The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LEONARD PELTIER, CHAUNCEY PELTIER, Plaintiffs, v. JOEL SACKS, individually and in his capacity as DIRECTOR OF the WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, et al., Defendants.	NO. 3:17-cv-05209-JCC REPLY IN SUPPORT OF STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Noting Date: January 22, 2021

I. INTRODUCTION

This Motion for Summary Judgment (Motion) centers on determining whether an artist's First Amendment interest in the display of his or her art is enforceable by the artist once the art is no longer owned by the artist. Plaintiff Leonard Peltier does not dispute the key factual grounding of State Defendants' Motion – the four paintings at issue were not owned by Mr. Peltier at the time they were displayed by the Washington State Department of Labor and Industries (LNI) for its Native American celebration. Indeed, Mr. Peltier expressly admits that he "transferred ownership" of the paintings to the International Leonard Peltier Defense Committee (ILPDC). Dkt. #79 at ¶ 41.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

Mr. Peltier presents no case law supporting his argument that an artist's First Amendment interest in the display of his art is enforceable by the artist after he transfers ownership of the art to another. Mr. Peltier fails to distinguish case law holding that an artist's First Amendment interests in a particular creation do not survive transfer of ownership. Whether the ILPDC could bring this action, as suggested by Mr. Peltier, is hypothetical at this point and beyond the scope of this Motion. However, as to this lawsuit there is no "case or controversy" between Mr. Peltier and LNI Director, Joel Sacks, over art that was not owned by Mr. Peltier.

II. ARGUMENT

A. Mr. Peltier Cannot Enforce First Amendment Interests over the Display of Art He Does Not Own

Mr. Peltier's attempt to distinguish the *Serra* decision misses the mark. *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988). In *Serra*, the artwork at issue was owned by the government and was removed from public display after complaints about the art were received. The artist's claim in *Serra* that his free speech rights were infringed by removing the art from display was not dismissed because the art in question was determined to be government speech, but because government owned the art – not the creating artist. The artist lacked standing to assert free speech interests relating to the display of art that he no longer owned. As stated by the *Serra* court:

> "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.

847 F.2d at 1050 (emphasis added).

The key aspect of the ruling in *Serra* is not in the identity of the purchaser, but in the fact that the artist relinquished his speech rights by selling the art. Ownership of the art is a necessary predicate for standing to assert a First Amendment claim arising from disputes over display of the art. *Id*. at 1050. Here, the government was not the purchaser of the art, but as in *Serra*, it is

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

undisputed that the artist was no longer the owner of the art when controversy arose over display of the paintings.[1]

Mr. Peltier makes no attempt to distinguish the Defendant's citation to *Burke v. City of Charleston*, 139 F.3d 401 (4th Cir. 1998). In *Burke*, an artist had been commissioned by the owner of a restaurant to paint a mural on the exterior of the building housing the restaurant. The art became the subject of extensive public controversy and ultimately the City of Charleston required the art to be covered up. *Id*. at 405. The artist filed suit against Charleston, but the building owner did not. The artist claimed his First Amendment rights were infringed by decision of the city to cover up his art. The court dismissed Burke's claim on the basis that standing for purposes of Article III's "case or controversy" requirement was not met because the artist's speech rights were relinquished when the art in question was sold to the restaurant owner. *Id*. As stated in *Burke*,

> We do not reach the merits of Burke's constitutional challenge because we find that Burke lacks standing to assert a First Amendment claim. Burke relinquished his First Amendment rights when he sold his mural to the restaurant owner, who alone has the right to *display* the mural. Thus, lacking a legally cognizable interest in the *display* of his work, Burke has not suffered an injury sufficient to satisfy the constitutional requirements for standing.

Id. at 401(emphasis in original).

Mr. Peltier presents no cases holding an artist retains First Amendment interests in the display of art that is no longer owned by the artist. Nor has Mr. Peltier cited to cases finding a constitutionally significant distinction between ownership acquired through a sale as opposed to ownership being acquired as a gift. Ownership is the linchpin of the analysis and it is undisputed that Mr. Peltier did not own the art that was removed from display in the LNI building. Under *Serra* and *Burke,* Mr. Peltier's First Amendment claim must be dismissed on the basis that he no longer has standing to assert free speech interests relating to the display of art that he does not own. In accord, *Mason v. State*, No. 87-2-08597-0 (The Twelve Labors of Hercules).

[1] In *Serra*, because the government has purchased the art and was publically displaying it, the Court noted that the art should be considered "government speech." 847 F.2d at 1050. Restrictions on government speech can involve some additional questions. *Id*. at 1050. Here, the art was not purchased by the government and has been determined not to have been government speech. Dkt. #54.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

B. The ILPDC Is Legally Distinct From Leonard Peltier

During the relevant time, the ILPDC was a lawfully registered advocacy organization with Chauncey Peltier, the Mr. Peltier's son, serving as Chair of the Board. Defendants do not dispute that the ILPDC is largely dedicated to gaining Mr. Peltier's release from prison and drawing attention to its belief that Mr. Peltier was wrongfully convicted. In addition to Mr. Peltier's cause, the ILPDC also advocates on behalf of others it considers to be political prisoners and various social justice causes. Nor do Defendants dispute that Mr. Peltier gives ownership of his art to the ILPDC to assist that organization in its advocacy for himself and any others advocated for by the ILPDC.

It is also undisputed that Mr. Peltier has never been member of the Board of the ILPDC and that all communication with the Defendants about the display of the art was between Chauncey Peltier, in his capacity as Chairman of the ILPDC Board, and LNI. Mr. Peltier further admits the ILPDC works with attorneys on behalf of him, but the organization itself does not serve as his legal counsel. Nor does Mr. Peltier present any argument or legal citations asserting that the ILPDC is his alter ego for any legal purposes.

Mr. Peltier's discussion of the mission of the ILPDC to advocate for his freedom and that of other alleged political prisoners is presented in a vacuum of case law. No authority is presented by him, and none has been found by Defendants, supporting the position that transferring ownership of art to an advocacy group allows the artist's First Amendment interests in the display of the art to survive the transfer of ownership when no other form of transfer has been shown to survive. Indeed, any artist might donate artwork to an advocacy group with the intent and purpose of that group to bring attention to the artist or to a cause supported by the artist. However, there is no authority that a transfer of ownership under that circumstance changes the analysis of standing for purposes of challenging an infringement of free speech rights for the display of the art. As explained in *Burke*, it is the owner of the art with standing to challenge government decisions impacting the display of the art and not the artist who has relinquished ownership. 139 F.3d at 401, 404-05. Here, the only entity with standing to challenge the removal

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
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of the art from the LNI display would have been the ILPDC as the owner of the art and the only entity that communicated with the State regarding display of the art.[2]

C. This Motion Does Not Raise Arguments Previously Ruled on by Judge Leighton

Mr. Peltier does not dispute the Defendants' knowledge that the art in question was owned by the ILPDC, not by Mr. Peltier and was learned through answers to discovery supplied by Mr. Peltier on April 3, 2019. Dkt. #74-1 at p. 10. Discovery of this fact was nearly nine months after Judge Leighton's July, 16, 2018, Order on Motion for Summary Judgment. Dkt. #54. An absence of standing goes to the subject matter jurisdiction of the court and can be raised at any time, and on motion for summary judgment the plaintiff must affirmatively appear in the record. *Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1140 (9th Cir. 2013).

In its previous Motion, Defendants argued that the artists and various displays invited for LNI's celebration of Native American heritage were part of the State's event and hence the displays were the State's speech. Dkt. #54 at p. 2 lns. 19-20. Judge Leighton rejected the argument that the displays were government speech. Dkt. #54. However, the legal impact of the art not being owned by Mr. Peltier was not presented to the Court.

III. CONCLUSION

The case law bearing on this Motion uniformly instructs that it is the owner of art that has standing to challenge restrictions on the display of the art and the artist relinquishes his free speech rights when ownership is transferred. *Serra*, 847 F.2d at 1050. Here, that critical and dispositive fact is undisputed. Ownership of the art in question had been transferred from the Mr. Peltier to the ILPDC. It is that organization, not Mr. Peltier, which may have had standing to bring an action for interference in its display of the paintings. *Burke,* 139 F.3d at 401. Accordingly, Defendants are entitled to summary judgment.

[2] Whether a timely challenge by the ILPDC would have been constitutional or contractual in nature is beyond the scope of this Motion.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

DATED this 22nd day of January, 2021.

ROBERT W. FERGUSON
Attorney General

/s/ Rene D. Tomisser
RENE D. TOMISSER, WSBA #17509
Senior Counsel
Attorney for State Defendants

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will send notification of such filing to all counsel of record.

Lawrence A. Hildes
LAW OFFICES OF LAWRENCE A. HILDES
P.O. Box 5405
Bellingham, WA 98227
(360) 715-9788
lhildes@earthlink.net
Attorney for Plaintiffs

DATED this 22nd day of January, 2021, at Olympia, Washington.

/s/ Rene D. Tomisser
RENE D. TOMISSER, WSBA #17509
Senior Counsel