



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Northern
California

June 23, 2022

Via Email

Michael Lambert, City Librarian
San Francisco Public Library
100 Larkin St.
San Francisco, CA 94102
citylibrarian@sfpl.org

Re: Canceled Exhibition of the *Wall + Response* Project

Dear Mr. Lambert:

I write on behalf of the American Civil Liberties Union of Northern California (“ACLU NorCal”) regarding the decision by the San Francisco Public Library to cancel an exhibition entitled *Wall + Response* based on the viewpoint expressed in the *Arab Liberation Mural*, scheduled to be featured in the exhibition. The decision raises serious First Amendment concerns. Public libraries play a special role in the education of community members and the free exchange of diverse ideas and information. That role is severely undermined when a library devalues certain viewpoints over others. I urge you to rescind your decision to cancel the *Wall + Response* exhibition and to instead use the exhibition as an opportunity to foster open dialogue about the perspectives expressed in the *Arab Liberation Mural*.

A. The library required that the *Arab Liberation Mural* be removed or photoshopped in order for the *Wall + Response* exhibition to go forward.

It is my understanding that the *Wall + Response* exhibition originally was scheduled to open at the San Francisco Public Library on March 12, 2022, with public programming through summer. The exhibition would have presented the two-year project entitled *Wall + Response*, which was a collaboration between local poets and the Clarion Alley Mural Project (“CAMP”), featuring poems responding to the political, social, and racial justice narratives depicted in four murals in San Francisco’s famed Clarion Alley. The murals and poems address pressing issues

American Civil Liberties Foundation of Northern California

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such as police brutality, affordable housing, inequality, and resilience, as well as the legacies of both the Black Panthers and six Arab leaders.

From the outset, the *Wall + Response* curators made clear which murals and poems were included in the project. CAMP's May 2021 exhibition application, for example, described the nature of the collaboration and included the titles of the four murals, which were—and remain—easy to view in public and on CAMP's website. It is my understanding that in response to that application, a representative of the San Francisco Public Library was extremely positive and wrote in an email to the *Wall + Response* curators that “we HAVE to do this [exhibit].” The library accepted the proposal and, starting in November, the *Wall + Response* curators worked with the San Francisco Public Library to prepare for the exhibition. Among other things, the library and the curators worked together on the layout of the exhibition and on publicity. The exhibition would have featured large “broadsides” or posters including an introduction to the *Wall + Response* collaboration, images of the four murals, signed poems, biographies of the participants, and imagery documenting the collaborative process. The exhibition also would have included live poetry readings and a discussion between participants.

It is my understanding that the San Francisco Public Library did not express any concern about the contents of the exhibition until approximately one week before the exhibition was to open. Only then did the library demand that the *Wall + Response* exhibition go forward without the *Arab Liberation Mural*. In a follow-up email, a representative of the library offered as a “concession” that the exhibition could go forward only if at least some of the images of the *Arab Liberation Mural* be photoshopped. In particular, the library reportedly took issue with the phrase, “Zionism is racism,” which is written on one of four protest signs rising above a crowd depicted in the bottom third of the mural.¹ I understand that, in email communications with the *Wall + Response* curators, the library representative described this phrase as being “offensive” and having “the potential to incite a public controversy.” And while professing to be “open to . . . a panoply of viewpoints on a wide range of topics,” the library purported to “draw the

¹ See *Arab Liberation Mural*, CAMP (Nov. 13, 2017), <https://clarionalleymuralproject.org/mural/arab-liberation-mural/> (last accessed June 23, 2022). Inexplicably, the library representative claimed in her email that the library had not been “able to discern certain details” in the mural until that time. But again, the May 2021 application specifically listed the four featured murals, which were easy to view in person and on CAMP's website. And the library's exhibition director and exhibition designer both had been working with the *Wall + Response* curators for months. In fact, I understand that the exhibition designer even suggested moving the *Arab Liberation Mural* to a more prominent location in the exhibition because of its vertical orientation.

line” at speech that the library perceives to “negatively target any specific race/ethnic community.”

B. The First Amendment bars the library from discriminating based on the viewpoint expressed in the *Arab Liberation Mural*.

It appears that the San Francisco Public Library is engaging in viewpoint discrimination by refusing to proceed with the *Wall + Response* exhibition because it disapproves of the political message contained in the *Arab Liberation Mural*. The First Amendment does not tolerate such discrimination.

Core political speech, including expressions of ideology and issue-based advocacy, represents “the essence of First Amendment expression.”² Such speech, including in the form of art, can express controversial and provocative ideas that are nonetheless fully protected by the First Amendment.³ As the U.S. Supreme Court has long emphasized, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”⁴ This is because “in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.”⁵

The *Arab Liberation Mural* addresses important issues of political and public concern related to Israel’s treatment of Palestinian citizens and refugees through imagery and text that enjoy full constitutional protection. That protection is not undermined by the possibility that

² See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995).

³ *Id.* (“[T]he speech in which [the plaintiff] engaged—handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression. . . . No form of speech is entitled to greater constitutional protection[.]”); see also *Snyder v. Phelps*, 562 U.S. 443, 458–59 (2011) (holding that even highly controversial speech on matters of public concern is entitled to full First Amendment protection); *id.* at 435 (“The arguably ‘inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.’”) (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)).

⁴ *Id.* at 458 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)); see also *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (reiterating “bedrock First Amended principle” that “[s]peech may not be banned on the ground that it expresses ideas that offend”).

⁵ *Snyder*, 562 U.S. at 458 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)) (alteration in original).

some viewers may feel uncomfortable due to the message of the work.⁶ While ACLU NorCal takes no position on the mural's underlying political message or viewpoint, it has long defended all speech protected under the First Amendment.

The constitutional problem with the decision to cancel the exhibition remains regardless of whether the San Francisco Public Library is considered a designated public forum or a limited public forum.⁷ There are good reasons to think the library is the former, given that it frequently and intentionally opens itself up to the expressive activity of private parties putting on exhibitions and events.⁸ The Ninth Circuit's decision in *Hopper v. City of Pasco* is instructive.⁹ In that case, the court concluded that a city turned its city hall into a designated public forum by exhibiting works by local artists.¹⁰ And because the city hall was a designated public forum, the city violated the First Amendment when it took down art later deemed to be too controversial. As the Ninth Circuit explained, the "mere fact that the works caused controversy is, of course, patently insufficient to justify their suppression" or to satisfy strict scrutiny.¹¹

But even if the San Francisco Public Library's exhibition spaces are deemed to be a limited public forum, where the government has more flexibility to regulate speech, the First Amendment still mandates that restrictions on speech in such places be reasonable and viewpoint

⁶ See, e.g., *id.* at 454, 456 (recognizing First Amendment rights of Westboro Baptist Church and its members to stage anti-homosexual demonstration near service member's funeral and to display signs such as "Thank God for Dead Soldiers" and "You're Going to Hell"); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977) (per curiam) (recognizing First Amendment rights of Neo Nazis seeking to march with swastikas and to distribute anti-Semitic materials in predominantly Jewish community); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (recognizing First Amendment rights of Ku Klux Klan members to advocate for white supremacy-based political reform achieved through violent means).

⁷ See *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (courts apply "forum based" approach to government regulations of private speech on government property).

⁸ See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 466 (2009) (The government "may create 'a designated public forum' if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose.").

⁹ 241 F.3d 1067 (9th Cir. 2001).

¹⁰ *Id.* at 1078–81.

¹¹ *Id.* at 1081.

neutral.¹² In these circumstances, the San Francisco Public Library is not permitted to open its space, approve the exhibition of four specified murals and responsive poetry, and then—on the eve of the exhibition—demand that only three of the murals be shown in their original form because the fourth mural’s perceived viewpoint is deemed to be too controversial or offensive.

C. The *Wall + Response* exhibition is not government speech.

The San Francisco Public Library cannot avoid the prohibition on viewpoint discrimination by claiming its exhibition spaces are nothing more than a venue for government speech.¹³ The Supreme Court has emphasized that the government-speech doctrine is narrow because it is “susceptible to dangerous misuse”¹⁴: “when a government claims that speech by one or more private speakers is actually government speech . . . , it can be difficult to determine whether the government is using the doctrine ‘as a subterfuge for favoring certain private speakers over others based on viewpoint.’”¹⁵

Under the “holistic inquiry” used “to determine whether the government intends to speak for itself or to regulate private expression,”¹⁶ the *Wall + Response* exhibition should be considered private speech. The overall focus of this inquiry is “the public’s likely perception as to who . . . is speaking.”¹⁷ This analysis assumes a “reasonable and fully informed observer.”¹⁸

¹² See *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 908 (9th Cir. 2007) (holding that plaintiffs were likely to show that public library’s meeting rooms constituted limited public forum because they were open for some, but not “unlimited,” public expression and explaining that restrictions on use of meeting rooms must be reasonable and viewpoint neutral), *abrogated on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

¹³ See *Pleasant Grove*, 555 U.S. at 467 (“The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”).

¹⁴ *Matal*, 137 S. Ct. at 1758.

¹⁵ *Shurtleff v. City of Boston, Mass.*, 142 S. Ct. 1583, 1595 (2022) (Alito, J., concurring) (quoting *Pleasant Grove*, 555 U.S. at 473).

¹⁶ *Shurtleff*, 142 S. Ct. at 1589.

¹⁷ *Id.*; *Pleasant Grove*, 555 U.S. at 471; see also *Eagle Point Edu. Assoc./SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097, 1103 (9th Cir. 2018) (“focus” of doctrine is “whether a reasonable observer would view the statement [in question] to be a statement by the government”).

¹⁸ *Pleasant Grove*, 555 U.S. at 487 (Souter, J., concurring).

Here, members of the public likely interpret the temporary exhibitions at the library to represent the messages of the artists, authors, and other presenters—not the San Francisco Public Library. For example, the library puts on a number of community events, exhibitions, and speaker series on a wide range of topics, but a reasonable viewer would not interpret the library to be adopting each position conveyed in exhibitions like *Monsters & Heroes*, which focuses on political graphics from the San Francisco Poster Syndicate, or promoting a specific religion when presenting a talk on “Images of Buddhism.”¹⁹ In addition, the planned *Wall + Response* exhibition was to feature the biographies of the artists and poets involved in the project as well as photographs taken over the course of the two-year collaboration. Such information makes clear that the library serves as facilitator, not speaker. Moreover, an informed observer would know that the library’s exhibition guidelines emphasize that the library “does not advocate or necessarily endorse the viewpoints of exhibitions or exhibitors.”²⁰ With this context and knowledge, a reasonable observer would recognize that the library has provided a forum for a series of diverse, private speakers to convey their own messages and to contribute to the vital exchange of ideas that libraries serve to foster.

Among other things, the holistic inquiry also considers the “extent to which the government has actively shaped or controlled the expression.”²¹ While the library’s exhibition guidelines purport to reserve to the library final authority over the selection, arrangement, and contents of exhibitions, the mere existence of such a policy is not dispositive. Rather, the library must consistently exercise control over content in order to transform private speech into government speech.²² For example, in *Shurtleff v. City of Boston*, the Supreme Court emphasized that while Boston maintained control over the date and time of flag raising events at city hall, it did not exert “control over the flags’ content and meaning,” which would have “indicate[d] that Boston meant to convey the flags’ messages.”²³ Here, too, there is no indication that the library

¹⁹ See *Monsters & Heroes: Political Graphics from the San Francisco Poster Syndicate*, San Francisco Public Library, <https://sfpl.org/exhibits/2021/10/30/monsters-heroes> (last accessed June 23, 2022); *Presentation: Mind and Form: Images of Buddhism*, San Francisco Public Library (June 14, 2022), <https://sfpl.org/events/2022/06/14/presentation-mind-and-form-images-buddhism> (last accessed June 23, 2022).

²⁰ *Exhibitions Guidelines*, San Francisco Public Library, <https://sfpl.org/services/exhibits-programs/exhibitions-guidelines> (last accessed June 23, 2022).

²¹ *Shurtleff*, 142 S. Ct. at 1589.

²² See *id.* at 1592; see also *Hopper*, 241 F.3d at 1075, 1078 (“What matters is what the government actually does[.]”).

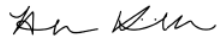
²³ *Shurtleff*, 142 S. Ct. at 1592.

means to convey exhibitions' messages as its own speech because there is no indication that, in practice, the library exerts control over exhibitions' content and meaning. Rather, it is my understanding that, once a proposed exhibition is accepted,²⁴ the library's exhibition designers generally work with the proponents of an exhibition on logistics like layout, publicity, and programming materials but do not propose substantive changes to the exhibitions themselves. This practice makes sense given that the contents of an exhibition often are final by the time it is proposed and accepted, as was the case with *Wall + Response*.

* * *

Based on the foregoing context and practice, the San Francisco Public Library appears to facilitate private speech through its exhibitions, not promote its own messages. As such, the library cannot discriminate against the viewpoints it perceives to be expressed in the artwork and speech of featured exhibits. Regrettably, the library seems to have engaged in just this type of discrimination when it decided at the last minute to remove or revise the *Arab Liberation Mural*. I therefore urge you to rescind your decision to cancel the *Wall + Response* exhibition. Instead of cancelling what the library perceives to be a controversial exhibition, I urge you to use the exhibition as an opportunity, consistent with the library's role as a center for information and learning, to welcome diverse perspectives and foster open dialogue about the viewpoint expressed in the *Arab Liberation Mural*. If you would like to discuss this matter further, please contact me at hkieschnick@aclunc.org.

Sincerely,



Hannah Kieschnick
Staff Attorney
ACLU Foundation of Northern California

cc: Kate Patterson, Director of Communications, kate.patterson@sfpl.org

²⁴ Moreover, the Supreme Court has expressly declined to hold that an application or permitting process transforms private speech into government speech. *See, e.g., Matal*, 137 S. Ct. at 1758 (“If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.”).