22-12863

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JARED MCGRIFF, OCTAVIA YEARWOOD, RODNEY JACKSON, and NAIOMY GUERRERO

Appellants,

v.

CITY OF MIAMI BEACH

Appellee.

On Appeal from U.S. District Court for the Southern District of Florida
Case No.: 1:20-cv-22583-MGC

APPELLANTS' INITIAL BRIEF

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CERTIFICATION OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, Appellants certify that the following individuals and entities may have an interest in the outcome of this case or appeal:

1. American Civil Liberties Union Foundation of Florida, Inc. – *Counsel for Plaintiffs-Appellants*
2. American Civil Liberties Union of Florida – *Counsel for Plaintiffs-Appellants*
3. Braun, Benjamin Z. – *Counsel for Defendant-Appellee*
4. City of Miami Beach – *Defendant-Appellee*
5. Cooke, Marcia G. – *U.S. District Judge*
6. Edwards, Jerry C. – *Counsel for Plaintiffs-Appellants*
7. Guerrero, Naiomy – *Plaintiff-Appellant*
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9. Jackson, Rodney – *Plaintiff-Appellant*
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11. Mack, Freddi R. – *Counsel for Defendant-Appellee*
12. McElligott, Matthew – *Counsel for Plaintiffs-Appellants*
13. McGriff, Jared – *Plaintiff-Appellant*
14. O'Sullivan, John J. – *U.S. Magistrate Judge*
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19. Yearwood, Octavia – *Plaintiff-Appellant*

Appellants further state that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request oral argument. This case presents an important question concerning the circumstances under which a municipality's censorship of publicly funded speech by private persons can be shielded from constitutional review by the government-speech doctrine.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had subject-matter jurisdiction over Plaintiffs' constitutional claims pursuant to 28 U.S.C. §§ 1331**Error! Bookmark not defined.** (federal question) and 1343(a)(3), (4) (civil rights). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 (final order of district court).

The appeal is timely because the district court's order granting summary judgment was entered on March 29, 2022, ECF[1] 81; the district court did not enter judgment in a separate docket entry, *see* Civil Docket for Case No. 1:20-cv-22583 (S.D. Fla.); and Plaintiffs filed their Notice of Appeal on August 25, 2022, ECF 83, which is less than 150 days from the order appealed from, *see* Fed. R. Civ. P. 58(c)(2)(B).

STATEMENT OF THE ISSUES

(1) Whether an order by a City official to remove a piece of art in a publicly funded art exhibit, because he believes the art is insulting to the police, is shielded by the government-speech doctrine from First Amendment review when the City has previously made no effort to control the message conveyed by any of the art in the exhibition;

[1] "ECF" cites are citations to the district-court docket.

(2) If the art is not government speech, whether the order violates the First Amendment as an act of viewpoint discrimination.

STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions in the Court Below

Plaintiffs Jared McGriff, Octavia Yearwood, and Rodney Jackson filed their original complaint on June 23, 2020, against the City of Miami Beach ("City") and the City's Mayor and City Manager in both their official and individual capacities. ECF 1. Plaintiffs amended their complaint on July 10, 2020, adding Plaintiff Naiomy Guerrero. ECF 9. On December 1, 2020, the district court granted in part the individual defendants' motions to dismiss, dismissing them from the lawsuit on the basis of qualified immunity, but permitted the claim against the City to proceed. ECF 39. Following discovery, the City filed a motion for summary judgment, ECF 62, and Plaintiffs filed a motion for partial summary judgment, ECF 68. On March 29, 2022, the district court granted the City's motion for summary judgment, holding that the government-speech doctrine exempted the City's conduct from First Amendment review. ECF 81. In so holding, the court relied in part on contractual language concerning "review and approval" to find that the City had final approval authority over the art exhibit's message. *Id*. at 10. The district court did not address Plaintiffs' motion for partial summary judgment except to the extent it denied all remaining motions as moot. *Id*. at 20.

The district court never entered final judgment as a separate entry on the docket. *See* Civil Docket for Case No. 1:20-cv-22583 (S.D. Fla.).

B. Statement of Facts

In February 2019, the City of Miami Beach began discussions concerning the production of an art exhibition for the upcoming Memorial Day weekend, May 23-27. ECF 75-1 (Carrington Decl.) ¶ 2. The backdrop to the exhibition was the long history of racial discrimination in Miami Beach, a history that had included a contentious relationship between the African American community and the Miami Beach Police Department. ECF 60-7 (Reddick Dep.) at 28:2-18; ECF 60-6 (Kenny Dep.) at 16:5-12. Memorial Day weekend—sometimes referred to as Urban Beach Weekend—reflected that history. ECF 60-5 (Morales Dep.) at 14:6-24. As one *Miami Herald* story put it:

> Questions of racial discrimination have often dogged Urban Beach Week, which attracts mostly young African Americans and has been met with a very large—and some say intimidating—police contingent.

ECF 60-13 (Brown, "The Killing of Raymond Herisse: 116 Shots That Shook South Beach," *Miami Herald* (May 5, 2013)).

Later in February, two City employees, Matt Kenny, Director of the City's Department of Tourism and Culture, and Brandi Reddick, Cultural Affairs Manager in the same Department, reached out to Dejha Carrington, an arts administrator and consultant. ECF 75-1 (Carrington Decl.) ¶ 2. Reddick explained in an email that the

City wanted to offer arts and cultural programming during Memorial Day weekend that year and asked if she was interested. Carrington met with Reddick and Kenny the next week, and they explained that the City wanted programming that would "reimagine Memorial Day weekend." *Id*. ¶ 4. The programming would be paid for with public funds. ECF 9-1 ("Professional Services Agreement" ("PSA")) at 3.

Carrington offered the view that, if a program were to be relevant, "it should be led by curators and artists from the Black community; it needed to deal honestly with the City's history around issues of race," and Kenny and Reddick agreed. ECF 75-1 (Carrington Decl.) ¶ 6. Carrington said that previous commitments would prevent her from undertaking the project, but that she would recommend potential collaborators. *Id*.

In an email dated March 2, 2019, Carrington then introduced the City to Plaintiffs Octavia Yearwood and Jared McGriff, also arts curators. ECF 60-12 (Carrington Email) at 2-3. The email incorporated a proposal prepared by Yearwood and McGriff, which, she said, reflected McGriff's and Yearwood's "commitment to telling a complete and authentic story about Miami Beach." ECF 75-1 (Carrington Decl.) ¶ 7. Their proposal suggested that the overall theme would be "Trust as Currency," a theme intended to ensure that the exhibition would "spark crucial conversations about inclusion, blackness, and relationships through arts and cultural programming" during the weekend. ECF 60-12 (Carrington Email) at 2-3. The

exhibition, which would be called "ReFrame: Miami Beach," ECF 60-16 (May 20, 2019 Press Release), would employ art and culture to "tell stories from different points of view." ECF 60-12 (Carrington Email) at 2-3. The City articulated that vision of ReFrame—an exhibit intended to "spark crucial conversations" about "blackness" and "inclusion," and to tell "stories from and with different points of view"—in a press release and internal City communications in the weeks running up to Memorial Day. ECF 60-16 (May 20, 2019 Press Release) at 1 (containing this language); ECF 60-20 (May 14, 2019 Letter to Commission from City Manager Morales ("LTC")) at 2 (same).

Soon thereafter, the City agreed to hire Yearwood and McGriff for the project, and, despite the absence of a written contract, both immediately began work on the exhibition, ECF 60-7 (Reddick Dep.) at 33-34; ECF 60-6 (Kenny Dep.) at 17; ECF 60-2 (Yearwood Dep.) at 117; ECF 60-1 (McGriff Dep.) at 65, which was a little more than one month away. ECF 60-2 (Yearwood Dep.) at 117. Kenny, who was the City Manager's designee for the implementation of the contract, ECF 9-1 (PSA) at 2, and Reddick worked closely with Yearwood and McGriff during the weeks before the exhibit—speaking or meeting with them on almost a daily basis. ECF 60-7 (Reddick Dep.) at 39. Yet, in the course of those several weeks, neither Reddick nor Kenny ever asked to see "any specific artwork that would be exhibited." ECF 24-1

(McGriff Dec.) ¶ 9; *see also id.* ¶ 12; ECF 60-7 (Reddick Dep.) at 27-28; ECF 60-6 (Kenny Dep.) at 16, 34.

Reddick sent a final contract, a "Professional Services Agreement," for the curators to execute on May 9, which Yearwood and McGriff executed through their respective corporate entities. ECF 9-1 (PSA).[2] The agreement consisted of twelve pages of boilerplate taken from the City's template professional services contract, ECF 60-7 (Reddick Dep.) at 30, as well as a one-page Exhibit A, "Scope of Services," that described the art installations that would be created for ReFrame, ECF 9-1 (PSA) at 13, and a one-page Exhibit B, entitled "Delivery of Services and Project Milestones," that provided timelines for various aspects of the curators' work, *id*. at 14.

The Lincoln Road Installation with *Memorial to Raymond Herisse*

One of the installations, called *I See You, Too*, was to be located at 747 Lincoln Road, which had been leased to the City for the event. *Id*. at 13; ECF 60-11 (Temporary License Agreement). McGriff and Yearwood enlisted Plaintiff/curator Naiomy Guerrero to organize *I See You, Too*. The theme of the installation was described in Exhibit A to the contract as an exhibition "about how propaganda and

[2] The agreements signed by Yearwood and McGriff were identical and are referred to as the "contract" or the "agreement."

misinformation have compromised us." ECF 9-1 (PSA) at 13. Guerrero enlisted Plaintiff Rodney Jackson and other artists to create artistic works that were consistent with that theme and that "sparked conversations" about "blackness." ECF 60-3 (Guerrero Dep.) at 69; ECF 60-4 (Jackson Dep.) at 52

Jackson created for the installation a vinyl portrait entitled *Memorial to Raymond Herisse*, with candles displayed below it. ECF 9-2. The portrait was accompanied by a placard describing the circumstances of Herisse's killing by the Miami Beach police during Memorial Day weekend several years earlier. ECF 9-3. The substance of the placard's description of the killing was largely drawn from an investigation published by the Miami Herald. ECF 60-3 (Guerrero Dep.) at 87; ECF 60-13 (*Miami Herald* article).[3] In describing the reasoning that led her and Jackson to select the Herisse incident as the subject of his artwork, Guerrero said that, in her research for the installation, she came across the *Miami Herald* article, which noted that "police gave misinformation, contradictions, [and] withheld information." ECF 60-3 (Guerrero Dep.) at 70. In her view, "withholding information or information that is missing from the narrative or histories is actually propaganda." *Id*.

[3] Brown, "The Killing of Raymond Herisse: 116 Shots That Shook South Beach," *Miami Herald* (May 5, 2013).

Reddick, who did not see *I See You, Too* until the morning that it opened, ECF 60-7 (Reddick Dep.) at 44, thought the exhibit "was done with utmost professionalism." *Id*. at 46. As she saw it, the art was "consistent with the mission of *I See You, Too* and ReFrame" and would "spark crucial conversations about blackness and inclusion." *Id*.

The Order that the Herisse Work Be Taken Down

Kenny visited the exhibit later the same morning at the request of Marcia Monserrat, the Chief of Staff for City Manager Jimmy Morales, who had been advised that police officers had complained about one of the pieces at the Lincoln Road venue. ECF 60-6 (Kenny Dep.) at 25-26; ECF 60-8 (Monserrat Dep.) at 40-42. Kenny and Monserrat went to the venue and reviewed the installation, including *Memorial to Raymond Herisse*. ECF 60-6 (Kenny Dep.) at 26-27; ECF 60-8 (Monserrat Dep.) at 23, 35. They then reported to the City Manager and showed him a photo of the Herisse work. ECF 60-6 (Kenny Dep.) at 26-27; ECF 60-8 (Monserrat Dep.) at 35-36, 40. Kenny "made it clear that [he] had no objections to it, and [he] felt that it was being blown out of proportion and that it best to leave it alone." ECF 60-6 (Kenny Dep.) at 29. He, like Reddick, believed that the work was consistent with the purposes of ReFrame. *Id*. at 36.

Nevertheless, Morales directed Kenny to tell the curators to take it down. *Id*. at 44:3-9. He also told Kenny to make it clear that if the Herisse work were not

removed, the City would close the entire Lincoln Road installation. *Id*. at 31-32; ECF 60-2 (Yearwood Dep.) at 171.

Kenny then met with Yearwood, and he told her that the Herisse work had to be taken down. He said that the City Manager made the decision, and, while he disagreed with that decision, he made it clear that if the work were not taken down, the City would close the entire Lincoln Road installation. ECF 60-6 (Kenny Dep.) at 31-32; ECF 60-2 (Yearwood Dep.) at 171. Believing that she had an obligation to the other artists whose work was displayed in the installation, Plaintiff Yearwood reluctantly acquiesced to Kenny's demand and took down the painting. ECF 60-2 (Yearwood Dep.) 182-84. In its place, she posted a sign that read, "This artwork has been removed at the request of the Miami Beach Police." *Id*. at 186.

Kenny subsequently met with Morales and expressed his concern about the Herisse takedown decision. He described his feelings this way:

> It's just to me, inconsistent with who I am as a person and not allowing art to be art, which is to spark emotions. It's not always going to be polite, it's not always going to be nice.

ECF 60-6 (Kenny Dep.) at 37. Subsequently, Kenny heard that the Miami Beach Police Chief was not particularly troubled by the Herisse work. *Id*. at 39. "I think it was something along the lines of 'This is what's causing all the controversy?'" *Id*.

The City's Explanation for the Order to Remove *Memorial to Raymond Herisse*

In a June 3, 2019 letter to the City Commission, City Manager Morales confirmed that he ordered that the *Memorial to Raymond Herisse* be removed,[4] and that he had done so first, because it was "not at all constructive, potentially divisive and definitely insulting to our police," and, second, because it had not received the "formal approval" required by the contract. ECF 60-19 (June 3, 2019 LTC).

When he mentioned "formal approval," Morales was referring to Exhibit A to the contract. ECF 9-1 (PSA) at 13. Exhibit A describes each of ReFrame's installations and bears the legend: "All installations shall be subject to review and approval by the City Manager's designee." *Id*. Whatever Morales thought was intended by that provision, the two City employees charged with supervising the implementation of ReFrame never took it to mean that they should review and approve the message conveyed by any of ReFrame's art. In the weeks during which Kenny and Reddick worked on ReFrame with the curators, they reviewed and approved various matters concerning the installations, such as "timing, cost, staffing, and publicity, among others." ECF 24-1 (McGriff Dec.) ¶ 9. However, neither

[4] In the letter, Morales denied that he had threatened to close the entire installation if the work was not taken down, a denial Kenny and Yearwood contradicted. ECF 60-6 (Kenny Dep.) at 31; ECF 60-2 (Yearwood Dep.) at 171.

Kenny nor Reddick ever reviewed any individual works of art. *Id*. ¶¶ 9, 12; ECF 60-7 (Reddick Dep.) at 39-40. They knew that the curators, as Reddick put it, were "well-respected leaders in our local arts community," ECF 60-7 (Reddick Dep.) at 21, and she and Kenny left the decision about what art best furthered the purposes of ReFrame and *I See You, Too* entirely to the curators. *Id*. at 27-28, 42; ECF 60-6 (Kenny Dep.) at 16. As Kenny put it, it was up to the curators "to essentially flesh out all of the programming for the entire weekend."[5] ECF 60-6 (Kenny Dep.) at 34.

C. Standard of Review

This Court reviews *de novo* a district court's grant of summary judgment. *Mech v. Sch. Bd. Of Palm Beach Cnty.*, 806 F.3d 1070, 1074 (11th Cir. 2015).

SUMMARY OF THE ARGUMENT

In the spring of 2019, the City of Miami Beach engaged the Plaintiff curators to create on public property an art exhibit to be funded by the City. ECF 9-1 (PSA) at 3. The exhibit, called "ReFrame: Miami Beach," was to be mounted on Memorial Day weekend of 2019. ECF 60-16 (May 20, 2019 Press Release). Both the curators and the City intended that ReFrame would "spark crucial conversations" about

[5] That no process of artistic review was contemplated is further indicated by Exhibit B to the contract, "Delivery of Services and Project Milestones" attached to the contract, ECF 9-1 (PSA) at 14, which lists the date by which various services would be accomplished. There is no mention among those dates of a time for submitting works of art for review. *Id.*; ECF 60-1 (McGriff Dep.) at 81.

"blackness" and "inclusion," and would tell "stories from and with different points of view" about the City's history of race relations. ECF 60-16 (May 20, 2019 Press Release) at 1; ECF 60-12 (Carrington Email) at 2-3.

On the first day that one of the exhibition's installations, entitled *I See You, Too*, opened, the City Manager received word that City police officers had complained about a piece of art being displayed at the installation. ECF 60-6 (Kenny Dep.) at 24-26; ECF 60-8 (Monserrat Dep.) at 40-42. He sent representatives to the installation, who brought back a photo of the art, *Memorial to Raymond Herisse*, and of an accompanying placard explaining that City police had killed Herisse on Memorial Day weekend several years earlier. ECF 60-8 (Monserrat Dep.) at 35-38, 40. The City Manager ordered that the work be taken down, explaining subsequently to the City Commission that he believed that the work was "potentially divisive and definitely insulting to our police." ECF 60-19 (June 3, 2019 LTC); ECF 60-8 (Monserrat Dep.) at 40.

The court below found that the City Manager's act of viewpoint discrimination did not violate the First Amendment because all the art displayed in ReFrame was government speech in accordance with the three factors set out in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), and *Walker v. Tex. Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). ECF 81 (Order Granting Def.'s Mot. for Summ. J. ("Order")) at 7-8. Central to the court's holding

was the belief that, pursuant to a clause in the contract subjecting all "installations" to "review and approval by the City Manager's designee," the City had final approval authority over the message conveyed by all ReFrame's art. *Id*. at 10-11. The court did not discuss whether the City exerted actual control over ReFrame's artistic message. The court also found that the other two factors, history and endorsement, favored the government-speech finding. *Id*. at 12, 16.

Last Term's decision in *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022), makes clear that, contrary to the holding of the court below, the control factor in government-speech determinations must be measured, not by the *power* to control, but by *actual* control. 142 S. Ct. at 1592-93. The unrebutted deposition testimony of the City Manager's designee, Matt Kenny, and Brandi Reddick, the two City employees responsible for supervising the ReFrame project, establishes definitively that the City made no effort to control ReFrame's message. *See* ECF 60-6 (Kenny Dep.) at 16, 34; ECF 60-7 (Reddick Dep.) at 27-28, 39-40, 42; *see also* ECF 24-1 (McGriff Dec.) ¶¶ 9, 12. In the weeks they worked with the curators on various practical and logistical matters, they never asked to see any of the art that the curators intended to display in ReFrame. *See* ECF 60-6 (Kenny Dep.) at 16, 34; ECF 60-7 (Reddick Dep.) at 27-28, 39-40, 42; ECF 24-1 (McGriff Dec.) ¶¶ 9, 12. There is no evidence in the record that the City made any effort whatsoever to control the message conveyed by ReFrame's art.

As for the endorsement and history factors, they either favor the Plaintiffs or are equivocal. Given that the City did not control ReFrame's art, the order to remove *Memorial to Raymond Herisse* was an act of viewpoint discrimination in violation of the First Amendment. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1279 (11th Cir. 2004).

ARGUMENT

In May 2019, the City of Miami Beach provided funds for Plaintiffs to create an art exhibit that was intended to "spark conversations" about "blackness" and "inclusion." ECF 60-16 (May 20, 2019 Press Release) at 1; ECF 60-20 (May 14, 2019 LTC) at 2; ECF 9-1 (PSA) at 3. The City Manager of Miami Beach ordered the removal of one of the works created for the exhibit—a painting that memorialized a victim of a police shooting—because he was told that police officers objected to its subject matter. ECF 60-8 (Monserrat Dep.) at 40-42; ECF 60-6 (Kenny Dep.) at 44; ECF 60-19 (June 3, 2019 LTC). The question before this court is whether that act of blatant viewpoint discrimination is shielded from First Amendment review because the art displayed in the exhibit was government speech. Contrary to the district court's holding, the works of art were private speech, not government speech. And because they were private speech, the City's viewpoint discrimination violated the First Amendment.

I. The ReFrame Exhibit Was Not Government Speech.

"When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 576 U.S. at 207. Although the Supreme Court has described the "government-speech doctrine" as "essential," it has also warned about its use in circumstances such as those presented by this appeal: "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

The Court re-visited that warning in last Term's ruling in *Shurtleff*:

> The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program. In those situations, when does government-public engagement transmit the government's own message? And when does it instead create a forum[6] for the expression of private speakers' views?

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[6] Despite the Supreme Court's use of the term "forum," its opinion did not engage in forum analysis, presumably because the nature of the forum would have been irrelevant given its determination that Boston had engaged in viewpoint discrimination. As the Court has repeatedly emphasized, in no forum is the government permitted to disfavor a particular viewpoint. *Perry*, 460 U.S. at 46; *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-30 (1995); *Shurtleff*, 142 S. Ct. at 1587. While the district court did not mention forum analysis in its summary-judgment opinion, it held at the motion-to-dismiss stage: "Because the decision to order the removal of the Herisse Memorial was not viewpoint neutral, Defendants' Motions to the extent based on traditional forum analysis are denied." ECF 39 (Order on Motion to Dismiss) at 29-30.

Id. at 1589.

When, as here, "a government invites the people to participate in a program," courts must "conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." *Id*. This review "is not mechanical" and "is driven by a case's context rather than the rote application of rigid factors." *Id*.

In this matter, the holistic inquiry begins with the very purpose of ReFrame. Instead of being a vehicle to "transmit the government's own message," *id*., ReFrame's purpose was, as the City acknowledged in a press release and the City Manager in a letter to the City Commission, to "tell stories from and with different points of view." ECF 60-16 (May 20, 2019 Press Release) at 1; ECF 60-20 (May 14, 2019 LTC) at 2. The purpose of ReFrame, in other words, was to tell *other* peoples' stories, not the government's.

While the three factors discussed in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015)— control, history, and endorsement—remain relevant to the free speech determination, *Shurtleff* makes clear that the control factor is paramount—and, most importantly, that control means *actual*, not theoretical, control. *See* 142 S. Ct. at 1592-93 (holding that the City of Boston's "lack of meaningful involvement" in crafting the messaging made the expression at issue

private speech). Justice Alito's separate opinion explains why this makes sense. The reason for centering control, he said, is because "speech by a private individual or group cannot constitute government speech if the government does not attempt to control the message." *Id*. at 1596 (Alito, J., concurring in the judgment). Two City employees who supervised the creation of ReFrame made clear that the City of Miami Beach made no attempt to control ReFrame's artistic expression. *See* ECF 60-6 (Kenny Dep.) at 16, 34; ECF 60-7 (Reddick Dep.) at 27-28, 39-40, 42; *accord* ECF 24-1 (McGriff Dec.) ¶¶ 9, 12. That testimony is uncontested. Under *Shurtleff*, that is essentially the end of the matter. That said, the conclusion remains the same even if the endorsement and history factors are considered, given that, as explained below, neither factor points to ReFrame as government speech.

A. The City Did Not Actively Control ReFrame's Message.

In *Shurtleff*, the speech at issue was the display of a flag on one of three flagpoles outside Boston's City Hall. *Shurtleff*, 142 S. Ct. at 1587 (majority op.). Two of the flagpoles had been used for government flags, but a third one had often been used by private organizations to display a flag conveying a non-governmental message. *Id*. In defending its decision to deny a private group's application to fly a flag on the third flagpole, Boston argued that all of the flag poles—including the third one—were government speech. *Id*. The question for the Court was whether "Boston actively controlled these flag raisings and shaped the messages the flags

sent," *id*. at 1592. It held that Boston did not. *Id*. Although the Court acknowledged Boston's involvement in a variety of logistical matters concerning the use of the flagpoles, "the city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech." *Id*. at 1593. In other words, in order to satisfy the control factor, the government must show that it has played an active role in shaping the

message. Prior decisions from the Supreme Court[7] and Eleventh Circuit[8] implied as much. So too have the decisions of other circuits.[9]

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[7] *See Shurtleff*, 142 S. Ct. at 1592 (describing *Summum* as a case where "we emphasized that Pleasant Grove City always selected which monuments it would place in its park"); *Walker*, 576 U.S. at 213 (state was found to control license plate messages not only because it had been given "final approval authority" over their selection, but because "the State has rejected at least a dozen proposed designs"); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561 (2005) ("all proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department").

[8] *See Leake v. Drinkard*, 14 F.4th 1242, 1250 (11th Cir. 2021) (participating in city-funded veterans parade was government speech because participation "depended on submission of an application to the City. The application expressly required applicants to describe the kinds of messages they intended to convey at the Parade. '[F]inal approval authority' over the application was exercised by the City based on the message the Mayor and City Council wanted the Parade to communicate"); *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1235 (11th Cir. 2019) ("The FHSAA controlled physical access to the microphone, but, notably, whether it controlled the content of the speech that went out over the loudspeaker is far from established on the limited record we have."); *Mech*, 806 at 1078 (private banner displayed on school property satisfied the control factor because "the schools control 'the design, typeface, [and] color'" of the banners and "dictate the information that the banners can contain, regulate the size and location of the banners, and require the banners to include the school's initials and the message 'Partner in Excellence'").

[9] Out-of-circuit decisions have looked for evidence of actual control of messaging when governments allege that private expression is government speech. For example, in upholding the free speech rights of artists whose works the city excluded from an art exhibition in city hall, the Ninth Circuit noted that the city "concedes that it exerted little or no substantive control over the selection and content of the art work displayed at City Hall." *Hopper v. City of Pasco*, 241 F.3d 1067, 1079 (9th Cir. 2001). Although the city possessed final approval authority in the contract with

The court below reached the wrong result because it misstated the applicable test for determining control. In its view, "[w]hether the government has the *power* to approve certain speech is the defining inquiry in evaluating the control factor." ECF 81 (Order) at 8 (emphasis added). But the proper question, as *Shurtleff* and other cases make clear, was not whether the City of Miami Beach had the "power" to approve the art exhibited in ReFrame, but whether it "actively controlled" and "shaped the messages," *Shurtleff*, 142 S. Ct. at 1592, expressed by that art.

If the proper question had been asked by the district court—did the City of Miami Beach actively control the art installed during ReFrame and did it shape the art's message—the answer is, as in *Shurtleff*, "not at all." *Id*. The evidence that the City did not seek to control the message expressed by ReFrame's art is entirely

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the private organization that managed the exhibit, "[p]rior to the exclusion of the works at issue here, the city neither pre-screened submitted works, nor exercised its asserted right to exclude works." *Id.* at 1078. The Fifth and Seventh Circuits have similarly held that failure to actively control the messaging at government-funded events or events on public property rendered the speech at issue private. *See Int'l Women's Day Mar. Plan. Comm. v. City of San Antonio*, 619 F.3d 346, 360 (5th Cir. 2010) ("[W]e conclude that San Antonio has not demonstrated that its procession sponsorship is government speech. The City has made no showing that it exercises any control over the messages conveyed at its sponsored events, other than endorsing the general message of each event through its provision of financial support."); *Higher Soc'y of Ind. v. Tippecanoe Cnty., Ind.*, 858 F.3d 1113, 1118 (7th Cir. 2017) ("[T]he County maintains no editorial control of individual speakers… at each event.…Without such control, it is hard for the County to maintain that the private speakers are really the County's alter ego.").

uncontested. Once the City engaged the curators to mount ReFrame, two City officials, Matt Kenny and Brandi Reddick, began working with them on an almost daily basis. ECF 60-7 (Reddick Dep.) at 39. During the several-week run-up to Memorial Day, they regularly discussed a variety of practical and logistical matters with the curators about the various installations. *See* ECF 24-1 (McGriff Dec.) ¶ 9; *see also* ECF 60-7 (Reddick Dep.) at 39-40. Their testimony made clear, however, that they never asked the curators about the messaging of the art they would exhibit. *See* ECF 60-6 (Kenny Dep.) at 16, 34; ECF 60-7 (Reddick Dep.) at 27-28, 39-40, 42; *accord* ECF 24-1 (McGriff Dec.) ¶ 12 ("Not once in any of those conversations did either of them, or any other City representative, ask to review any of the art works that would be exhibited at that venue").[10] Given their professional respect for the curators, ECF 60-7 (Reddick Dep.) at 21, they left all decisions about the art to the curators. *See id*. at 27-28, 39-40, 42; ECF 60-6 (Kenny Dep.) at 16, 34.

[10] Reddick's and Kenny's testimony about the difference between their involvement with various logistical and practical matters concerning ReFrame, and their lack of involvement with ReFrame's artistic expression, bears a striking similarity to the observation in *Shurtleff* that Boston exercised control over an event's "date and time" and "over the plaza's physical premises," and "it provided a hand crank so that groups could rig and raise their chosen flags." *Id*. at 1592. There, as here, actual control required active crafting of the messaging, not just control over logistical matters.

The testimony that Reddick and Kenny never asked to see, nor actually saw, the art created for ReFrame during the weeks before it went on display was simply ignored by the district court. Whatever the reason—it is possible that the court's focus on the power to control the art led it to the view that actual control was irrelevant—the undisputed evidence is that, until Morales ordered the take-down of *Memorial to Raymond Herisse*, no City employee had exhibited any interest in the content of any of ReFrame's art.

In short, at no point did the City exercise actual control over the art's messaging. ReFrame's art was, as it was intended by the City, expression that was controlled by the private individuals who were responsible for its creation. Because it was not City-controlled messaging, it was not government speech.

B. Viewers of the ReFrame Installations Would Not Believe That the City Endorsed the Message Conveyed by the Art.

The endorsement factor asks "whether the public would tend to view the speech at issue as the government's." *Shurtleff*, 142 S. Ct. at 1591. Or, as this court has put it, would "observers reasonably believe the government has endorsed the message"? *Mech*, 806 F.3d at 1076. The principal evidence cited by the district court to conclude that observers would believe that the City had endorsed ReFrame's message was the exhibit's name, "ReFrame: Miami Beach," and the fact that much of the publicity for the exhibit was generated by the City. But naming the exhibit

"ReFrame: Miami Beach" says little more than the subject matter of the exhibition—that which was being "reframed"—was Miami Beach.[11] And that the City publicized an art exhibit that it hoped would attract visiting tourists no more implies endorsement of the art that it displays than does its publicity of Art Basel, a private event that it also publicizes.

The district court's endorsement ruling relied principally on the decision in *Leake v. Drinkard*, 14 F.4th 1242 (11th Cir. 2021), in which the court noted that, the "City [of Alpharetta] publicly advertised and promoted the 2019 parade on its website, where it identified itself and the Legion as co-hosts," *id*. at 1249. It is true that the City of Miami Beach publicized ReFrame and advertised the exhibition on its website. But there's a critical difference in what the two cities said about their respective events that casts doubt on the relevance of *Leake* to the district court's conclusion about endorsement. As the court noted in *Leake*,

[11] The name "ReFrame: Miami Beach" no more implies that the art exhibited was endorsed by the City than does the name Austin City Limits Music Festival imply that the City of Austin endorses the songs performed at the Festival. The district court also mentioned City-generated announcements of a pre-exhibition cocktail party, ECF 60-18, but any hypothetical reasonable observer deemed by a court to have seen the statement that "the City of Miami Beach and ReFrame launch *their* inaugural festival," *id*. at 1 (emphasis added), must also be deemed to have the knowledge, repeatedly expressed by the City, that the very purpose of this event was not to promote a single, government message but rather "to tell stories from and with different points of view." *E.g.*, ECF 60-16 (May 20, 2019 Press Release) at 1.

> The City publicly identified the 'goal of th[e] parade' as the celebration of 'American war veterans' and the recognition of 'their service to our country.' The City publicly endorsed the sentiment that 'all war veterans, especially those from Alpharetta' should be 'celebrate[d] and honor[ed].'

Id. at 1249. Under those circumstances, the court, not surprisingly, concluded that "observers [would have] reasonably believe[d] the government ha[d] endorsed the [Parade's] message." *Id*.

But observers of ReFrame saw an entirely different message. ReFrame, they learned, was an exhibit intended to "spark crucial conversations" about "blackness" and "inclusion," and to tell "stories from and with different points of view," and that intention was articulated explicitly through both a press release and internal City communications in the weeks running up to Memorial Day. ECF 60-16 (May 20, 2019 Press Release) at 1 (containing this language); ECF 60-20 (May 14, 2019 LTC) at 2 (same). In other words, reasonable observers would know that the stories being told by ReFrame were *not* attributable to the City, and were *not* endorsed by the City, but rather were other peoples' stories.

One other telling fact undermines any reasonable observer's inference that the City of Miami Beach meant to endorse the message expressed by the Herisse work. A screenshot taken from a video created by the curators to document ReFrame closes in on the Lincoln Road entrance to *I See You, Too* and shows that there is nothing whatsoever to indicate the City's involvement with the installation. ECF 60-14.

Passersby to the Lincoln Road installation would see *I See You, Too* as just one more of the dozens of random storefronts along Lincoln Road. Members of the public entering *I See You, Too*, therefore, would have had no reason to believe that the City was involved with the exhibition or endorsed the message of any of the art displayed inside.[12]

Just as the evidence of endorsement by the City of Miami Beach government was weaker than in *Leake*, it is also weaker than in *Shurtleff*. As the Supreme Court noted, the flags were flying in front of Boston's City Hall, a place where "the public would ordinarily associate a flag's message with Boston." *Shurtleff*, 142 S. Ct. at 1591. Nevertheless, in the Court's view, this did not "resolve whether Boston conveyed a city message with these flags." *Id*.

And so here: given the lack of compelling evidence that a reasonable observer would have assumed Miami Beach's endorsement of ReFrame's message, the endorsement factor does not weigh in favor of a determination that either ReFrame or the *I See You, Too* installation was government speech.

C. Art Has Not Traditionally Been a Medium for Conveying a Government Message.

[12] While the district court acknowledged that the Plaintiffs believed that the screenshot undermined the City's endorsement argument, it simply responded, without explanation, "The Court disagrees." ECF 81 (Order) at 16.

The history factor requires that a court determine whether the medium for conveying the message at issue has "*traditionally* been used as a medium for government speech." *Walker*, 576 U.S. at 214 (emphasis added); *Cambridge*, 942 F.3d at 1232 (same). Looking at a medium's "traditional" function, the Court, in *Walker*, found that "the history of license plates shows that . . . they long have communicated messages from the States." 576 U.S. at 210-11. Similarly, in *Summum*, 555 U.S. at 470, the Court noted that "[p]ermanent monuments displayed on public property *typically* represent government speech." (emphasis added). Monuments and license plates have a history of traditionally communicating a government message, while art, if the word "traditional" means anything different from "sometimes," does not.

That artistic expression—the medium at issue in this case—has *sometimes* been used to convey government speech, *see* ECF 81 (Order) at 12-14, is, of course, true. But it is also true that, throughout history, art has often been used as a medium for personal expression. ECF 60-10 (Felshin Rebuttal Report) at 4-5. The district court's conclusion that the history factor favored the government was possible only because the court inexplicably ignored the testimony of Plaintiffs' expert.

While the City's expert, Thomas Folland, emphasized the extent to which art has, historically, conveyed a government message, he conceded that, at least in the past two centuries in this country, art has been a medium for "personal private

aesthetic or political expression." ECF 60-9 (Folland Report) at 2. While noting that concession, Plaintiffs' expert, Nina Felshin, an art historian and professional curator, faulted Folland for "imply[ing] a degree of parity in modern America between art that expresses a government message and art that expresses a personal aesthetic or political viewpoint." ECF 60-10 (Felshin Rebuttal Report) at 6. In Felshin's opinion, "the indisputably dominant form of artistic expression during the past 200 years was, and continues to be, conceived and created by individual artists free of government influence." *Id*. at 4-5. The "amount of officially commissioned art," she explained, "pales beside the number of personally expressive works of art evidenced by the permanent collections and temporary exhibitions of American art museums, including historical, modern and contemporary art institutions; commercial galleries; alternative spaces; art fairs, such as the world-famous international Art Basel in Miami Beach; art collecting; art schools; artist studios; and guerrilla street art." *Id*. at 7.

Finally, Felshin took strong exception to Folland's conclusion that ReFrame and *I See You, Too* "[were] consistent with [the] history of artwork as government speech," ECF 60-9 (Folland Report) at 16. She noted that "[f]unding and publicity of an arts event, and identification of it as a City event, are hardly indicative of an intention by a municipality to determine the message conveyed by the exhibit." ECF 60-10 (Felshin Rebuttal Report) at 12-13. Referring to two recent municipally

funded art exhibits, she noted that "both exhibitions demonstrate the willingness of a municipality to speak openly about the darker aspects of its past and present," and, in the words of one of the municipal arts councils, to "spark[] a deeper discussion about art, activism and the support necessary to create real and lasting change." *Id.* at 13. "[T]hose words," Felshin said, "resonate precisely with what the curators intended with ReFrame." *Id.*

If it were true, as the district court suggested, that the history factor supports a determination of government speech just because the medium has *sometimes* been used to convey a government message, then the history factor would weigh conclusively in the government's favor in every single case, since all media have sometimes been used for that purpose. That obviously cannot be the law. *Cf. Penkoski v. Bowser*, 548 F. Supp. 3d 12, 22-23 (D.D.C. 2021) ("[N]oting that the government often uses 'written words' does not advance the [history] analysis very far."). The district court's conclusion is not supported by any decision of the Supreme Court or of this court.

Because the history of art as a traditional medium of government expression is, at the least, equivocal, the history factor does not weigh in favor of a determination that ReFrame was government speech.

* * *

For the reasons discussed above, none of the individual government speech factors—control, endorsement, and history—support the district court's government speech holding. Even were it otherwise—if, for example the history and endorsement factors weighed in favor of a government speech determination, as they did in *Shurtleff*, 142 S. Ct. at 1591, the City's failure to actively control ReFrame's message is, as it was in *Shurtleff*, "the most salient feature of this case." *Id*. at 1592. Given that failure, ReFrame was not government speech, and the decision to take down the Herisse work is subject to full First Amendment review.

II. The City's Removal of the *Memorial to Raymond Herisse* Was Unconstitutional Viewpoint Discrimination.

The City does not dispute that City Manager Morales ordered that *Memorial to Raymond Herisse* be taken down after a complaint from the police. ECF 60-6 (Kenny Dep.) at 24-26; ECF 60-8 (Monserrat Dep.) at 40-42. Indeed, Morales frankly admitted to the City Commission that he had given the order because the work was "not at all constructive, potentially divisive and definitely insulting to our police." ECF 60-19 (June 3, 2019 LTC). It is difficult to imagine a more flagrant First Amendment violation than the removal of a work of art depicting a victim of a police killing because the police were offended by it.

The City Manager's order violates fifty years of settled constitutional law concerning the government's regulation of speech because of its viewpoint.

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."). That principle has been repeatedly reaffirmed by the Supreme Court. *See id.* at 829 ("When the government targets…particular views taken by speakers on a subject the violation of the First Amendment is all the more blatant.") (citing *R. A. V. v. St. Paul*, 505 U.S. 377, 391 (1992)); *id.* ("Viewpoint discrimination is thus an egregious form of content discrimination. 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") (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (It is a First Amendment "bedrock principle" that the "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *see also Holloman*, 370 F.3d at 1279 ("One of the most egregious types of First Amendment violations is viewpoint-based discrimination."). In no forum is the government permitted to disfavor a particular viewpoint. *See supra* n.6.

The constitutional prohibition against viewpoint discrimination—against prohibiting the expression of views because a government official finds them offensive—is no less applicable here than it was in *Shurtleff*. Once the Supreme Court determined that flags flying on Boston's third flagpole were not government

speech, Boston's refusal to fly the plaintiff's flag became an act of viewpoint discrimination in violation of the First Amendment. *Id*. at 1593. And so here: since ReFrame was not the speech of the City of Miami Beach, the order to take down *Memorial to Raymond Herisse* violated Plaintiffs' First Amendment rights.

CONCLUSION

Because neither ReFrame nor *Memorial to Raymond Herisse* was government speech, the City's decision to take down the *Herisse* work violated Plaintiffs' First Amendment rights. Accordingly, the district court's order granting the City's motion for summary judgment should be reversed, and the case should be remanded for the district court to grant Plaintiffs' motion for partial summary judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

On behalf of Plaintiffs-Appellants, I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 7545 words.

Dated: November 3, 2022

/s/ Daniel B. Tilley
Daniel B. Tilley

CERTIFICATE OF SERVICE

I, Daniel B. Tilley, counsel for Plaintiffs-Appellants and a member of the Bar of this Court, certify that on November 3, 2022, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Daniel B. Tilley
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