BEFORE THE HON. RONALD J. LEIGHTON

IN THE UNITED STATE DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

LEONARD PELTIER, CHAUNCEY PELTIER,	**) CASE NO.: 3:17-cv-05209-RBL**
	) PLAINTIFFS' RESPONSE TO STATE
	) DEFENDANTS' MOTION FOR
Plaintiffs	**) SUMMARY JUDGMENT**
	)
v.	**)**
	) NOTED FOR MAY 25, 2018
JOEL SACKS, ET AL.,	**)**
_____	**)**

Plaintiffs hereby respond as follows to State Defendants' Motion for Summary Judgment. Defendants' Motion should be denied as discussed below as Defendants are incorrect that it is their First Amendment Right in question, not Plaintiffs', and because there are disputed issues of material fact and law as further discussed below.

I. INTRODUCTION

This is a case involving a dispute over whether Defendants had the right to take down paintings by Plaintiff Leonard Peltier from a public exhibition in a State-owned building open to

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

and accessed by the public for essential government services simply because he was and is a controversial figure personally and two individuals complained that his artwork was included. Caselaw makes clear that they do not.

II. STATEMENT OF RELEVANT FACTS

Leonard Peltier was an activist with the American Indian Movement, an organization targeted specifically under the FBI's COINTELPRO (Counter-intelligence program) aimed at destroying and undermining organizing by a host of progressive and radical groups and individuals. Targets of COINTELPRO included Martin Luther King, the Women's Movement of the late '60's and '70's, as well as the Black Panthers and American Indian Movement, and many others. The details of COINTELPRO, its illegality, and the harm it caused are amply documented in the Final Report of the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (Church Committee Report).

1974 two FBI agents drove onto the Pine Ridge Lakota Reservation in South Dakota ostensibly to investigate a supposedly stolen pair of boots, firing shots as they went. This occurred in the midst of a campaign of violence and terror carried out by then Tribal Chair Dick Wilson and his "GOON Squad" with the assistance of the FBI.

Members of AIM returned fire, and the two FBI Agents and one member of AIM were shot and killed.

The following year, Leonard Peltier was extradited from Canada based on false affidavits (See Globe and Mail, December 12, 2000) to face murder charges of the two agents after his co-

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

arrestees Bob Robideau and Dino Butler were acquitted based on self-defense in a trial in Cedar Rapids, IA.

Peltier's trial was moved to a less friendly venue (Fargo, N.D.) and the trial was replete with irregularities and statements by the Federal Prosecutors and their witnesses that later proved to be untrue.

Peltier was convicted and sentenced to two life terms plus seven years and has been in prison ever since (42 years), making him one of the longest held political prisoners in the world.

Since then, a prosecutor has admitted he has no evidence to prove Peltier guilty of murder, a key witness has admitted to being coerced into providing a false statement, others have confessed to firing the fatal shots, documents have shown the gun Peltier was said to be carrying doesn't match the ballistics found on the shots that killed those agents and a judge who heard the case has said he ought to be released. Despite all that, Peltier, now 70, continues to be held in a maximum security prison, while his parole hearings having come and gone. http://www.sfreporter.com/santafe/article-10814-painting-a-view-past-prison-walls.html#sthash.toO7X8eQ.dpuf

Despite his imprisonment, which poses numerous barriers, Mr. Peltier has made remarkable contributions to humanitarian and charitable causes.

Leonard Peltier has played a key role in getting people from different tribes, with a history of animosity, to come together in peace. He advocates for peaceful resolution of all issues that deal with Native Americans and respect for the rights of others.

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

Leonard Peltier has worked with Dr. Steward Selkin on a pilot program on the Rosebud Reservation, the Leonard Peltier Health Care Reform Package, to document needs and requirements for delivery and care. The ultimate intent of the program is to fundamentally alter health care delivery on reservations throughout the U.S.

He has worked with Professor Jeffery Timmons on a program to stimulate reservation-based economics and investments in Native American business enterprises, including a component to teach business ownership and operation to the young people of First Nations.

In 1992, Leonard Peltier established a scholarship at New York University 1 for Native American students seeking law degrees. He also was instrumental in the establishment and funding of a Native American newspaper by and for Native young people in Washington State. In addition to having raised two of his grandchildren from prison, Leonard Peltier has been a sponsoring father of two children through ChildReach, one in El Salvador and the other in Guatemala.

Every year, he sponsors a Christmas gift drive for the children of Pine Ridge. Peltier also serves on the Board of the Rosenberg Fund for Children.

Leonard Peltier organized an emergency food drive for the people of Pohlo, Mexico, in response to the Acteal Massacre. He also frequently contributes to Head Start programs and domestic violence shelters to help address funding shortfalls.

Peltier has helped several Indian prisoners rehabilitate themselves by advocating a drug- and -alcohol-free lifestyle while encouraging pride and knowledge in their culture and traditions.

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

He also has worked to develop prisoner art programs thereby increasing prisoners' self-confidence.

During his time in prison, Leonard Peltier has been the subject of a great deal of international attention and support but is not as well known in the US.

As a Federal prisoner, Peltier has extremely limited means of communication with the outside world-which is particularly important as his health deteriorates and he and his supporters attempt to gain a pardon or commutation of his sentence.

During the time of his incarceration, Peltier has become an accomplished artist garnering international acclaim.

"Painting is a way to examine the world in ways denied me by the United States justice system, a way to travel beyond the walls and bars of the penitentiary," he's quoted as saying on the website of the International Leonard Peltier Defense Committee. "Through my paints I can be with my people—in touch with my culture, tradition and spirit. I can watch little children in regalia, dancing and smiling; see my elders in prayer; behold the intense glow in a warrior's eye. As I work the canvas, I am a free man." http://www.sfreporter.com/santafe/article-10814-painting-a-view-past-prison-walls.html#sthash.toO7X8eQ.dpuf

His artwork can go to places he cannot, exhibitions in Portland, Santa Fe, London, etc., raising awareness of his case and demand for liberation as well as reflecting his artistic expression (See Defendants' Public Records Release to Plaintiffs, Install 1, Attached as Hildes Dec., Ex. 1, p. 139).

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

"More and more, as people become aware of his body of work, Peltier is being taken seriously as a fine artist. James Rutherford of Chiaroscuro Gallery on Canyon Road, one of the important Santa Fe galleries exhibiting extraordinary works of Native American arts, showed Peltier's oils at his former gallery — Copeland Rutherford — in the nineties." http://www.redwedgemagazine.com/online-issue/sovereign-imagination-peltier.

"The Peltier capture and incarceration story is an important through line in the ongoing narrative of colonization of Native peoples. As much as one might desire to assign him dual hats — a jaunty beret for artist, a feathered warbonnet for AIM freedom fighter — the identities are merged, and not readily separable; donning and doffing haberdashery is a privilege a man in Leonard Peltier's position does not possess. He has but one vulnerable hatless, head, and it's been on the chopping block for a very long time.

"I'm skipping ahead, but in the presence of the canvasses themselves one feels every brush stroke as a droplet of water that might cumulatively erode the walls and rust the bars that isolate him from most everything and everyone he holds dear. There's nothing casual or recreational or hobbyistic about his paintings: whatever else they are — aesthetically, symbolically, or discursively — stroke by measured stroke, each one is a quiet demand for personal liberation. http://www.redwedgemagazine.com/online-issue/sovereign-imagination-peltier.

And Peltier has used his artwork as a force for good:

Leonard Peltier donates his artwork to several human rights and social welfare organizations to help them raise funds. Most recently, recipients have included the American

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

Civil Liberties Union; Trail of Hope (a Native American conference dealing with drug and alcohol addiction); World Peace and Prayer Day; the First Nation Student Association; and the Buffalo Trust Fund.

In March 2010, Peltier organized an art benefit on behalf of earthquake victims in Haiti. *International Leonard Peltier Defense Committee, "The Humanitarian,"* https://www.whoisleonardpeltier.info/home/about-peltier/humanitarian/ (last visited on June 21 - 25, 2017).

In June of 2015, Brian Frisina, who works in the Library at the Department of Labor and Industries headquarters in Tumwater sought to display a collection of Indigenous (Native American) art in the rotunda of the L & I headquarters building for Native American Heritage Month (Hildes Dec, Ex. 1, pp. 1-3).

Frisina explained to the Director of L& I, Defendant Joel Sacks, who Leonard Peltier was and the controversy around him, and included links to the Leonard Peltier Defense Committee's website (Hildes Dec, Ex. 1, pp. 2-3).

There were discussions involving a number of staff at L & I, including Sacks and Defendant Tim Church, L & I's Public Affairs Director, and the exhibition was approved, including, specifically the four paintings by Peltier (Hildes Dec., Ex. 1, pp. 1-3, 8-11, 13-14; Ex.4-6).

Frisina arranged with Plaintiff Chauncey Peltier, Peltier's son and Director of the Leonard Peltier Art Gallery in Portland, OR, for the loan of four paintings for the exhibition (Hildes Dec., Ex. 4-6). The loan was expressly for exhibition in the entryway/rotunda of the

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

L & I Headquarters building, an area specifically open to and accessible by the public including, employers and workers seeking forms, required workplace posters, or information, workers seeking to file a claim, and other members of the public there for a number of reasons (Hildes Dec., Ex. 1, pp. 139-149).

The art exhibition was expressly intended to reach a public audience and Defendant Church and others at L & I discussed ways to do additional outreach to make the public aware of the exhibition. (Hildes Dec., Ex. 1, pp. 139-149).

The Washington Department of Labor and Industries regulates hours of work, overtime, enforces the minimum wage, enforces required breaks, oversees Occupational Safety and Health, protects workers' rights in the workplace, takes action in cases of wage theft, regulates and licenses a number of trades, professions, and industries, prints and has available required posters for workplaces, oversees the state Workers Compensation Program, and takes and administers claims in many of these areas.

The headquarters is open to the public for a host of purposes related to any and of the areas listed above as well as meetings and educational events (see https://www.lni.wa.gov).

Along with at least 133 comments supporting the inclusion of Leonard Peltier's artwork (Hildes Dec., Ex. 3, p. 144, 6th line from the bottom, "133 emails – requesting Leonard Peltier's art continue…") were three negative comments from former FBI agents who have made a point of opposing and trying to fight every book, every art exhibition, and every attempt by Peltier's legal team to have him granted a pardon, a sentence commutation, parole, or a new trial (see letters from Woods and Langberg, already before the Court from their dismissal motions).

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

At least one of them maintains a website specifically devoted to denying any relief to Peltier (*www.noparolepeltier.com/)*. A second one was disciplined for shaking down a congressmember to try and get salary increases for himself and other FBI Agents (Hildes Dec., Ex. 9, Los Angeles Times, June 14, 1988, *FBI looks into agents' lobbying of Gallegly*). Those individuals made knowingly false statements to L & I and to the media in order to intimidate and persuade L & I to remove Peltier's paintings (see Plaintiffs' Response to Defendants' Woods and Langberg's Motions to Dismiss).

There is no information that any of the three individuals actually saw the exhibition, ever saw artwork in question, and none of them live in Washington State. Former Defendant Woods lives in Ohio. Former Defendant Langberg lives in Southern California, and there is no public record of the third individual or his alleged organization other than a statement to the media allegedly made by him. There was a fourth who wrote a blog saying he was offended and who did include pictures of the exhibition, but all we know of him is his e-mail address and name.

These few objections prompted meetings and discussions at the highest level of L & I including Defendants' Sacks and Church and the Governor and his office (Hildes Dec., Ex. 1, pp. 1, 38-40, 64 (as examples of forwards made by Sacks), 41, 72, 123-125; Ex. 2, p.1; Ex. 3, pp. 18-19, 24-25, 44, 144 (see note above, p8: 17-18 of this motion)).

Based on the "controversy" raised by the four people with a specific personal agenda objecting to the mere presence of paintings by Peltier (there were no objections to the content of the paintings), Sacks, Inslee, and Church made the decision to remove Peltier's paintings half-way through the exhibition, solely because Peltier was controversial (Hildes Dec., Ex. 1, pp. 32-

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

33, 36, 37, 38-40, 62-63, 65, 70, 81-82 (these are all the same letter, all signed by Sacks and emailed from his email address; one was forwarded by Sacks to another employee from his phone); Ex. 2, pp. 1, 39 and 42; Ex. 7 and 8).

Sacks personally responded to the e-mailed complaints about the removal of the artwork, taking personal responsibility for the decision (*Ibid, Ex. 1 and 2*). In those statements and in the media and public statements by Church, the State Defendants made clear that the decision was based on who the artist was, not his artwork.

Chauncey Peltier, with some effort, was able to find a new exhibition space for the paintings: however, that exhibition space was at two grocery stores (the Olympia Food Co-op Westside and Eastside Branches) miles from the sight of the exhibition, where the clientele was already aware of and supported Peltier, thus depriving him of the opportunity to reach a new audience (*Ibid, Ex. 1 and 2*).

When members of the Board of the International Leonard Peltier Defense Committee and representatives for Leonard and Chauncey Peltier contacted Sacks and Inslee to try and resolve the situation, they were told it was irrelevant as the Exhibition had already ended, that the Olympia Co-op was just as good a venue (*Ibid, Ex. 1*), and insisted that the State had a right to ban an artist from an exhibition solely because of the political controversy surrounding that artist (Hildes Dec., Ex. 8).

A claim for damages and this action followed.

III. ISSUES PRESENTED

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

A. Whether this is government speech or the speech of the artist.

B. Whether in an exhibition where the art is not purchased by the government for display, but loaned by the artist for an exhibition, the artist has First Amendment Rights.

C. Whether this case involves a public forum.

D. Whether the government can move to exclude expression due solely to the identity of the artist/speaker.

E. Whether a small number of objections from the public justify removal of an artist's work from a public exhibition.

F. Whether non-Indigenous officials have the legal right to determine what is and is not a proper expression of Native American art or artists.

G. Whether government officials acting in their official capacity, under color of authority to make decisions about Free Expression are liable under a Monell theory.

H. Whether locating a commercial space that caters to a specific subset of the public for the art in question to be shown is sufficient to absolve the state actors of liability.

I. Whether Defendants knew or should have known that they would cause emotional distress to Plaintiffs and whether their conduct in doing so was sufficiently extreme and outrageous.

IV. EVIDENCE RELIED UPON

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

1) Documents produced by the Governor's Office and the Department of Labor and Industries in response to Public Records Act Requests.
2) Previous pleadings in this matter.
3) News Articles about the Incident.
4) Party Declarations and the Declaration of John Bean

V. LEGAL ARGUMENT

A. NECESSARY ADDITIONAL CASELAW ON SUMMARY JUDGMENT

Defendants cite cursory, incomplete and inaccurate standards for summary judgment. Therefore, Plaintiffs offer the correct standards herein herein:

A court must examine "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" to determine whether a summary judgment movant met the burden to "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A "material" fact could affect the outcome of the suit under the governing substantive law. Id. at 248; Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 987 (9th Cir. 2006).

The court cannot undertake "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts," except to view evidence in the light most favorable to nonmoving parties. Anderson, 477 U.S. at 255 ("The evidence of the non-movant is

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

to be believed, and all justifiable inferences are to be drawn in his favor." (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-58 (1970)). Summary judgment is inappropriate where any undisputed facts may reasonably lead to divergent inferences. Braxton Secret v. A.H. Robins Co., 769 F.2d 528, 531 (9th Cir. 1985).

Here, there are numerous disputed material facts and Defendants mis-cite and misstate the applicable law throughout.

B. DEFENDANTS MISSTATE THE STANDARDS AND BURDENS UNDER 1983

Defendants take an extremely narrow area of 1983 law (deliberate exposure by a government employee (police officer or social service worker to physical threat or harm by a third party) and try to claim that it's the general 1983 standard. In fact, both of the cases they cite for the deliberate indifference standard Kennedy and Tamas and all of the cases that cite to them, involve law enforcement officers informing a dangerous third party that Plaintiff has made statements or taken actions against them (Kennedy) or leaving minor children in the custody of a relative or step-relative of whom there are strong suspicions and warnings of abusing the children (Tamas). This is a very particular sub-set of §1983 caselaw where the state actor isn't personally inflicting the harm. It has nothing to do with the situation here where the harm caused is to the First Amendment Rights of Plaintiffs and is inflicted by Defendants and their staff directly.

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

The correct chain of caselaw goes back to Monell itself, where the legal precedent for §1983 claims against government agencies and their employees and officials was devised in the first place.

> "In *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978), the Supreme Court established that local governing bodies can be sued directly under 42 U.S.C. § 1983 for monetary, declaratory, or injunctive relief when action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. "Every person who ... *subjects, or causes to be subjected,* any ... person ... to the deprivation of rights ... secured by the Constitution ... shall be liable to the party injured." 42 U.S.C. § 1983 (emphasis added). *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 124-25 (2d Cir. 2004).
> Municipal liability may be based upon "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." *Monell*, 436 U.S. at 694. "This does not mean that the Plaintiff must show that the municipality had an explicitly stated rule or regulation." *Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995).

There is no deliberate indifference in that standard, and no application that Defendants can cite to, of an expansion of deliberate indifference into direct actions by state actors-that is a, with the specifically noted 3de party exception, a criminal not a civil standard.

Here, Sacks was and is the Director of L & I; Church is and was his Public Affairs Officer; and Inslee was and is the Governor of the State. Sacks and Church were directly involved in the decision to include Peltier's painting, despite full knowledge of the potential for

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

controversy, and all three were directly involved in the decision to remove the paintings because Peltier was “too controversial. Sacks writes e-mail after e-mail defending and taking ownership of his decision to have Peltier’s paintings removed, and they make clear that the removal is strictly because of the controversial nature of Peltier himself (See Exhibit 3, etc.).

The one things Defendants cite correctly is the Saucier v. Katz standard for qualified immunity and the fact that the court can start with either prong-Constitutional harm and notice.

The second prong of the qualified-immunity analysis asks whether the right in question was "clearly established" at the time of the violation. Hope v. Pelzer, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Governmental actors are "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Ibid. "[T]he salient question is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." Id., at 741, 122 S.Ct. 2508, 153 L.Ed.2d 666. Courts have discretion to decide the order in which to engage these two prongs. Pearson v. Callahan, 555 U.S. 223, 236 (2009). But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. See Brosseau v. Haugen, 543 U.S. 194, 195, n. 2, (2004) (per curiam); Saucier, supra, at 201, Hope, supra, at 733, n. 1. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S., at 249, 106 S.Ct. 2505, 91 L.Ed.2d 202. Summary judgment is appropriate only if "the movant shows that there is no

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); see also Anderson, supra, at 255, 106 S.Ct. 2505, 91 L.Ed.2d 202. Tolan v. Cotton, ___ U.S. ___, 134 S.Ct. 1861, (2014).

Here, as discussed below, Defendants violated Plaintiffs' First Amendment Rights by removing Leonard Peltier's paintings from a public art exhibition strictly due to the political controversy surrounding the artist. Further there is significant caselaw making clear that Defendants' actions were Constitutionally violative and that caselaw preceded the time of Defendants' actions. In addition, Plaintiff's counsel advised Defendants in writing that there was no legal justification for the removal of the paintings, citing the relevant case law and asking Defendants to rectify the harm that they had caused. Defendants refused continuing to cite Constitutionally invalid arguments in the face of the caselaw that disproved their arguments (see Exhibits 4-6).

C. THIS IS A CASE ABOUT INDIVIDUAL FREE SPEECH, NOT GOVERNMENT FREE SPEECH, AND THEREFORE PLAINTIFFS' FIRST AMENDMENT RIGHTS APPLY

Defendants incorrectly claim that this is actually an issue about the government's free expression. They are incorrect, and their cases are inapplicable.

Defendants rely on *NEA v. Finley*, 524 U.S. 569 (1998), *Serra v. United States General Services Admin.*, 847 F.2d 1045, (9th Cir. 1988), *Rosenberger v. Rector and Visitors of Univ. of VA*, 515 U.S. 819(1995), and by analogy, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

(2009), which even the government admits is not applicable, and only applies to permanent monuments erected to reflect the history of the town by the town itself.

NEA v. Finley applies only to cases involving government funding of artists by grants through the National Endowment for the Arts and, at numerous points throughout the opinion, the Finley court differentiates between government funding by grant, and exhibition of art. It points out that the government can make standards for what art to fund that it cannot make for what art to exhibit.

"Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria. that would be impermissible were direct regulation of speech or a criminal penalty at stake."
Natl. Endowment for the Arts v. Finley, 524 U.S. 569, 118 S.Ct. 2168, (1998)

Newton v. LaPage and *Serra* similarly are irrelevant, as they only apply, explicitly in the opinions, to art purchased by the government for display where the artist did not retain a contractual right to control how, when, and where the art was displayed.

"In this case, the speaker is the United States Government. "Tilted Arc" is entirely owned by the Government and is displayed on Government property. Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA; if he wished to retain some degree of control as to the duration and location of the display of his work, he had the opportunity to bargain for such rights in making the contract for sale of his work. Nothing GSA has done limits the right of any private citizen to say what he pleases, nor has Serra been prevented from making any sculpture or displaying those that he has not sold. Rather, the Government's action in this case is limited to an exercise of discretion with respect to the display of its own property. Though there are conceivably situations in which the Government's exercise of its discretion in this regard could violate the First Amendment rights of the public, see Board of Education v. Pico, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982), nothing GSA has done here encroaches in any way on Serra's or any other individual's right to communicate."
Serra v. United States General Services Admin., 847 F.2d 1045, (2d Cir., 1988)

Rosenberger actually supports Plaintiffs' position that the government cannot making decisions based on the politics or controversy about the subject.

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

"1. The Guideline invoked to deny SAF (Student Activity Funds) support, both in its terms and in its application to these petitioners, is a denial of their right of free speech. Pp. 828-837.

(a) The Guideline violates the principles governing speech in limited public forums, which apply to the SAF under, e. g., Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46-47. In determining whether a State is acting within its power to preserve the limits it has set for such a forum so that the exclusion of a class of speech there is legitimate, see, e. g., id., at 49, this Court has observed a distinction between, on the one hand, content discrimination— i. e., discrimination against speech because of its subject matter—which may be permissible if it preserves the limited forum's purposes, and, on the other hand, viewpoint discrimination— i.e., discrimination because of the speaker's specific motivating ideology, opinion, or perspective—which is presumed impermissible when directed against speech otherwise within the forum's limitations, see id., at 46. The most recent and most apposite case in this area is Lamb's Chapel v. Center Moriches Union Free School Dist.,508 U.S. 384, 393, in which the Court held that permitting school property to be used for the presentation of all views on an issue except those dealing with it from a religious standpoint constitutes prohibited viewpoint discrimination. Here, as in that case, the State's actions are properly interpreted as unconstitutional viewpoint discrimination Pp. 828-832.
Rosenberger v. Rector and Visitors of Univ. of VA, 515 U.S. 819 (1995)

So, this is not speech involving art owned by the government, nor about grant-writing priorities; it is a case about an art exhibition in a location open to the public, that contains government services that the public avails themselves of, where the public is encouraged to attend through press statements and other advertising.

There, the Freedom Expression rights of the artist control and are protected by the First Amendment.

The Supreme Court instructs us that, in assessing a First Amendment claim for speech on government property, "we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). If the forum is public, "speakers can be excluded . only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

Id. at 800, 105 S.Ct. 3439. If, on the other hand, the forum is nonpublic, the government is free to restrict access "as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.' " Id. (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Hopper v. City of Pasco 241 F.3d 1067 (9th Cir. 2001).

Here, as described above, the art was displayed in an area and facility readily open to the public, where the public was being encouraged to come, and it is therefore, a public forum, and a compelling state interest is required to justify restricting Plaintiffs' speech there.

Defendants then fall back on the argument that people were offended, and that this therefore detracts from the "intended message of the exhibition." First of all, nowhere in their pleadings do Defendants ever say what the "intended message" was. Secondly, it is a group of White people, with the exception of the person who suggested Peltier's art and invited him to submit it, determining what the proper message of an art exhibition devoted to American Indian art should be. Thirdly, they have not articulated how the controversy detracted from whatever message they thought it should have. The history of American Indians (First Nations people) is one of struggle against White colonialization of their land. One would be hard-pressed to find an exhibition of First Nations' art that either doesn't touch on that in some way, or at least involve artists who do.

In addition, the courts have a paucity of sympathy for the argument that Free Expression should be regulated in order to avoid offending the public.

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

"Another area in which the judicial treatment of free speech issues differs from that of religious expression issues involves the way in which courts accommodate the interests of the unwilling observer or listener. With speech cases, the listener is given very little consideration. In *Cohen v. California* 403 U.S. 15 (1971) where it was held unconstitutional for the state to convict a person for wearing a jacket plainly bearing the phrase "Fuck the Draft" in a courthouse, the Court rejected the notion that a state could regulate or restrict the use of vulgarity because of its offensive impact on objecting observers, even children. (fn76) And in *United States v. Playboy Entertainment Group, Inc*. 529 U.S. 803 (2000), the Court ruled that confining the Playboy Channel's sexually explicit programming to late-night hours posed too great a burden on the speech interests of the programmers, and that it was the duty of those offended by such programming to simply "avert[their] eyes.""

39 Wake Forest L. Rev. 361. INEQUALITY AMONG EQUALS: DISPARITIES IN THE JUDICIAL TREATMENT OF FREE SPEECH AND RELIGIOUS EXERCISE CLAIMS.

In fact, the Courts have found that protecting offending speech is the very purpose of the First Amendment.

"The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge v. Oregon,* 299 U. S. 353, 299 U. S. 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

"Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire*, supra,* pp. 315 U. S. 571-572, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *See Bridges v. California,* 314 U. S. 252, 314 U. S. 262; *Craig v. Harney,* 331 U. S. 367, 331 U. S. 373."

Terminiello v. City of Chicago, 337 U.S. 1 (1949).

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

Defendants try to get around this by arguing that isn't the paintings themselves, but the identity of the artist that justifies removal and censorship. The Supreme Court has decisively ruled this Unconstitutional.

> "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers, which] may be a means to control content. The Government may also commit a constitutional wrong when by law it identifies certain preferred speakers. There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead to this conclusion." *Citizens United v. FEC*, 558 U.S. 310, 312 (2010).

So, the government cannot remove art because the artist is disfavored, disliked, or controversial. The fact that his presence offends someone does not present a compelling, or even substantial state interest and is Unconstitutional.

And, those it doesn't matter, it is worth noting that based on the records the State produced, they only received three complaints about the artwork, all from former employees of an agency with a vested interest in maintaining a particular view of the incident at controversy in South Dakota, and none of whom had even visited the exhibition, seen the artwork, or even lived in Washington. They were offended by its mere existence. The law does not exist to ratify such censorship.

It's also worth noting that Defendants were aware in advance of the controversy, and Sacks and Church were directly involved in the discussions approving the inclusion of Peltier's paintings with full knowledge and then reacted with censorship when a few objections were made.

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

Having found a First Amendment violation, the analysis moves on to Notice. Citizens United has been well-known and much discussed caselaw since it came out in 2010, five years before Sacks, Church, Inslee, and those under them made the decision to remove Peltier's paintings from public display.

All of the other caselaw cited has been of record for a longer period of time, much of it for many decades, including the pivotal cases in First Amendment law.

Therefore, as a matter of law, Defendants were on notice of the Unconstitutionality of their actions and are thus not entitled to qualified immunity.

D. STATE CONSTITUTIONAL VIOLATION AND TORT CLAIMS ACT

Defendants cite cases that only apply where Plaintiffs have not filed a tort claim. Here Plaintiffs properly complied with the Tort Claims Act and presented a Claim for Damages, which was rejected by the State. So, Plaintiffs have availed themselves of that process. Furthermore, as to the State Constitutional Cause of action, even according to Defendants and their caselaw, it does allow for a declarative judgement that Defendants violated Plaintiffs' Right to Free Expression. For this cause of action, Plaintiffs would accept a finding of violation and an order to rehang the paintings, alone, or as part of a larger exhibition for the two weeks remaining of the month contracted for.

E. DEFENDANTS ARE LIABLE FOR THE TORT OF OUTRAGE

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

Here, Defendants acted with an extreme and cavalier attitude towards Plaintiffs' First Amendment Rights; as if Plaintiffs had none, and as if Defendants, all of whom are White could determine what American Indian Culture is.

They knew or should have known that removing and censoring Peltier's art would cause the Peltiers, especially Leonard who has precious few avenues to be heard, a great deal of emotional distress, as it did.

They aced with reckless disregard for that emotional distress and Plaintiffs' Constitutional Rights and allowed three people to exert a hecklers veto and be offended, sight unseen, by the very existence of Plaintiffs' free Expression.

A jury can and should find that this action by the State Defendants shocks the conscience and has sufficient evidence to find Defendants liable for Outrage.

F. NEGLIGENCE

Defendants owed Plaintiffs' a duty of reasonable care to not trample on their First Amendment Rights, trampled on that duty, and caused direct, foreseeable actual harm and are liable therefore.

VI. CONCLUSION

For all of the above reasons, and when examined in the light most favorable to Plaintiffs, this court should find that Defendants were personally involved in Unconstitutional depriving Plaintiffs of protected First Amendment Expression and caused the harms, Constitutional and tortious related thereto and deny Defendants Motion for Summary Judgment.

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

Respectfully Submitted:

Dated this 20th Day of May, 2018,

/s/ LAWRENCE A. HILDES

LAWRENCE A. HILDES WSBA #35035
P.O. BOX 5405
BELLINGHAM, WA 98227
(360) 715-9788
lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER

PROOF OF SERVICE

Lawrence A. Hildes certifies as follows:

I am over the age of 18 years, and not a party to this action. I am a citizen of the United States.

My business address is P.O. Box 5405, Bellingham, WA 98227

On May 21, 2018, I served the following documents(s) described as follows PLAINTIFFS' Response to State Defendants' Motion for Summary Judgment on the following persons(s) in this action at the following addresses:

Peter J. Helmberger Office of the Attorney General peterh@atg.wa.gov Attorney for Defendants Joel Sacks, Timothy Church, & Gov. Jay Inslee

By placing a true copy of the above documents in a sealed envelope with postage fully prepaid in the mail at Bellingham, WA, addressed to the person(s) above at the above

[X] By electronically serving, by filing an electronic copy with the court in such a way that notice will be sent to counsel for Defendants

[X] (FEDERAL) I declare under penalty of perjury that I am a member of the BAR of this court, and 27 that the above information is true and correct.

Executed on May 21, 2018, at Bellingham, Washington.

____/S/_____
Lawrence A. Hildes

LAWRENCE A. HILDES
P.O. Box 5405, Bellingham, WA 98227
Phone: (360) 715-9788, lhildes@earthlink.net
Attorney for Plaintiffs LEONARD AND CHAUNCEY PELTIER