



Written by [Bob Adelman](#) on August 16, 2023

## First Amendment Right to Free Speech Confirmed by D.C. Appeals Court

A lower court's ruling [was overturned on Tuesday](#) in a major victory for the First Amendment in the nation's capital.

During the summer of 2020, following the death of George Floyd, when protesters were busily defacing buildings and streets of Washington, D.C., with chalk and spray paint, a much smaller group of pro-life protesters chalked the phrase "Black Preborn Lives Matter" on the street in front of a Planned Parenthood abortuary.

Two of them — 29-year-old Warner DePriest representing the Frederick Douglass Foundation (FDF) and 22-year-old Erica Caporaletti of Students for Life of America (SLA) — who had previously obtained permission from the district to do so, were arrested and charged under the district's anti-defacing law.



Ekaterina Bolovtsova/pexels

That law had been all but abandoned by the district's Metropolitan Police Department during the BLM riots, but was deliberately and selectively applied to the two pro-life protesters.

When they sued for discrimination and violation of their First Amendment rights, the court ruled against them. On Tuesday, however, the U.S. Court of Appeals for the District of Columbia overturned the lower court's ruling and gave it back to the court to allow the original complaint to continue.

The president of the local chapter of the Frederick Douglass Foundation, J.R. Gurley, [said](#), "The city shouldn't allow some groups to participate in the public forum and shun others from doing so just because city officials disagree with their viewpoint. The First Amendment protects our right to peacefully share our pro-life message in Washington, D.C. without fear of unjust government punishment ... thankfully, the D.C. Circuit agreed."

Kristan Hawkins, president of SLA, added:

Viewpoint discrimination is un-American, and as the case proceeds, we look forward to learning more about how D.C. officials picked winners and losers in their enforcement.

Free speech rights you're afraid to use don't really exist, and we will keep fighting for the rights of our students to stand up for the preborn and their mothers.

Appeals court judge Neomi Rao, a Trump appointee, wrote for the three-judge panel that ruled unanimously in favor of the students:



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We hold the Foundation has plausibly alleged the District discriminated on the basis of viewpoint in the selective enforcement of its defacement ordinance.

We therefore reverse the dismissal of the Foundation's First Amendment claim and remand for further proceedings.

The "selective enforcement" of the ordinance — or non-enforcement against BLM thugs violating the district's laws against defacement — galled Rao, who wrote:

In the summer of 2020, thousands of protesters flooded the streets of the District to proclaim "Black Lives Matter." Over several weeks, the protesters covered streets, sidewalks, and storefronts with paint and chalk. The markings were ubiquitous and in open violation of the District's defacement ordinance, yet none of the protesters were arrested.

During the same summer, District police officers arrested two pro-life advocates in a smaller protest for chalking "Black Pre-Born Lives Matter" on a public sidewalk....

This lopsided prosecutorial response — several arrests for small, chalked pro-life messages and no arrests for widespread "Black Lives Matter" messages — does not comport with the deterrence value or culpability associated with the number of protesters and the scope of defacement, suggesting improper selective enforcement.

She concluded:

The First Amendment prohibits the government from favoring some speakers over others. Access to public fora must be open to everyone and to every message on the same terms.

The District may act to prevent the defacement of public property, but it cannot open up its streets and sidewalks to some viewpoints and not others.

During the summer of 2020, the District arrested individuals chalking "Black Pre-Born Lives Matter" on the sidewalk, while making no arrests against the many individuals marking "Black Lives Matter" on sidewalks, streets, and other property.

The Foundation [and SLA] has plausibly alleged that its members were similarly situated to individuals against whom the defacement ordinance was not enforced, and that the District discriminated on the basis of viewpoint when enforcing the ordinance.

It's one thing for this writer to celebrate this victory for the First Amendment by writing about it. It's another thing altogether to have the courage to take to the streets and confront the forces that would neuter it in person. Kudos to DePriest and Caporaletti for taking a stand and paying the price for the rest of us. A right not exercised is no right at all.



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