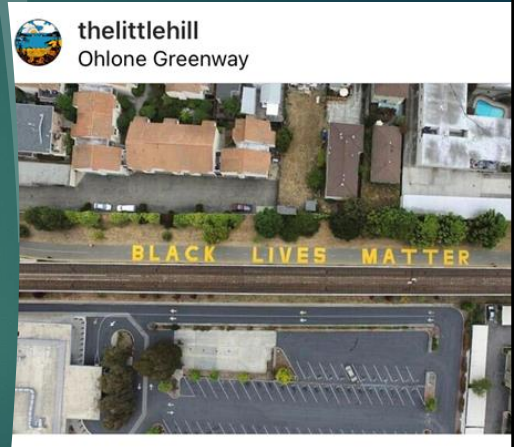
- ▶ Adopt a resolution that provides clear guidelines on the expressive action such as displaying ceremonial flags or commemorative murals.
- ▶ Select a location on public property and clarify that the selected location does not constitute a public forum. If feasible, select a location where the City has previously engaged in government speech.



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Key Takeaways/Best Practices *cont.*

- ▶ State that the expressive action reflects the views of the City Council.
- ▶ Do not engage in expressive activity based solely on request from a third party or sponsor expression of a third party.



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Thank you!

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