64 F.Supp.2d 184
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United States District Court,
E.D. New York.
THE BROOKLYN INSTITUTE OF ARTS AND SCIENCES, Plaintiff,
v.
THE CITY OF NEW YORK and Rudolph W. Giuliani, individually and in his official capacity as Mayor of the City of New York, Defendants.
No. 99 CV 6071.

Nov. 1, 1999.

Opinion and Order

GERSHON, District Judge.

The Mayor of the City of New York has decided that a number of works in the Brooklyn Museum's currently showing temporary exhibit "Sensation: Young British Artists from the Saatchi Collection" are "sick" and "disgusting" and, in particular, that one work, a painting entitled "The Holy Virgin Mary" by Chris Ofili, is offensive to Catholics and is an attack on religion. As a result, the City has withheld funds already appropriated to the Museum for operating expenses and maintenance and, in a suit filed in New York State Supreme Court two days after the Museum filed its suit in this court, seeks to eject the Museum from the City-owned land and building in which the Museum's collections have been housed for over one hundred years.

The Museum seeks a preliminary injunction barring the imposition of penalties by the Mayor and the City for the Museum's exercise of its First Amendment rights. The City and the Mayor move to dismiss the Museum's suit in this court, insofar as it seeks injunctive and declaratory relief, on the ground that this court must abstain from exercising jurisdiction in favor of the New York court action, in which, they argue, the Museum may assert, by way of defense and counterclaim, its First Amendment claims. For the reasons that follow, defendants' motion is denied, and plaintiff's motion is granted.

BACKGROUND

An examination of the history of the Brooklyn Museum and its relationship to the City of New York will illuminate the current controversy.

I. The History of the Brooklyn Museum

...

The Museum today describes itself as having the second largest art collection in the United States, with approximately one and a half million objects. Its collections are divided into the following departments: (1) Egyptian, classical and ancient middle eastern art; (2) painting and sculpture; (3) arts of Africa, the Pacific and the Americas; (4) Asian art; (5) decorative arts, costumes and textiles; and (6) prints, drawings and photography. The Museum also has two research libraries and an archive. The Museum's permanent collection includes secular as well as numerous non-secular objects. Materials submitted to the court confirm the following description by the Museum's Chief Curator: "The collections include Catholic and Protestant religious works of art, Jewish religious objects, objects representing many Eastern religions, African spiritual objects, native American tribal objects, pre-Colombian objects, Islamic religious objects, as well as religious objects from numerous other cultures." These include many paintings and other objects which are reverential of the Madonna and other figures and symbols important to Christianity.

In addition to displaying works from its permanent collection to the public, the Museum regularly mounts temporary exhibits, and has done so throughout its history. Some of these exhibits involve well-known artists and their works. Others display little-known artists or obscure or esoteric works. The current temporary exhibit, "Sensation: Young British Artists from the Saatchi Collection" (the "Sensation Exhibit" or the "Exhibit") is not the first controversial exhibit the Museum has mounted. Past controversial exhibits include art and performance exhibits in 1990 and 1991, respectively entitled, "The Play of the Unmentionable: The Brooklyn Museum Collec-

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tion," and "Too Shocking to Show," which, to judge from contemporaneous news articles and materials prepared by the Museum, were provocative responses to protests over exhibits and performances at other institutions. Neither party to this litigation is aware of any past objection by the City to any Museum exhibit, or any prior effort by the City to stop an exhibit because of the content of any works included.

Undisputed documentary evidence establishes the Museum's commitment, throughout its history and continuing to date, to extensive educational programs for children, teachers, families, members of surrounding communities, and the general public. The Museum's Education Division serves over fifty thousand children and thirty-five thousand adults each year, with a staff of twenty-six full-time employees, nine full-time paid interns, thirty-five part-time instructors, and forty volunteer tour guides.

II. City Funding of The Brooklyn Museum

The Contract provides that "[the City] shall pay to the [Institute] each year such sum as may be necessary for the maintenance of said Museum Building, or as may be authorized by law or be apportioned or appropriated by [the City]." …

Consistent with the applicable statutes, the Lease, and the Contract, as well as with historical practices, the City's Procedures Manual specifies that public funds are provided to designated cultural institutions to help meet costs for general maintenance, security and energy, and in some instances to support education programs. … The City's Fiscal Year 2000 appropriation of approximately $5.7 million to the Museum specifies that the funding contributes to "maintenance, security, administration, curatorial, educational services and energy costs." The City was not asked to fund the controversial exhibit giving rise to this action. …

III. The Controversy over the Sensation Exhibit

The Sensation Exhibit was first shown in 1997 at the Royal Academy of Art in London, where it drew record crowds for a contemporary art exhibit and generated controversy and some protest demonstrations. The Brooklyn Museum's Director, Arnold Lehman, viewed the Exhibit in London and decided to attempt to bring it to New York after its scheduled showing at a museum in Berlin. The Exhibit includes approximately ninety works of some forty contemporary British artists, a number of whom have received recognition by the artistic community. Chris Ofili, Damien Hirst, and Rachel Whiteread, for example, have received the Turner Award from the Tate Gallery. After being shown in Brooklyn, the Exhibit is scheduled to be shown at the National Gallery of Australia, and the Toyota City Museum outside of Tokyo.

Mr. Lehman's efforts to bring the Exhibit to Brooklyn continued through 1998, and plans were finalized in April 1999. Mr. Lehman, starting in 1998, kept the Museum's Board of Trustees informed of his efforts, and of the Exhibit's controversial nature. The Mayor of the City is an *ex officio* member of the Board, but his representative did not attend certain meetings at which the Exhibit was discussed, although minutes of the meetings were sent to him. The Commissioner of the City's Department of Cultural Affairs, Schuyler Chapin, also is an *ex officio* member of the Board of Trustees. His designated representative did attend meetings regularly and receive minutes of Board meetings. On or about March 10, 1999, Mr. Lehman gave Commissioner Chapin a copy of the catalog for the Exhibit and discussed its content. The catalog includes photographs and descriptions of virtually all of the works in the Exhibit, including every work that the City now finds objectionable. For example, it contains a full page color photograph of "The Holy Virgin Mary" and a description of the materials of which it is made, including elephant dung. On or about April 6, 1999, Mr. Lehman sent letters to members of the Board of Trustees, including Commissioner Chapin and other public officials, stating that the Exhibit was controversial, and he set forth the Museum's plans to charge an admission fee for the Exhibit and to require that all children be accompanied by an adult. The letters specifically described the work of the artist Damien Hirst, recognized "for his sections of various animals (sharks, lambs, etc.) individually preserved and presented in sealed, formaldehyde-filled glass containers." The Museum issued a similar press release on about the same date. A *New York Times* article on April 8, 1999, entitled "British Outrage Heads for Brooklyn," described

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reactions of shock and condemnation, together with protests, that the Exhibit had generated in London, as well as accusations by detractors that the Exhibit promoted the commercial interests of Charles Saatchi, owner of all of the works in the Exhibit. The article described some of the controversial works in the Exhibit, including that of Hirst.

Commissioner Chapin, in a letter dated April 14, thanked Mr. Lehman for his “fascinating letter” about the Exhibit, which, he wrote, seemed designed to “shake up New York's art world.” Commissioner Chapin voiced no objection to the Museum's planned admission policies and promised to convey “any thoughts about funding he might have.” There is no evidence that the Mayor himself was personally ***191** aware of the specific contents of the Exhibit.

The Exhibit was scheduled to open to the public at the Museum on October 2, 1999. City officials first began raising objections to the Exhibit on September 22. On that date, Commissioner Chapin, stating that he was acting on behalf of the Mayor, advised Mr. Lehman by telephone that the City would terminate all funding to the Museum unless it canceled the Exhibit. Commissioner Chapin specifically referred to the fact that the Mayor found objectionable “The Holy Virgin Mary” by Chris Ofili. (All of the five Ofili works in the Exhibit use elephant dung together with other materials. In addition, on the painting entitled “The Holy Virgin Mary,” there are small photographs of buttocks and female genitalia scattered on the background.) The Mayor explained his position publicly that day, taking particular exception to “The Holy Virgin Mary.” The Mayor stated that this work “offends me” and “is sick,” and he explained his decision to terminate City funding as follows:

You don't have a right to a government subsidy to desecrate someone else's religion. And therefore we will do everything that we can to remove funding from the [Museum] until the director comes to his senses. And realizes that if you are a government subsidized enterprise then you can't do things that desecrate the most personal and deeply held views of the people in society.

The Mayor also referred to a Hirst work of two pigs in formaldehyde as “sick stuff” to be exhibited in an art museum.

The following day, the Mayor accused the Museum of violating the Lease by mounting an exhibit which was inaccessible to schoolchildren and by failing to obtain his permission to restrict access to the Exhibit, which he made clear he would not give because of his view that taxpayer-funded property should not be used to “desecrate religion” or “do things that are disgusting with regard to animals.” In a letter from New York City Corporation Counsel Michael D. Hess to Mr. Lehman, dated September 23, 1999, Mr. Hess stated that “[t]he Mayor will not approve a modification of the Contract to allow [the Museum] to restrict admission to the museum. In light of the fact that [the Museum] has already determined that it would be inappropriate for those under 17 years of age to be admitted to the exhibit without adult supervision (a determination with which the City does not disagree), [the Museum] cannot proceed with the exhibit as planned.”

The Mayor and other senior City officials continued, and escalated, their attacks on the Exhibit and their threats to the Museum, vowing to cut off all funding, including construction funding, to seek to replace the Board of Trustees, to cancel the Lease, and to assume possession of the Museum building, unless the Exhibit were canceled. …

In response to the City's threats, including explicit statements by senior officials that the City would withhold its monthly payment of $497,554 due on October 1, 1999, the Museum commenced this action against the City and the Mayor on September 28,1999, pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief, to prevent the defendants from punishing or retaliating against the Museum for displaying the Exhibit, in violation of the Museum's rights under the First and Fourteenth Amendments, including cutting off funding, terminating the lease, seizing the building or attempting to fire the Board of Trustees. The City has in fact withheld the scheduled October payment to the Museum. Plaintiff filed an amended complaint on October 1, 1999, adding claims for damages against the defendants, and claims of violation of the Equal Protection Clause and state and local law.

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Meanwhile, on September 30, 1999, shortly before a conference scheduled by this court began, the City filed an action for ejectment against the Museum in New York State Supreme Court, Kings County. On the basis of that suit, the City invoked the abstention principles of *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and asked this court to dismiss plaintiff's claims for injunctive and declaratory relief. …

ABSTENTION: THE MOTION TO DISMISS

[1] The City and the Mayor seek dismissal of this action, insofar as it seeks injunctive or declaratory relief, in deference to a state court ejectment action filed by the City two days after this action was filed. The City, recognizing that the damages claim cannot be dismissed under abstention principles, *see Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996), also requests this Court to stay determination of the damages claim in deference to the state ejectment action. The motion is denied.

[2] “Federal courts have an unflagging obligation to adjudicate cases brought within their jurisdiction. It is now black-letter law that abstention from the exercise of federal jurisdiction is the narrow exception, not the rule.” *Cecos International, Inc. v. Jorling,* 895 F.2d 66, 70 (2d Cir.1990); ... The City cannot oust the federal courts of jurisdiction over a fundamental First Amendment dispute by asserting in state court a landlord-tenant issue, especially one that, as will be seen, is purely pretextual. There is no federal constitutional issue more grave than the effort by government officials to censor works of expression and to threaten the vitality of a major cultural institution, as punishment for failing to abide by governmental demands for orthodoxy. The defendants have not shown that the plaintiff, having properly invoked this court's jurisdiction, must instead assert its First Amendment claims as counterclaims to an ejectment action.
…

Thus, the state court action was conceived and initiated as an instrument to pressure the Museum and to compel it to cancel the Exhibit or remove specific objectionable works, without any reasonable expectation by the City that it could prevail on the merits of an action for ejectment, and it is part of an ongoing effort to retaliate against and deter plaintiff's exercise of First Amendment rights. The federal courts are not divested of jurisdiction in deference to such governmental purposes, nor to a municipality's preference to litigate federal constitutional issues in state court.

THE FIRST AMENDMENT CLAIM: THE MUSEUM'S MOTION FOR A PRELIMINARY INJUNCTION

I. Standard for Issuing a Preliminary Injunction

[10][11] A party seeking a preliminary injunction must ordinarily demonstrate (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground of litigation and a balance of hardships tipping decidedly in its favor. The defendants argue that the second, lesser standard is inapplicable to them as governmental actors, but the kind of governmental conduct entitled to a “higher degree of deference” and therefore requiring a showing of a likelihood of success on the merits, is not involved in this case, where defendants essentially rely on the Lease, which restates the purposes of the enabling legislation, and the Contract. In any event, as will be seen, the Museum easily establishes a likelihood of success on the merits….

II. Irreparable Harm

[12][13] The Museum is suffering and will continue to suffer irreparable harm if an injunction is not granted. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”…

The City and the Mayor argue that there is no irreparable injury because the Museum has not shown that the withholding of funding prevented it from showing the Sensation Exhibit or that the loss of its operating and maintenance subsidy will force the imminent closing of the Museum….
This is not a case involving the mere assertion of an incidental infringement of First Amendment rights insufficient to establish irreparable harm. ... Nor does the Museum rely on remote or speculative fears of

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future retaliation. ... The Museum has already suffered direct and purposeful penalization by the City in response to its exercise of First Amendment rights. First, the City has cut off appropriated funding. Second, the City has sued in state court to evict the Museum from the property which it has occupied for over one hundred years and in which it houses its enormous collections of ancient and modern art. In its abstention motion, the City asks the court to treat its ejectment suit as brought in good faith, that is, as brought with the goal of ejecting the Museum. It cannot on the one hand seek so serious a penalty (it could, after all, have brought only a declaratory judgment action) and on the other hand claim that no harm is imminent. For a museum of the magnitude of the Brooklyn Museum, planning for a move of one and a half million art objects would obviously be a monumental task. Given the finding of a likelihood of success on the merits of the Museum's claim of a First Amendment violation, the Museum should not have to wait until a City sheriff is at the door to seek equitable relief.

In addition, the facts establish an ongoing effort by the Mayor and the City to coerce the Museum into relinquishing its First Amendment rights. On September 24, the Mayor stated that "since they [the Museum Board members] seem to have no compunction about putting their hands in the taxpayers' pockets ... and throwing dung on important religious symbols, I'm not going to have any compunction about trying to put them out of business, meaning the board." Then, on September 28, the Mayor went on to state that "[t]he Corporation Counsel told them what we're going to do, the lease tells us what we're required to do, which is to evict them and to stop dealing with them as a board. We'll do that over a period of time. We'll hold back their funds because they are not a properly constituted board at this point and then over a period of time there will be a substitute board put in place."

That the Museum has so far stood up to these efforts does not deprive it of the right to injunctive relief. The prospect of money damages does not cure the irreparable injury of an already existing, purposeful penalization for the exercise of First Amendment rights. Nor must the Museum endure ongoing efforts to coerce the relinquishment of those rights, including the continuing threat of ejectment, because money damages are available at the conclusion of the suit. Irreparable injury has been established.

III. The Museum's Likelihood of Success on its First Amendment Claim

[14] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...." *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). In keeping with that principle, the First Amendment bars government officials from censoring works said to be "offensive," *Texas v. Johnson,* 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), "sacrilegious," *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 531, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), "morally improper," *Hannegan v. Esquire,* 327 U.S. 146, 149, 66 S.Ct. 456, 90 L.Ed. 586 (1946), or even "dangerous," *Regan v. Taxation with Representation of Washington,* 461 U.S. 540, 548, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). "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 itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. at 414, 109 S.Ct. 2533.

…

[15] The City and the Mayor acknowledge that the art being shown at the Museum and the ideas which they find that art to express are within the protections of the First and Fourteenth Amendments. Contrary to their assertions, however, although they did not physically remove the art objects from the Museum, they are not insulated from a claim that they are violating the overwhelming body of First Amendment law establishing that government cannot suppress ideas indirectly any more than it can do so directly.

…

In many different contexts, then, the Supreme Court has made clear that, although the government is under no obligation to provide various kinds of benefits, it may not deny them if the reason for the denial would require a choice between exercising First

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Amendment rights and obtaining the benefit. That is, it may not "discriminate invidiously in its subsidies in such a way as to 'aim [ ] at the suppression of dangerous ideas.' " *Regan,* 461 U.S. at 548, 103 S.Ct. 1997 (citation omitted).

[16] The decision to withhold an already appropriated general operating subsidy from an institution which has been supported by the City for over one hundred years, and to eject it from its City-owned building, because of the Mayor's objection to certain works in a current exhibit, is, in its own way, to "discriminate invidiously in its subsidies in such a way as to 'aim [ ] at the suppression of dangerous ideas.' " *Id.* "The Government's purpose is the controlling consideration" in determining whether a restriction on speech is viewpoint discriminatory. *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). By its own words, the City here threatened to withhold funding if the Museum continued with its plans to show the Exhibit. When the Museum resisted, the City withheld its funding and filed a suit for ejectment. While initially the City engaged in various claims of a violation of its Lease and Contract, unrelated to the content of the Exhibit, the City has now admitted the obvious; it has acknowledged that its purpose is directly related, not just to the content of the Exhibit, but to the particular viewpoints expressed. There can be no greater showing of a First Amendment violation.

In a case remarkably similar to this one, *Cuban Museum of Arts and Culture, Inc. v. City of Miami,* 766 F.Supp. 1121 (S.D.Fla.1991), the City of Miami was enjoined from refusing to renew an expired lease with the Cuban Museum because the Court held that the City had violated the museum's First Amendment rights, in that the refusal to renew was motivated by the City's opposition to the museum's exhibition of works of Cuban artists who were either living in Cuba or who had not denounced Fidel Castro. These works were highly offensive to a large segment of the Cuban population of Miami. The Court found that the exhibition was fully protected by the First Amendment, that the absence of a "right" to renewal did not defeat the First Amendment claim, and that the claimed lease violations were pretextual. *See Cuban Museum,* 766 F.Supp. at 1126-27 … It found that the "City would not have acted to deny the plaintiffs' continued use and possession of the premises but for the plaintiffs' controversial exercise of their First Amendment rights." *Id.* at 1129. The same is true here.

The cases establishing the principle that the government cannot avoid the reach of the First Amendment by acting indirectly rather than directly also illustrate the fallacy in the claim of the Mayor and the City that, while the Exhibit can be shown privately, "the taxpayers don't have to pay for it." Federal taxpayers in effect pay for the mailing of periodicals that many of them find objectionable; and they subsidize all manner of views with which they do not agree, indeed, which they may abhor, through tax exemptions and deductions given to other taxpayers. State taxpayers pay the salary for the professor whom the State wants to fire for speaking out against the State college. In sum, where the denial of a benefit, subsidy or contract is motivated by a desire to suppress speech in violation of the First Amendment, that denial will be enjoined. That is all that is involved here.
…

Clarifying what the case at bar is *not* about will further illustrate the distinction between requiring the taxpayer to support a particular point of view, which is not involved here, and barring government officials from invidiously discriminating against ideas they find offensive, either to themselves or to members of the community.

First, there is no issue presented here about the City's right to itself take positions, even controversial ones. The Museum does not challenge the principle that government may choose, through its funding, to espouse a viewpoint on a matter of public concern without, as a result, being required to give equal time to an opposing view. *See Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). Thus, the doctrine of *Rust,* upon which defendants rely, has no relevance here. That is, the Mayor and the City are permitted to foster the values that they claim to be seeking to foster, such as respect for the most dearly held beliefs of others and lack of vulgarity in art. As the Court stated in *Barnette,* 319 U.S. at 640, 63 S.Ct. 1178, however, "[n]ational unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Con-

stitution compulsion as here employed is a permissible means for its achievement." Indeed, the notion that government officials can stifle expression in order to protect the public good reverses our most basic principles….

Second, the City and the Mayor argue that, if they are not allowed to cut off all financial support to the Museum as a result of its display of the Sensation Exhibit, there will be no limit on what the public is required to support in the name of the First Amendment. This is incorrect. The Museum makes no claim in this case that government has an obligation to fund particular forums of expression such as museums. ... Thus, the issue is not whether the City could have been required to provide funding for the Sensation Exhibit, but whether the Museum, having been allocated a general operating subsidy, can now be penalized with the loss of that subsidy, and ejectment from a City-owned building, because of the perceived viewpoint of the works in the Exhibit. The answer to that question is no.

The reliance of the City and the Mayor on *National Endowment for the Arts v. Finley,* 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998), as support for their claim that viewpoint discrimination in arts funding is permissible, is misplaced. In *Finley,* the Supreme Court rejected a facial challenge to a provision adding "general standards of decency and respect for the diverse beliefs and values of the American public" to the "considerations" to be applied by the NEA in the awarding of grants to individual artists and arts organizations. … The Court … went on to hold the challenged provision facially constitutional upon finding that it "[did] not preclude awards to projects that might be deemed 'indecent' or 'disrespectful' nor place conditions on grants..." and, further, because the Court did "not perceive a realistic danger" that it will be used "to effectively preclude or punish the expression of particular views." *Id.* at 2175-77. Thus, even in *Finley,* where the issue was the "considerations" that could apply in the awarding of grants, unlike here, where funding has already been appropriated for general operating expenses, the Supreme Court upheld the "decency" and "respect" considerations only by reading them, on their face, as not permitting viewpoint discrimination.

When questioned on oral argument whether the City could direct a publicly supported library to remove particular books on pain of a loss of financial support, counsel for defendants responded that the visual art in the Exhibit has a greater impact than do books. Counsel for the Museum, in reply, noted that books like *Mein Kampf* have done enormous harm, but are still protected by the First Amendment. The relative power of books and visual art is of course immaterial. The communicative power of visual art is not a basis for restricting it but rather the very reason it is protected by the First Amendment. As recently stated by the Court of Appeals for the Second Circuit, "[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection." *Bery,* 97 F.3d at 695. ...

In their supplemental memorandum, the Mayor and the City argue that libraries are different from art museums because they are less selective; unlike the works in museums, they say, the inclusion of a book in a library carries "no connotation of worthiness or endorsement of its content." On the contrary, public libraries are, of physical and fiscal necessity, selective; they do not contain every book published. And there is no basis in the record for concluding that the Brooklyn Museum, with its one and a half million art objects, any more than a public library, endorses the perceived content of every work it makes available to the public. Whether or not the City and the Mayor agree with the Museum's judgment that a particular exhibit is worthy of showing is no different, in constitutional terms, from whether or not they agree that particular books are worthy of being made available to the public in a public library.

…

Whether the art shown is perceived as offensive or respectful, vulgar or banal, "good" art or "bad" art, the Mayor and the City offer no basis for the court to conclude that the Exhibit falls outside the broad parameters of the enabling legislation. Nor is there any basis for the City's accusation that the Museum has failed in its duty to educate. As for the defendants' emphasis on the unsuitability of the Sensation Exhibit for children, they acknowledge that there is nothing in the Lease or Contract which requires that every exhibit be suitable for schoolchildren of all ages. Nor

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is there anything which prevents the Museum from imposing reasonable restrictions on the access of schoolchildren to certain exhibits, in order to accommodate the Museum's undisputed right to display what Deputy Mayor Lhota called "mature" works of art.

There is also no language in the Lease or Contract that gives the Mayor or the City the right to veto works chosen for exhibition by the Museum. The Contract provides for the City to make maintenance payments to the Museum, without stating any conditions regarding the content of the Museum's artworks. …

That the advertising for the Exhibit cautions viewers that "the contents of the exhibition may cause shock, vomiting, confusion, panic, euphoria and anxiety" is not, as the City urges, an admission by the Museum that the Exhibit violates the Lease and Contract. Taking the advertising at face value (although the City has also argued that it is a crude effort to attract attention to the Exhibit), the City fails to show that art that is considered shocking, provocative, or disturbing gives rise to a violation of the Lease or the Contract.

The City and the Mayor argue that, if the court enjoins the withholding of its subsidy, the Museum will be free, under the protection of the First Amendment, to do anything at all, even transform itself into, for example, a museum of pornography. That, of course, is absurd. The Museum has been publicly supported for over one hundred years as a broad-based *art* museum. If it now sold its collections and became a pornography museum, the withholding of operating subsidies and the claims of a lease or contract violation would arise under vastly different facts from those presented here. The City and the Mayor have not shown that the funding provided has not been spent for the purpose authorized.

Finally, the City and the Mayor argue that they have a "duty" to withdraw support for the Museum because it showed paintings that are offensive and that desecrate religion in a public building. Given the Mayor's emphasis on the anti-Catholic sentiment he finds in the Ofili work, and despite the defendants' explicit disavowal of reliance on the Establishment Clause on oral argument, it is important to note the requirement that government remain neutral with regard to religious expression, whether "it manifest a religious view, an antireligious view, or neither." *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 841, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). In *Rosenberger,* the Supreme Court held unconstitutional a state university's denial of funding to a student journal solely because the journal espoused a Christian viewpoint. *See generally Joseph Burstyn, Inc.,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098.

It is undisputed that the Museum's permanent collections contain many reverential***205** depictions of the Madonna as well as other religious paintings and ritual objects. Just as there is no suggestion that the Museum is violating the Establishment Clause and endorsing religion by showing these works, ... there can equally be no suggestion that the Museum is violating the Establishment Clause by showing Mr. Ofili's work. The question of endorsement is evaluated from the perspective of the "objective observer." The Brooklyn Museum contains art from all over world, from many traditions and many centuries. No objective observer could conclude that the Museum's showing of the work of an individual artist which is viewed by some as sacrilegious constitutes endorsement of anti-religious views by the City or the Mayor, or for that matter, by the Museum, any more than that the Museum's showing of religiously reverential works constitutes an endorsement by them of religion. The suggestion that the Mayor and the City have an obligation to punish the Museum for showing the Ofili work turns well-established principles developed under the Establishment Clause on their head. If anything, it is the Mayor and the City who by their actions have threatened the neutrality required of government in the sphere of religion.

CONCLUSION

The City's motion to dismiss is denied. As the Museum has established irreparable harm and a likelihood of success on its First Amendment claim, its motion for a preliminary injunction is granted.

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