UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 1:20-cv-22583-UNGARO

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

Plaintiffs,
v.

CITY OF MIAMI BEACH,
DAN GELBER, and JIMMY MORALES,

Defendants.
_____/

PLAINTIFFS' OPPOSITION TO DEFENDANT CITY OF MIAMI BEACH'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants have moved to dismiss the First Amended Complaint. Because the alleged facts, accepted as true for purposes of the motion, state a claim upon which relief can be granted, the motion must be denied. Defendants have also moved for summary judgment. Discovery has yet to begin, let alone conclude, and a motion for summary judgment would be premature. Furthermore, it is apparent even at this point that there are disputes as to material issues of fact which also require the denial of Defendants' motion.

STATEMENT OF FACTS

In the spring of 2019, Plaintiff Jared McGriff, through his corporate entity, Quinn Projects, LLC, and plaintiff Octavia Yearwood, through her corporate entity, Team Ohh, LLC, entered into Professional Services Agreements (the Agreements, which were identical, and have been filed as ECF documents 13-1 and 13-2 are referred to collectively as the "PSAs") with the City to produce

art installations for the upcoming Memorial Day weekend, May 23-27, on the subject of race relations. McGriff and Yearwood subsequently enlisted artist Rodney Jackson and curator Naiomy Guerrero to participate in the project. The City, which called the project "ReFrame Miami Beach," said in a public announcement about the project that "ReFrame sparks crucial conversations about inclusion, surveillance, and propaganda using the works of local artists, curators, and organizers." ECF 9, *Plaintiffs' First Amended Complaint,* at ¶ 25.

Exhibit A to the contract, entitled "Scope of Services," (ECF 13-1, p.13), described the five installations that the curators would create for public exhibition. One of the venues was located at 737 Lincoln Road, where the curators created an installation that was called "*I See You, Too*." The installation contained several works, described collectively as an exhibition "about how propaganda and misinformation have compromised us."[1] Jackson's painting, entitled "Memorial for Raymond Herisse," which was accompanied by a placard describing the circumstances of Herisse's killing by the Miami Beach police, was one of those works. ECF 9, *FAC*, at ¶ 35.[2]

On Saturday, May 25, the day after the Herisse painting was mounted, Matt Kenny, the Director of the City's Department of Tourism and Culture, advised Plaintiff Yearwood that the Police Department objected to "Memorial for Raymond Herisse" and that the City required that

[1] The City contends that, since the contract named Yearwood and Guerrero as the curators of the Lincoln Road installation, McGriff has no claim of injury by virtue of the removal of the Herisse painting. (ECF 21, p. 10) However, McGriff was involved in many aspects of the installation, and had an overall supervisory role with regard to all the installations. See Affirmation of Jared McGriff ("McGriff Aff."), attached hereto as ECF 24-1, ¶ 15.

[2] The City argues that Jackson's painting failed to further the purpose of the installation. In fact, the painting addressed the "common perception that Miami Beach has always been a place of racial harmony." (McGriff Aff., ¶ 9). Both the Herisse painting and a photo exhibit in the installation sought to correct that misinformation by showing "the dark history of racial discrimination and abuse" on Miami Beach. *Id.*

the painting be taken down. ECF 9, *FAC*, at ¶ 37. If the work was not taken down, he threatened to close the entire "*I See You, Too*" exhibit. ECF 9, *FAC*, at ¶ 38. Believing that she had an obligation to the other artists in the exhibit, Plaintiff Yearwood reluctantly acquiesced to Kenny's demand. That afternoon, Plaintiffs took down the painting and, in its place, posted a sign that read, "This artwork has been removed at the request of the Miami Beach Police." ECF 9, *FAC*, at ¶ 38.

In a letter to the City Commission some days later, Defendant Morales, confirmed that it was he who had ordered that the art be removed, and he had done so because he and the police objected to the painting's viewpoint, which he termed "definitely insulting to our police as depicted and narrated." ECF 13-4, *LTC 320-2019 - Update Regarding Art Piece Removal During Memorial Day Weekend*, p. 1. At a subsequent public forum, Mayor Gelber stated that, while it was Defendant Morales who decided to order that the painting be removed, he, as Mayor, had the authority to overrule that decision, but that he had declined to do so because he supported the decision. ECF No. 13-6, *Transcript of Town Hall Meeting*, p. 62:6-62:24.

ARGUMENT

I. DEFENDANT'S CONTRACT DEFENSES

The City does not deny the indisputable evidence that Morales ordered Jackson's painting taken down because neither he nor the police liked its point of view about the Herisse killing. Instead, the City maintains that the contract gave it the right to review the content of all of the works of art in the installations and to reject those whose message it did not like. Instead, the City makes two arguments: first, that two provisions in the contract gave the City absolute authority to disapprove any of the curated works; and second, that the contract required that all of the

installations provide a "positive" point of view about race relations on Miami Beach and, in the City's view, the Herisse painting violated that provision.

A. The "Review and Approve" and "Satisfaction" Language in the Contract Did Not Give the City the Authority to Approve Individual Works of Art

As to the argument that the contract conferred upon the City absolute authority to reject any work for any reason, the City cites two provisions. The first is §5.2 of the "Scope of Services," which provides that the "City may also, through its City Manager, and for its convenience and without cause, terminate the agreement at any time during the term by giving written notice to Consultant of such termination; which shall become effective within ten days..." ECF 21, p. 3-4. But neither Kenny nor anyone else gave written notice of termination. Kenny had no power under that provision to terminate Plaintiffs' rights under the contract without that ten days' written notice. In fact, none of the Defendants mentioned the contract at all in ordering the painting removed. ECF 9, *FAC*, at ¶ 39.

The second provision cited by Defendants is also in "Scope of Services." It reads: "Curated Exhibitions. All venues are suggestions and not yet confirmed. All venues shall be subject to mutual agreement of the parties. All installations shall be subject to review and approval by the City Manager's designee."

Plaintiffs were unaware of that language in the final version of the contract that they executed. McGriff Aff., ¶ 8-9. Significantly, it was not in the draft of the contract that they were given to review, and, in the email from the City that accompanied the final version of the contract, there was no mention of the fact that this language had been added. McGriff Aff., ¶7, and exhibit attached thereto. At no point, did any City employee refer to this language and claim that it

authorized the City to reject any of the art to be exhibited at the installations if the City disapproved of its content. McGriff Aff., ¶8 - 10.

In his letter to the City Commission explaining his order to remove the Herisse painting, Defendant Morales says that the painting "was not presented to staff and therefore did not receive formal approval for the exhibit plans prior to the installation." *See* ECF 13-4 p. 1 - LTC 320-2019, *Update Regarding Art Piece Removal During Memorial Day Weekend.* Echoing Morales, Defendants now argue that Plaintiffs did not get the formal approval for the Herisse painting required by the contract. ECF 21, ¶ 12.

The argument is wrong on two accounts: (1) there was no process specified in the contract that provided for any kind of formal review and approval, either of the installations or any individual works of art specified in the contract; and (2) the "review and approval" provision was not intended to permit the City accept or reject the individual works of art to be exhibited within the respective installations.

The City's argument that a process of formal review was required is contradicted by the realities of the project. There were only a few weeks from the time that the contracts were signed until the public exhibition on Memorial Day. Because the City was responsible for, among other things, the installations' cost, staffing, locations, timing, and publicity, approvals of the curators' proposals for the installations had to be given contemporaneously (McGriff Aff., ¶ 9). Accordingly, in the weeks leading up to the event that arrangements for the installations were being made, Yearwood and McGriff were in daily contact with the two City representatives, Brandi Reddick and Matt Kenny, in order to discuss "a wide variety of matters concerning the installations." McGriff Aff., ¶ 4.

Exhibit B to the contract, entitled "Delivery of Services and Project Milestones," (ECF 13-1, p.14) confirms that the daily process of approval in which the curators and the City representatives engaged is precisely what the contract contemplated. McGriff, Aff., ¶ 6. Exhibit B lists the steps that had to be taken in the weeks before Memorial Day weekend, none of which included a requirement that work be submitted for formal approval. Because the City had to assist the curators in securing locations, and in making other practical arrangements, the approval process was ongoing and collaborative, and was not a separate step during the process of implementing the contract. McGriff Aff., ¶ 10.

The City's argument that individual works of art, such as the Herisse painting, required City "review and approval" under the contract, is undercut by the conduct of Reddick and Kenny during the weeks that they and Plaintiffs were working together. Although they and Plaintiffs talked on a daily basis about various aspects of the installations, "[a]t no time did Reddick or Kenny ever say or imply that they wanted to see any of the installations in advance to see if their content was satisfactory." McGriff Aff., ¶ 5. In particular, the curators spoke "frequently" with Reddick and Kenny about the Lincoln Road installation, and "[n]ot 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." McGriff Aff., ¶ 7. Indeed, Plaintiffs flatly assert that they would not have entered into a contract with the City that permitted it to censor any artist's work based on its point of view. McGriff Aff., ¶ 5.

The City points to one final piece of language in the contract that purportedly justifies its act of censorship: "Notwithstanding the foregoing, all services provided by the Consultant shall be performed in accordance with the Proposal and to the reasonable satisfaction of the City Manager." ECF 13-1, ¶ 2.1. To the extent that the argument implies that Defendant Morales had

to approve of the art works during the process of their creation, the argument fails for the same reason that the argument concerning the "review and approval" provision fails, namely, that none of the City's representatives nor Plaintiffs believed that the City had to be "satisfied" with any of the individual works of art, nor did any process exist to determine such satisfaction. At the very least, the language relied upon by Defendants in support of their "review and approval" defense does not rise to the level of specificity required to establish a knowing and intelligent waiver of First Amendment rights that would be sufficient to insulate Defendants from First Amendment scrutiny. Furthermore, the course of conduct of the City's representatives and officials may constitute waiver of any contract-based claim that Defendants may claim. Regardless, dismissal is not warranted at this state, and Plaintiffs should be afforded the opportunity to conduct discovery and depositions to rebut and refute Defendant's "review and approval" defense.

B. <u>The Contract Did Not Oblige the Plaintiffs to Convey a Positive Message</u>

Finally, the City argues that Jackson's painting of Herisse violated the contract's requirement that the installations promote only a positive image of race relations on Miami Beach. (ECF 21, p. 3) In support of that argument, the City refers to a description of two out of the five installations in the contract – **not including *I See You, Too*** –, and to a letter from the City Manager to the City Commission written *after* he ordered the take-down of the Herisse work. ECF 13-4.

As for the contract provision, Defendants again reference Exhibit A to the PSAs, which describes the Scope of Services to be performed by Plaintiffs. One of the proposed installations was described as "Vehicle Messaging Board Installation on Ocean Drive Closure," which likened the installation to the "large digital road signs …that advertise lane closures and warn against bad behavior." Plaintiffs proposed putting such signs "to good use with poetic and witty interventions that subvert common narratives and promote a positive message." ECF 13-1, p.13. A description

of a second installation, entitled "Digital Campaign," offered to promote "the positive side of Memorial Day Weekend" and to "combat the incessant negative attacks from the media…" *Id.*

Notably, the quoted language does not appear in the description of the *I See You, Too*, installation. In fact, the only description of the *I See You, Too* exhibit is that it is "an exhibition about how propaganda and misinformation have compromised us." ECF 13-1, p.13. There is, therefore, no credible basis for the contention that the Herisse painting, which appeared in the *I See You, Too* installation, violated the contract by not promoting a positive view of race relations on Miami Beach as such a view was never required by the City.

II. PLAINTIFFS' CLAIMS SATISFY THE REQUIREMENTS OF ARTICLE III

Defendants argue that this action should be dismissed on justiciability grounds, claiming that Plaintiffs lack standing and that their claims are unripe or, alternatively, are moot. We will treat those arguments in the order in which Defendants present them.

A. <u>Plaintiffs McGriff and Yearwood have standing.</u> Defendants argue first that Plaintiffs McGriff and Yearwood do not have standing because they were paid the full contract price stated in their respective contracts. However, both Plaintiffs have alleged reputational and psychological injury as a result of Defendants' actions (ECF 9, *FAC* ¶. 44), which is a compensable injury for a First Amendment violation. *Meese v. Keene*, 481 U.S. 467, 476 (1987)

In their second and third arguments, Defendants point to the PSA provisions that the work was to be performed in accordance to the reasonable "satisfaction of the City Manager and that "[a]ll installations shall be subject to review and approval by the City Manager's designee." Defendants argue that this language constituted a waiver of Plaintiffs First Amendment rights and should be a bar to this lawsuit. ECF 21, p.9. However, those provisions were not intended to give the City the right to approve the content of any works of art exhibited by Plaintiffs. McGriff Aff.,

¶ 5. Even if that was the City's intent, the record is clear that Plaintiffs did not knowingly and voluntarily waive their First Amendment rights. See section IV, *infra.*

Fourth, Defendants argue that McGriff and Yearwood do not have standing because the contract provided that all the installations would become "the sole and exclusive property of the City" and "shall not otherwise be made public and/or disseminated by Consultant, without the prior written consent of the City Manager." ECF 21, p.9. We know of no case, nor apparently do Defendants, since they cite none, to support the dubious proposition that, if the government prevents the public display of art because it is offended by its viewpoint, it is relieved of a First Amendment violation if it is allowed to take subsequent possession of the art.

Fifth, Defendants argue that McGriff lacks standing because the PSAs say that he was not a co-curator of *I See You, Too*. However, McGriff had numerous other responsibilities for that installation, and, given his public role as co-producer of the entire ReFrame project, he has suffered reputational injury as a result of the City's act of censorship. McGriff Aff., ¶ 15 - 16.

B. <u>Plaintiff Guerrero has standing.</u> Defendants also argue that Plaintiff Guerrero lacks standing because she did not have a "sufficient stake or cognizable interest" in the *I See You, Too* exhibit and does not allege that she suffered an "injury-in-fact." ECF 21 p.10. However, Plaintiff Guerrero does allege that she was involved in the planning and execution of the *I See You, Too* exhibit, and alleges that she suffered reputational and psychological harm as a result of Defendant's unlawful censorship. ECF 9, *FAC* ¶¶ 33-34, 44.

C. **<u>Plaintiff Jackson has standing.</u>** Defendants argue that the artist who created "Memorial for Herisse" lacks standing to bring suit because "he has never requested that the City display his artwork, the City never denied such a request from him, and he and the City have not entered into any contractual agreements that might confer any rights upon him." ECF 21, p.10.

However, pursuant to the contract, the curators selected Jackson to produce a work of art, which, again, pursuant to the contract, they then exhibited. Jackson alleges reputational and psychological damage as a result of the City's unconstitutional action. It is not clear why it should make a difference whether or not he was the one who requested that his work be exhibited.

Defendants also argue Jackson lacks standing because the City obtained an ownership interest in the artwork produced under the PSAs, citing *Burke v. City of Charleston*, 139 F.3d 401 (4th Cir. 1998). However, Burke, who challenged a city's refusal to permit the display of his mural, had sold the mural to a private third party and suffered no injury by the City's action. The City of Miami Beach may have had the right to ownership of Jackson's painting, but, at the time of its takedown order, Jackson owned it and had a constitutional right under the PSA to exhibit it. The City's order infringed on that right and caused him injury.

D. Plaintiffs' claims are not moot. Defendants argue that the Plaintiffs' claims are moot because they arose out of an event that took place a year ago. While it is, of course, true that the Herisse painting can no longer be displayed at last year's event, injunctive relief that orders that it be displayed at a comparable public place will redress the injury plaintiffs suffered by the City's action.

As for Plaintiffs' damage claim, Defendants say that it is barred by the clause in the contract limiting liability clause for its breach. But, first, this is not an action for breach of contract, and, second, a limitation of liability clause in a contract cannot bar a court award under § 1983.

E. Plaintiffs' claims are ripe. Defendants also argue that this lawsuit should be dismissed because "Plaintiffs voluntarily covered the Herisse Memorial at the City's Request." Defendants argue that Plaintiffs "voluntarily" put up a sign informing the public that the City had required the removal of the painting, thus Plaintiffs acquiesced to the City's action and waived any claim for

damages. But it is clear from the Complaint (ECF 9, *FAC* ¶ 37) that the Plaintiffs were coerced into taking down the Herisse painting by the City's threat that the entire Lincoln Road installation would be closed down if they did not comply. ECF 9, *FAC* ¶ 6.

Defendants also argue that the claims of Plaintiffs Jackson, McGriff, and Guerrero are unripe because they did not make a separate independent request to the City to display Memorial for Herisse. However, no request was required under the contract or under the Constitution. The *I See You, Too* installation was approved by the City when it signed the contract that included the description of the installation, and no subsequent request to display any work after the City's censorship was required to present a claim pursuant to 28 USC 1983.

III. SINCE THE CONTRACT DID NOT REQUIRE THAT *I SEE YOU, TOO* CONVEY A PARTICULAR MESSAGE, THE ORDER TO TAKE DOWN THE HERISSE PAINTING BECAUSE OF ITS VIEWPOINT VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS

Plaintiffs agree with Defendants that the starting point for the disposition of this action is the "government speech" doctrine. (ECF 21, p. 13) We also agree with the City that, if the City, in authorizing the Reframe Miami project, required that the installations created by Plaintiffs convey a particular message, then there is no First Amendment claim. *Johanns* v. *Livestock Marketing Assn.*, 544 U.S. 550, 553, (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.") However, if, as Plaintiffs contend, the City did *not* require the *I See You, Too* installation to convey a particular message, then the Herisse painting was not government speech and the order to take down the Herisse painting because the Morales and the police were offended by its content was an act of viewpoint discrimination in violation of the First Amendment.

A. The Curators Were Not Required to Convey a City Message

The central issue in determining whether or not the Reframe project was government speech is whether was it created to convey a particular message. But nowhere in their government speech argument (ECF 21, p. 13-18) do Defendants ever identify what the purported message is that Plaintiffs were supposed to convey. The closest they come is to state that "the City's decision to not to display the Herisse Memorial at its *I See You, Too* event was government speech." ECF 21, p. 14. But a decision by the government to order that an artist's painting be taken down is an act of censorship, not an act of government speech, and it violates the First Amendment unless the government required that the painting convey a government-sponsored message. We still must know what message, if any, the artists were required to convey.

The only other clue in the City's brief about what government message the Plaintiffs were allegedly required to convey appears in the Facts section of Defendants' brief. In paragraph 2 of that section, (ECF 21, p.3) the City states that the purpose of the project was "to promote a unifying and positive message to change negative perceptions of the City." Two things are worth noting: first, no document is cited for that proposition. The language does not appear in the PSAs, nor, as far as we know, in any other document related to the project. Second, the City fails to mention what was said consistently in the City's publicity about the purpose of the project, which was namely to "spark crucial conversations" about race relations on Miami Beach. ECF 13-3, LTC 236-2019 Letter from Commissioner Morales to Miami Beach Commission re: Memorial Day Cultural Activations. One can only guess that maybe Defendants balked at making the improbable assertion that the City had invested tens of thousands of dollars in a project the purpose of which was to spark one-sided conversations.

The subsequent two paragraphs of the City's Facts recitation do quote phrases containing the words "positive" and "negative" (ECF 21, ¶¶3 - 4), but they are not from any of the City's public statements about the project, but rather from an exhibit to the contract setting forth the Scope of Services to be performed. Those words only appear in the descriptions of two of the five exhibits that were to be produced by Plaintiffs. ECF 13-1, p. 13. Importantly, neither of those words appear in the paragraph describing the *I See You, Too* exhibit. Accordingly, that installation was not required to convey any particular message. Since the *I See You, Too* installation was not required to convey a City message, the Herisse painting was not government protected by the First Amendment, and Defendant Morales's takedown order was unconstitutional.

B. Under The *Summum/Walker* Factors, The Herisse Painting Was Not Government Speech

Defendants cite two recent Supreme Court cases, *Pleasant Grove City v. Summum,* 555 U.S. 460 (2009) and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.,* 576 U.S. 135 (2015), which they call the "*Summum/Walker* "three part test," (ECF 21, p.14), for determining whether or not government subsidized speech is government speech. However, in reviewing the facts of this case, it is clear that none of factors constituting the three-part test support Defendants' contention that Plaintiffs' artistic works were government speech.

1. **The History Factor** The first factor obliges a court to look at the history of the kind of speech in question. It is true, as Defendants point out, that art has sometimes been commissioned to convey a government-sponsored message. ECF 21, p. 13-15. But, of course, there is an equally established tradition that art has been a vehicle for individual expression and fully protected by the First Amendment. *Cuban Museum of Arts & Culture v.Miami*, 766 F.Supp.1121, 1126 (S.D. Fl. 1991) ("plaintiffs' exhibition of art…is subject to the full protection of the First Amendment"). It

may be true, as in *Summum*, that monuments have a history of being commissioned by government to convey a particular message. And it may be true that art – such as public murals -- is sometimes commissioned by government for that purpose. But it certainly cannot be said of art, generally, that its history is one of conveying a government message. This factor, the history of artistic expression, tells us nothing about whether the painting at issue here is government speech.

2. **The Public Perception of Endorsement**. The City argues that the public would believe that the City had endorsed the message conveyed by Jackson's Herisse painting. ECF 21, p. 16. On its face, the argument, aside from the implausibility of the notion that anyone would think that the City had endorsed a message saying that its police had murdered someone, is implausible. In addition, the City points to nothing in the record that suggests the public would believe that the message conveyed by these art works is endorsed by the government. Furthermore, the art exhibit was not on public property. The City entered into an agreement whereby it was provided a license to occupy privately held land between May 6 and May 30, 2019. ECF 13-5, *Temporary License Agreement*. Even if this Temporary License Agreement somehow converted the event space into public property, the mere fact that the art was on public property does not imply that the government endorsed the viewpoints of the exhibits. Public property – the public streets, public colleges, plazas, auditoriums – is the scene of speech on a daily basis. The message is often hostile to the government. No one could seriously contend that the fact of its location on public property implied government endorsement of the message being conveyed.

The City argues that various aspects of the contract – that the City paid for the installations, retained control of them, leased the Lincoln Road venue, used a government email address – would lead "an informed observer" to conclude that the art works conveyed a government-endorsed

message. *Id.* But none of those things were known to anyone but the handful of people who saw the contract. What *was* known to the general public was that the installations were intended to "spark conversations" about race relations in Miami Beach. Conversations have at least two perspectives. The public surely did not believe that the City endorsed all of them.

3. **City Control Over the Message**. Defendants point to two provisions in the contract that gave the City control over the message being conveyed by the art installations. The first specifies that ownership of the work created under the contract would vest in the City. ECF 21, p. 17-18. But Defendants fail to explain why that implies City control over the message conveyed by the art. One can easily imagine a lease between the City and a curator that provides for the curator to display art at a City-owned facility and, in exchange, the City then becomes the owner of the art. There is no reason to infer from that fact alone that the City has controlled the message conveyed by the art. The same is true here.

The second provision concerns the City's power of "review and approval" of the installations. That provision, as we have explained previously, *supra*, at p.4, did not give the City any authority to review individual works of art, but rather was a vehicle for a collaborative process involving the curators and two City employees that permitted the City to review and approve a wide variety of matters relating to the installations, including venue, cost, publicity, staffing, and other matters. McGriff Aff., ¶ 9. At no time did the City employees ask to review any of the works of art to be exhibited, and thus did not approve or control any of their messaging.

Because the ReFrame project was not intended to convey a government message, and because the project satisfies none of the *Summum/Walker* factors, the Herisse painting was not government speech. Since it was taken down because its viewpoint offended Defendant Morales

and the police, the City's action violated the First Amendment. *Texas v. Johnson*, 491 U.S. 397 (1989) ("if there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea because society finds the idea itself offensive or disagreeable").

IV. EVEN IF PLAINTIFFS WERE CONSIDERED EMPLOYEES, THEIR ARTISTIC EXPRESSION WAS PROTECTED BY THE FIRST AMENDMENT

Defendants argue, alternatively, that this case is controlled by *Garcetti v. Ceballos,* 547 U.S. 410 (2006), which denies First Amendment protection to employees who speak pursuant to their job duties. *Id*. at 421. In other words, "speech that owes its existence to a public employee's professional responsibilities," *id.* at 421 and is a product that "the employer itself has commissioned or created," *id*. at 422, is not protected by the First Amendment. Defendants argue that since the quoted phrases describe the speech here, the order to take down the Herisse painting was not unconstitutional.

While it is true that those phrases describe the art here, they have no bearing on the disposition of this case. *Garcetti* is a case about the relationship between an employer and an employee, and the result was dictated by the fact that Ceballos' memo – the speech in question – was written pursuant to his "official duties." *Id. at* 421. When an employer hires an employee to speak, the Court says the employer has a right to dictate the message. "It simply reflects" the Court's desire to uphold "the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 422. As the Court noted, "Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Id.* at 422-23. *See also, Hubbard v. Clayton County Sch. Dist.*, 756 F.3d 1264, 1268 (11th Cir. 2014).

Seen that way, the Court is simply adhering to the principle of the government speech cases, which it cited in *Garcetti*. *Id.* ("*Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833 (1995) ('[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes')").The government speech cases, like *Garcetti,* ask the same question: was the speaker paid to "promote a particular policy." Since the City did not require that the *I See You, Too* installation convey a particular message. *Garcetti* does not apply to this case.[3]

Moreover, pursuant to the explicit terms of the PSA, Plaintiffs were "deemed to be an independent contractor, and not an agent or employee of the City." ECF 13-1, p. 1. Therefore, Defendants' claims that Plaintiffs public employees should be dismissed outright.

V. THE CONTRACTS' PROVISIONS FOR "APPROVAL" AND "SATISFACTION" DID NOT CONSTITUTE A KNOWING WAIVER OF THE PLAINTIFFS' FIRST AMENDMENT RIGHTS

The City has contended that the language in the contract providing for "review and approval" and "satisfaction" by the City Manager gave the City the power to order the removal of the Herisse painting. In effect, the City contends that those provisions constituted a waiver of the Plaintiffs' First Amendment rights.

As we discuss in the Statement of Facts, the "review and approval" and "satisfaction" provisions were mere boilerplate and were not ever discussed among the parties. In fact, the "review and approval" language did not even appear in the draft contract that the curators reviewed

[3] The City also argues that the removal of the Herisse painting was justified under "traditional forum analysis." ECF 21, p. 20. Leaving aside the fact that there is no evidence that the City created a forum of any kind, there is no case that permits government to discriminate on the basis of viewpoint in any kind of forum that it creates. *Perry Educ. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 437 (1983); *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995). Accordingly, the City's act of viewpoint discrimination in removing the Herisse painting violates the First Amendment under traditional forum analysis.

and was inserted in the final contract without any notice or explanation. Neither of the curators ever noticed those provisions. McGriff Aff. ¶ 5.

It is clear that, until the City Manager objected to the content of the Herisse painting, no one from the City took those boilerplate provisions seriously. There was never any process of formal approval either of the installations or the particular art works, but, rather, there was an ongoing and collaborative process in which the curators proposed, and the curators reviewed and approved, a variety of aspects of the installations, including cost, location, publicity, staffing and more(*Id.* at ¶ 9), everything but content.

Even if the City did intend that these provisions gave it content control over the art, given that the provisions were boilerplate and that they were never discussed by the parties, the provisions cannot be considered a knowing waiver of Plaintiffs' First Amendment rights.

The Supreme Court has consistently held that enforcement of a waiver requires evidence of "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458 (1938). *See also Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) ("We are unwilling to find waiver in circumstances which fall short of being clear and compelling."). It has directed courts to "indulge every reasonable presumption against waiver" of such rights. *Zerbst*, 304 U.S. at 464. *See also Johnson v. United States Dep't of Agriculture*, 734 F. 2d 774, 784 (11th Cir. 1984) ("Our precedent requires specific proof of a knowing and voluntary waiver of a right to due process.") (citing *Gonzalez v. City of Hidalgo*, 489 F. 2d 1043, 1046 (5th Cir. 1973)). Waiver depends upon the facts of a particular case, *United States v. Wynn*, 528 F.2d 1048, 1050 (5th Cir.1976), and "is good only if it is done in an informed manner." *Johnson v. United States Dep't of Agriculture,* 734 F.2d 774, 784.

The curators had no knowledge of the "review and approval" and "satisfaction" language in the contract when they signed it. And if they had, the language is so broad that it fails to satisfy the requirement that the language of a waiver be unambiguous. *See Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) ("[A] waiver of constitutional rights in any context must, *at the very least*, be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.") (emphasis added).

Given the facts surrounding the parties' agreement to the contract, and the vagueness of the language at issue, there can be no serious contention that the plaintiffs knowingly waived their First Amendment rights. Accordingly, the City Manager's order to remove the Herisse painting was unconstitutional.

Respectfully submitted,

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