

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

_____)	
FABIAN WILLIAMS a.k.a.)	
“OCCASIONAL SUPPERSTAR;”)	
PETER FERRARI a.k.a. “PLF;”)	
BENITO FERRO a.k.a. “YOYO FERRO;”)	CIVIL ACTION FILE NO.
GRANT HENRY; SISTER LOUISA’S)	
CHURCH MURCH, LLC;)	_____
)	
Plaintiffs,)	
)	JURY TRIAL DEMANDED
vs.)	
)	
CITY OF ATLANTA, GEORGIA,)	
)	
Defendant.)	
_____)	

VERIFIED COMPLAINT

COME NOW Fabian Williams a.k.a. “Occasional Superstar;” Peter Ferrari a.k.a. “PLF;” Benito Ferro a.k.a. “Yoyo Ferro;” Grant Henry; and Sister Louisa’s Church Murch, LLC; (collectively “Plaintiffs”), and bring this Complaint showing the Court as follows.

INTRODUCTION

1.

As shown more fully herein, Plaintiffs are property owners and artists who have been threatened by the City of Atlanta with enforcement of its unconstitutional City Ordinance § 16-28.025. Plaintiffs have been directed by the City of Atlanta that they must submit applications for their existing artwork on private property to be approved or face removal and criminal prosecution. All future artwork, the City of Atlanta has mandated, must go through the ordinance process, which among other requirements, requires that any visual artistic expression on private property be sponsored by a city council person and receive pre-approval from the city council, three government departments, and the mayor before artists can permissibly express themselves.

2.

Because City Ordinance § 16-28.025 is unconstitutional and the speech it suppresses is protected expression, this lawsuit aims to enjoin its enforcement. This action seeks declaratory and injunctive relief and damages for violations of Plaintiffs' First, Fourth, Fifth, and Fourteenth Amendment rights under the United States Constitution and corollary rights under the Georgia Constitution.

JURISDICTION AND VENUE

3.

This action is brought pursuant to 42 U.S.C. §§ 1983 and 1988, as well as the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and 17 U.S.C. § 106A. Jurisdiction is founded upon 28 U.S.C. §§ 1331 and 1343, and the aforementioned constitutional and statutory provisions. Plaintiffs further invoke the supplemental jurisdiction of this Court to hear claims arising under state law pursuant to 28 U.S.C. § 1367.

4.

Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because the claims arose in Atlanta, Georgia, which is situated within the district and divisional boundaries of the Atlanta Division of the Northern District of Georgia.

PARTIES

5.

Plaintiff Fabian Williams a.k.a. "Occasional Superstar" is a resident of the state of Georgia.

6.

Plaintiff Peter Ferrari a.k.a. "PLF" is a resident of the state of Georgia.

7.

Plaintiff Benito Ferro a.k.a. "Yoyo Ferro" is a resident of the state of Georgia.

8.

Plaintiff Grant Henry is a resident of the state of Georgia.

9.

Plaintiff Sister Louisa's Church Murch, LLC is a Georgia domestic limited liability company with its principal place of business at 489 Edgewood Avenue, SE, Atlanta, Georgia 30312.

10.

Defendant City of Atlanta, Georgia ("Atlanta" or "City"), is a body corporate and politic and a political subdivision of the State of Georgia, duly established under its laws and Constitution. At all relevant times, Atlanta acted under color of state law.

FACTUAL ALLEGATIONS

Background Facts

11.

Defendant City of Atlanta has an ordinance, § 16-28.025, purporting to regulate "public art" ("Ordinance § 16-28.025" or the "Public Art Ordinance"),

which has been in existence since 1982 but until recently was little known or enforced.

12.

The Public Art Ordinance, is located within the “General and Supplementary Regulations” chapter of the City’s zoning code in between provisions for the “collocation of private antennas” on “rail transportation communication facilities,” § 16-28.024, and provisions for parking requirements for eating or drinking establishments that derive a certain portion of income from alcohol sales, § 16-28.026.

13.

Until recently, none of the Plaintiffs – all of whom either have public art on their private property in the City or engage in the creation of public art in the City – were aware that such an ordinance existed.

14.

The Public Art Ordinance is a criminal provision, punishable by “by a fine not exceeding \$1,000.00, imprisonment for a term not exceeding six months, work on the public streets or on public works of the city for not more than six months, supervised home confinement for a term not to exceed six months, or any combination thereof.” Atlanta Ordinance § 1-8. Furthermore, “[w]ith respect

to violations of th[e] Code that are continuous with respect to time, each day the violation continues is a separate offense." *Id.*

15.

In the beginning months of 2017, Plaintiffs and others were contacted by the City and its officials and informed of the City's intention to begin enforcing Ordinance § 16-28.025. *See, e.g.,* Correspondence from Haley Carlson, Public Art Coordinator for the City of Atlanta, Mayor's Office of Cultural Affairs to Plaintiff Peter Ferrari a.k.a. "PLF" (via Facebook) and to Plaintiffs (via an artist intermediary), attached hereto as Exhibit A.

16.

Defendant gave Plaintiffs a June 9, 2017 deadline to have received approval for their works after which time Defendant said enforcement was imminent.

Free Speech Problems With Atlanta's Public Art Ordinance

17.

Ordinance § 16-28.025 is as follows:

Public art is a visual, wholly noncommercial artistic expression intended and able to be viewed from a public way that meets the criteria specified herein. Public art meeting the following criteria may be conditionally located in any district. Consistent with the purpose and intent of this section, the Atlanta city council may, by ordinance, approve a work of public

art. Said approval shall not be granted unless said ordinance contains the following three preliminary certifications:

(1) A certification from the director of the bureau of traffic and transportation or designee that the work will not constitute a traffic hazard or undue and dangerous distraction to motorists or pedestrians;

(2) A certification from the executive director of the urban design commission or designee that the work does not contain and is not intended to convey a commercial message primarily, provided that the name of a sponsor for said work may be displayed on an adjacent plaque or similar display that is no more than two square feet in area; and

(3) A certification from the director of the bureau of cultural affairs or designee that the work is not inconsistent with the City of Atlanta's public art program. The council, if provided with these certifications, shall approve, conditionally or otherwise, a work of public art upon finding that it does not negatively affect the public interest related to aesthetics, additional sign clutter, and public safety. In making this finding, the council shall consider the required certifications; the spatial relationship of the proposed art to the building or premises upon which it is located as well as the surrounding area; vehicular and pedestrian traffic safety; the existence of nearby signs; and the size, dimensions and other physical characteristics of the proposed work. In applying these criteria, the council shall in no way restrict the content or message of the proposed work.

(emphases added).

18.

The Public Art Ordinance purports to require government pre-approval for any and all “visual, wholly noncommercial artistic expression intended and able to be viewed from a public way.” Thus, the Public Art Ordinance acts as a prior restraint on speech.

19.

The Public Art Ordinance, on its face and as applied, unconstitutionally regulates speech based on content, without narrow tailoring or compelling justification.

20.

To the extent that the Public Art Ordinance has criteria for allowing or barring public art, the criteria are vague, overbroad, and convey standardless discretion to numerous officials. There are no standards whatsoever for City Council sponsorship or approval, thereby subjecting artistic expression on private property to non-approval and rejection based upon its popularity with councilmembers or its viewpoint or content.

21.

Beyond the text of the ordinance, there are no published standards describing how to apply the various criteria set forth in the Public Art Ordinance. Upon information and belief, there are likewise no such unpublished standards.

22.

Such a lack of standards makes the Public Art Ordinance ripe for arbitrary decisions with regard to who is permitted to engage in artistic expression and on what terms.

23.

Defendant's Ordinance § 16-280.25 applies to expression taking place on private property that has not received any form of government subsidy.

24.

Upon information and belief, and based upon review, there is no other ordinance in the nation which purports to require multi-layered government approval as a precondition to even the most basic forms of artistic expression on private property that is not publicly funded.

Retroactive Enforcement

25.

In its communications with Plaintiffs and others evincing an intent to begin enforcing the Public Art Ordinance, the City described an "amnesty" process in which artists or property owners involved with already-existing public art would submit a "modified certification application," which if approved, would allow the City to "grandfather the mural into [its] database." See Exhibit A.

26.

The City made clear that if an already existing mural did not go through the application process or if it was not approved pursuant to that process that it would be removed: *See* Exhibit A (“All uncertified public artwork is subject to removal.”).

27.

The “modified certification application” asks for certain demographic information and requires a photograph of “the work at its location.” The modified certification application has been published by the City on its website. *See* City Of Atlanta Mayor’s Office Of Cultural Affairs, Mural Amnesty Application, <http://www.oaatlanta.com/wp-content/uploads/2017/04/OCA-Mural-Amnesty-Application-1.pdf>.

28.

The modified certification application requires multiple layers of official approval, including at minimum, approval by the Director of the Office of Cultural Affairs, or his or her designee; the City Council; and the Mayor without sufficient constitutional standards governing approval.¹ *See id.*

¹ Approval for works may be possible without mayoral approval if the approving ordinance were to satisfy the procedures set forth in Atlanta Ordinance § 2-403 (requiring a City Council supermajority).

Prospective Enforcement

29.

For murals not yet in existence, the City has created an application titled the “Certification for the Installation of Public Art,” which requires that property owners and artists go through a more extensive process to comply with Atlanta Ordinance § 16-28.025. *See* Exhibit A.

30.

Atlanta Ordinance § 16-28.025 imposes at least five layers of bureaucracy before a person can engage in any visual artistic expression visible to the public on their private property. The Public Art Ordinance requires approval from:

- a) the Office of Transportation;
- b) the Executive Director of the Urban Design Commission, or his or her designee;
- c) the Director of the Office of Cultural Affairs, or his or her designee;
- d) the City Council, via a majority vote to approve an ordinance certifying a specific work public art; and
- e) the Mayor, who must also approve the ordinance certifying a specific work of public art.

31.

For artistic expression not yet in existence, the “Certification For The Installation Of Public Art” application requires detailed information about a work for officials to review, including the following:

- a) a “drawing or photo of work,”
- b) a “drawing or representation of work in context to its location,”

- c) the “artist’s resume,” and
- d) a “artist statement regarding work.

Id.

32.

As an additional layer, the City states that public art sponsors or artists should arrange to present their work to the appropriate Neighborhood Planning Unit:

Although it is not required by ordinance, it is recommended that you make a presentation to the Neighborhood Planning Unit (NPU) in which the public art will be located. In order to be placed on the next NPU agenda, please contact the NPU coordinator in Bureau of Planning, 330-6145, Suite 3050, 55 Trinity Ave., SW, Atlanta, GA 30335.

Id.

33.

The City further “recommends” that applicants “contact the council member for the district in which the public art will be located to request the support of that council member and assistance in submitting the necessary legislation for final council action.” *Id.*

34.

Atlanta Ordinance § 16-28.025 contains no time parameters whatsoever for any of the five layers of consideration and approval purportedly required before

a person can engage in artistic expression visible to the public on their private property.

35.

In addition to the lack of standards for approval at the multiple layers, this lack of time parameters grants unbridled discretion to multiple layers of city government, any one of which could stall or derail the legal display of public art.

36.

Pursuant to the Public Art Ordinance, an application for public art can sit on any number of officials' desks for indefinite periods of time without being approved or denied.

37.

By implication, the application for Certification for the Installation of Public Art indicates that without the approval of either the council person for the area where the art is to be located or the relevant NPU, an application will be viewed less favorably and potentially denied.

38.

The Public Art Ordinance conveys standardless discretion to City officials to approve or deny expression based on, among other factors, whether the "work will . . . constitute a traffic hazard or undue and dangerous distraction to motorists or pedestrians;" whether the "work is []consistent with the City of

Atlanta's public art program;" and whether the work "negatively affect[s] the public interest related to aesthetics."

Facts Regarding the Plaintiffs

39.

Plaintiff Fabian Williams a.k.a. "Occasional Superstar" is a muralist and artist. His existing works of art are subject to removal and he faces criminal prosecution under Ordinance § 16-28.025. Believing the Public Art Ordinance to be unconstitutional and the application process to be improper, Plaintiff Fabian Williams a.k.a. "Occasional Superstar" has refused to fill out or submit any such application.

40.

Plaintiff Peter Ferrari a.k.a. "PLF" is a muralist and artist. His existing works of art are subject to removal and he faces criminal prosecution under Ordinance § 16-28.025. Believing the Public Art Ordinance to be unconstitutional and the application process to be improper, Plaintiff Peter Ferrari a.k.a. "PLF" has refused to fill out or submit any such application.

41.

Plaintiff Benito Ferro a.k.a. "Yoyo Ferro" is a muralist and artist. His existing works of art are subject to removal and he faces criminal prosecution under Ordinance § 16-28.025. Believing the Public Art Ordinance to be

unconstitutional and the application process to be improper, Plaintiff Benito Ferro a.k.a. "Yoyo Ferro" has refused to fill out or submit any such application.

42.

Grant Henry is the proprietor of Sister Louisa's Church Murch, LLC. This entity's physical place of business has a mural on its exterior wall that subjects the businesses and Mr. Henry to criminal prosecution under Ordinance § 16-28.025. Said mural is subject to removal under Ordinance § 16-28.025. Believing the Public Art Ordinance to be unconstitutional and the application process to be improper, Plaintiff Grant Henry has refused to fill out or submit any such application.

43.

Plaintiff Sister Louisa's Church Murch, LLC ("Church Murch") has a physical place of business which has a mural on its exterior walls that subjects the business to criminal prosecution under Ordinance § 16-28.025. Said mural is subject to removal under Ordinance § 16-28.025. Believing the Public Art Ordinance to be unconstitutional and the application process to be improper, Plaintiff Church Murch has refused to fill out or submit any such application.

44.

In addition to already existing artwork purportedly regulated by the Public Art Ordinance, Plaintiffs all plan to engage in future conduct governed by

the Public Art Ordinance. The Public Art Ordinance thus chills protected speech, imposes an undue burden on a fundamental constitutional right, and exposes Plaintiffs to the risk of criminal prosecution for constitutionally protected speech.

CLAIMS FOR RELIEF

Count One: Free Speech

45.

The allegations set forth above are incorporated by reference herein and below.

46.

By threatening Plaintiffs with (1) criminal prosecution (2) removal of constitutionally protected existing artistic expression on private property that is not publicly funded, and (3) by enacting a law that is vague, overbroad, and conveying of standardless discretion, Defendant City of Atlanta has deprived Plaintiffs of their right to free speech as protected by the First and Fourteenth Amendments, as well as the Georgia Constitution's Article I, Section I, Paragraphs V and IX.

47.

By forcing Plaintiffs to complete an unnecessarily burdensome application process – or threatening Plaintiffs with criminal prosecution if they do not

comply – Defendant City of Atlanta is engaging in an improper prior restraint of speech, thus depriving Plaintiffs of their right to free speech as protected by the First and Fourteenth Amendments, as well as the Georgia Constitution’s Article I, Section I, Paragraphs V and IX.

48.

By treating visual artistic expression visible to the public on private property differently than other expression, Defendant City of Atlanta is engaging in content-based discrimination without sufficient narrow tailoring or a compelling government interest, thus depriving Plaintiffs of their right to free speech as protected by the First and Fourteenth Amendments, as well as the Georgia Constitution’s Article I, Section I, Paragraphs V and IX.

49.

By asserting that “[a]ll uncertified public artwork is subject to removal,” Defendant has threatened to unilaterally seize and destroy artistic expression protected by the First Amendment without first obtaining an adjudication that such expression is unlawful, in violation of the First and Fourth Amendments.

Count Two: Unconstitutional Taking

50.

The allegations set forth above are incorporated by reference herein and below.

51.

Communications from the City to artists and property owners have been clear. *See Exhibit A* (“All uncertified public artwork is subject to removal.”). While it is not clear how the City would remove such uncertified works, such removal would constitute a taking barred by the Fifth and Fourteenth Amendments.

52.

Were the City to paint over walls containing uncertified public artwork, such painting would constitute a trespass and a permanent physical occupation, which is a *per se* taking.

53.

Similarly, were the City to remove paint from walls containing uncertified public artwork, such removal would constitute government directly appropriating or destroying the private property of another, which is also a constitutional taking.

54.

Such takings are impermissible because there is no sufficient “public” purpose behind the removal of uncertified public artwork.

55.

In any event, such takings cannot be done without the payment of just compensation.

Count Three: Violation of the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A
By Plaintiffs Williams, Ferrari, and Ferro

56.

The allegations set forth above are incorporated by reference herein and below.

57.

Plaintiffs are artists who have created works of visual art of recognized stature in the city which are not certified under the Public Art Ordinance.

58.

Defendant City of Atlanta has threatened to remove such works.

59.

Pursuant to the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A, Plaintiffs have the moral right to prevent any destruction of a work of recognized stature.

60.

Plaintiff Fabian Williams a.k.a. "Occasional Superstar" has created several unpermitted works of recognized stature within the City that are subject to destruction under the Public Art Ordinance.

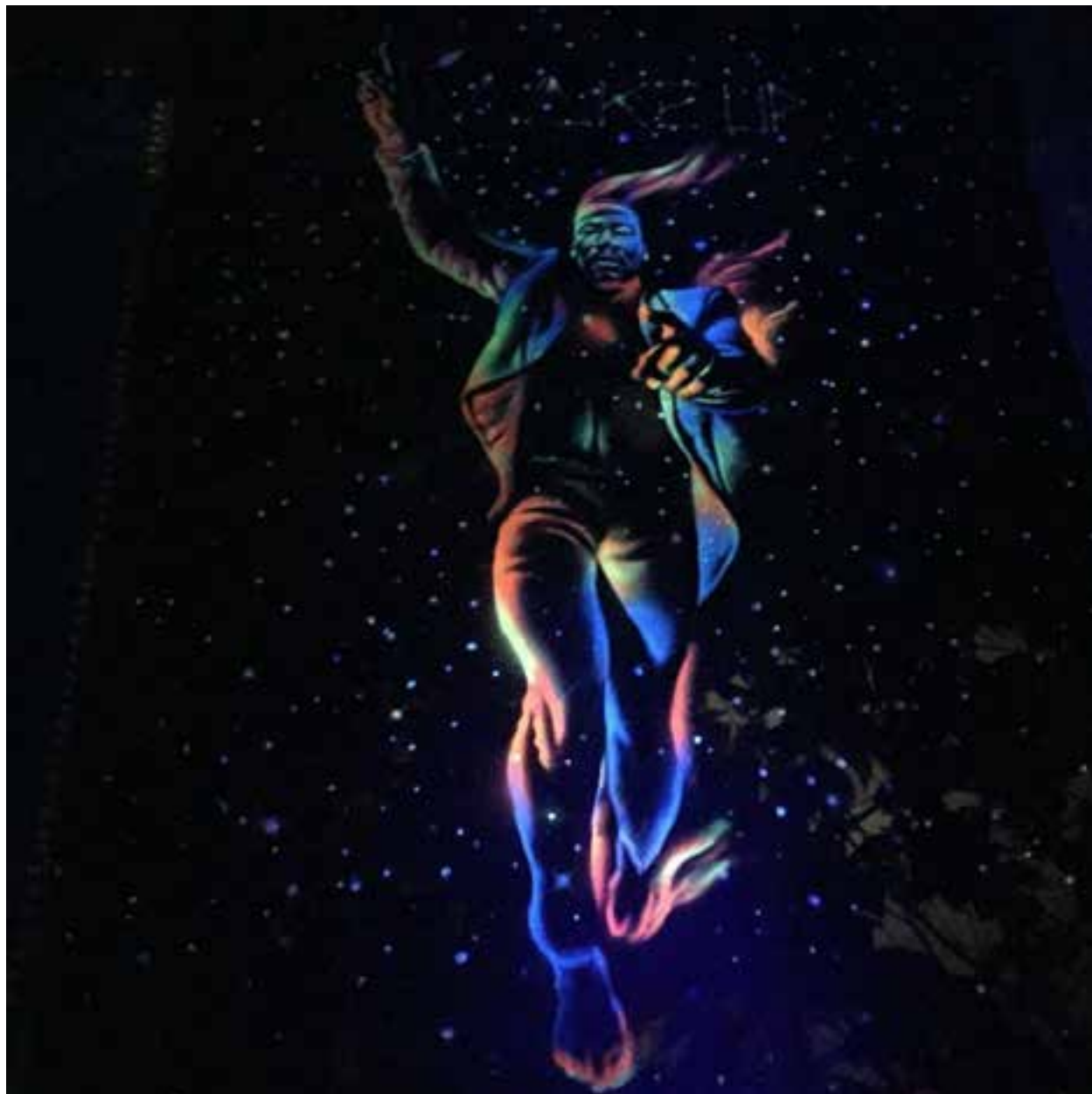
61.

Two such works are located side by side in the East Atlanta neighborhood. One depicts a modern reimagining of author and intellectual James Baldwin and the other is an image of hands with a directive to love and serve.



62.

Another work of recognized stature by Occasional Superstar portrays a glowing Martin Luther King, Jr. as a spiritual superhero amidst celestial bodies.



63.

Plaintiff Peter Ferrari a.k.a. "PLF" has created several unpermitted works of recognized stature within the City that are subject to destruction under the Public Art Ordinance.

64.

One such work in Reynoldstown creates interplay between a brick wall and nearby trees.



65.

And another work located in Midtown precariously positions a home in a set of outstretched hands.



66.

Plaintiff Benito Ferro a.k.a. “Yoyo Ferro” has created several unpermitted works of recognized stature within the City that are subject to destruction under the Public Art Ordinance.

67.

One such work covers the entirety of the exterior of a local school and was made in collaboration with the students, giving the community a sense of ownership of the building.



68.

Another work of recognized stature by Yoyo Ferro transformed the side of a building on Memorial Drive with playful abstractions of figures and color.



PRAYER FOR RELIEF

WHEREFORE, on the basis of the foregoing, Plaintiffs respectfully pray that this Court:

- (A) Assume jurisdiction over this action;
- (B) Award nominal, compensatory, and other damages against Defendant in an amount determined by a jury;
- (C) Award declaratory and injunctive relief as set out herein and in Plaintiffs' Motion for Preliminary and/or Permanent Injunctive Relief;
- (D) Award reasonable attorneys' fees, expenses, and costs of litigation pursuant to 42 U.S.C. § 1988 and other applicable laws;
- (E) Award such other and further relief as this Court deems just and proper.

A JURY TRIAL IS REQUESTED.

This 30th day of May, 2017.

Respectfully Submitted,

/s/ Gerald Weber

Gerald Weber

Georgia Bar No. 744878

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/s/ Zack Greenamyre

Zack Greenamyre

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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FABIAN WILLIAMS a.k.a.)	
"OCCASIONAL SUPERSTAR" et al.,)	
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Plaintiffs,)	
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vs.)	CIVIL ACTION FILE NO.
)	
CITY OF ATLANTA, GEORGIA,)	
)	
Defendant.)	
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VERIFICATION OF BENITO FERRO

I verify under penalty of perjury that the foregoing is true and correct and state that I am a plaintiff in the within and foregoing civil action and I verify that the facts contained in the complaint are true and correct to the best of my knowledge, information, and belief.

SO VERIFIED this 26 day of May, 2017.



BENITO FERRO a.k.a. YOYO FERRO

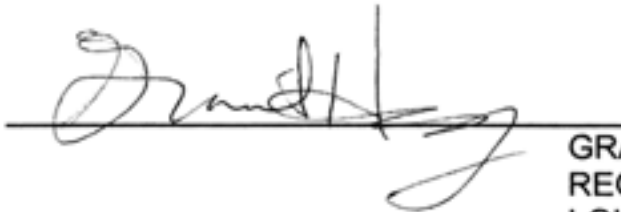
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vs.))	
))	
CITY OF ATLANTA, GEORGIA,))	
))	
Defendant.))	
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VERIFICATION OF GRANT HENRY

I verify under penalty of perjury that the foregoing is true and correct and state that I am a plaintiff in the within and foregoing civil action and I verify that the facts contained in the complaint are true and correct to the best of my knowledge, information, and belief.

SO VERIFIED this 13 day of May, 2017.



GRANT HENRY, individually, and as
REGISTERED AGENT for SISTER
LOUISA'S CHURCH MURCH, LLC

CERTIFICATION OF ELECTRONIC FILING

The undersigned hereby certifies the filing of this Complaint, motion and accompanying brief, and verifications upon the parties and all counsel by the Court's Electronic Filing System.

This 30th day of May, 2017

/s/ Zack Greenamyre
Zack Greenamyre
Georgia Bar No. 293002