

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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MEDIA ALLIANCE, INC. and STEPHEN C. PIERCE,

Plaintiffs,

-against-

ROBERT MIRCH, Commissioner of Public Works for  
the City of Troy, individually and in his official capacity,  
and the CITY OF TROY,

Defendants.

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COMPLAINT

Civil Case No. \_\_\_\_\_

Hon. \_\_\_\_\_,

U.S.D.J.

PLAINTIFFS DEMAND

TRIAL BY JURY

PRELIMINARY STATEMENT

1. Plaintiffs Media Alliance, Inc. and Stephen C. Pierce bring this action to vindicate their civil rights, under the United States and New York State Constitutions, to exercise free speech and freedom of assembly and to provide a forum for artistic and political expression and other protected forms of free speech in the City of Troy, New York.

2. In March 2008, Plaintiffs extended an invitation to artist Wafaa Bilal (“Bilal”) to display his digital art work, “Virtual Jihadi,” at Plaintiffs’ Sanctuary for Independent Media, located at 3361 Sixth Avenue, in Troy, New York. Previously, Rensselaer Polytechnic Institute (“RPI”) had offered to display Bilal’s digital art work, but had withdrawn the offer due to controversy surrounding the exhibit.

3. Defendant Robert Mirch, Commissioner of Public Works for the Defendant City of Troy, learned about Bilal’s exhibit and the controversy surrounding it. Disagreeing with the content of the piece, Defendant Mirch issued a press release denouncing Bilal’s piece, calling upon Plaintiffs to abandon their plans for the exhibit, and calling upon the public to participate in a protest against the exhibit at the Sanctuary.

4. On March 10, 2008, the opening day of the exhibit, the City of Troy Department of Public Works, which Defendant Mirch directs, conducted a previously unscheduled inspection of the Sanctuary's building at 3361 Sixth Avenue, in Troy, New York.

5. On March 10, 2008, Defendant Mirch appeared on a radio talk show to denounce Bilal and his exhibit. During the talk show, Defendant Mirch called upon the Plaintiffs immediately to cancel the upcoming exhibit of Bilal's art work at the Sanctuary, and he called upon the public to join him that evening in a public demonstration against the exhibit.

6. On the evening of March 10, 2008, the exhibition of Bilal's piece "Virtual Jihadi" opened as scheduled at the Sanctuary at 3361 Sixth Avenue, in Troy, New York. Defendant Mirch was present, and he led a group of followers in a public protest outside the building.

7. The following morning, March 11, 2008, Plaintiffs received notice in a telephone message from the City of Troy Department of Public Works, Bureau of Code Enforcement, that the March 10 inspection had identified code violations and that "there should be no assembly" at the Sanctuary, "at all for any reason," until the alleged code violations were corrected.

8. On March 11, 2008, the Defendant City of Troy, through the Department of Public Works, sent a written Notice of Violations regarding the building at 3361 Sixth Avenue, in Troy, New York. The Notice of Violations alleged the existence of code violations and directed that the "building shall not be used as a place of assembly until the [specified] items are corrected."

9. The Defendants' retaliatory use of their law enforcement authority violated the Plaintiffs' fundamental rights to free speech and assembly, due process and equal protection under the First, Fifth, and Fourteenth Amendments to the United States Constitution, Article 1, Sections 6, 8, and 9 of the New York State Constitution, and principles of common law.

10. In this action under 42 U.S.C. § 1983, Plaintiffs seek a declaration that the Defendants' actions are unconstitutional; an injunction ordering the Defendants to cease and refrain from interfering with, or otherwise taking action against them in retaliation for the exercise of their, constitutional rights; nominal damages against Defendant Mirch; and attorneys' fees.

#### JURISDICTION AND VENUE

11. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331, 1343(3)-(4), and 1367.

12. Venue is proper pursuant to 28 U.S.C. § 1391(b) in that the Plaintiffs reside in this District and a substantial part of the events giving rise to Plaintiffs' claims occurred in this District.

13. This Court has jurisdiction under 28 U.S.C. §§ 2201, 2202 to grant declaratory relief; under Fed. R. Civ. P. 65 to grant injunctive relief, and under 42 U.S.C. § 1988 to award costs and attorneys fees.

#### PARTIES

14. Plaintiff Media Alliance, Inc. is a not-for-profit corporation duly organized and existing under the laws of the State of New York. Plaintiff Media Alliance, Inc. owns and operates The Sanctuary for Independent Media (the "Sanctuary"), located at 3361 6th Avenue, Troy, New York, which offers a venue for artistic and political expression in the City of Troy.

15. Plaintiff Stephen C. Pierce is the Executive Director, and the President of the Board of Directors of Plaintiff Media Alliance, Inc. His business address is 3361 6th Avenue, Troy, New York.

16. Defendant Robert Mirch is the Commissioner of Public Works of the City of Troy. Pursuant to the Code of the City of Troy, the Commissioner of Public Works has supervision and control over the Bureau of Engineering, the Bureau of Traffic Control, the Bureau of Streets, the Bureau of Sanitation, the Bureau of Buildings, the Bureau of Code Enforcement and the Central Garage. Troy, N.Y., Code of Ordinance, § 0-78 (2008). As such, Mirch holds a policy-making role and, upon information and belief, has final decision-making authority with respect to the local building code, housing code, zoning ordinance, plumbing code and electrical code, and the enforcement thereof, in the City of Troy, and the Defendant City of Troy is accountable and responsible for his actions. In addition, Mirch is an elected member, and the Majority Leader, of the Rensselaer County Legislature and, at the time of the events complained of herein, worked in the office of former State Senate Majority Leader Joseph L. Bruno. He is sued here in his official capacity for injunctive relief and in his individual and official capacity for nominal damages.

17. Defendant City of Troy is a municipality organized under the laws of the State of New York.

#### FACTUAL ALLEGATIONS

18. In February 2008, RPI invited Iraqi-born digital media artist Wafaa Bilal to lecture and to display his work as part of a visiting artists program focused on Islamic culture.

19. Bilal's digital art work, a video game called "Virtual Jihadi," is a parody of a commercial video game called "Quest for Saddam." In the commercial game, players target the ex-Iraqi leader Saddam Hussein. In Bilal's modified version, the artist plays the role of a suicide bomber on a quest to locate the U.S. President.

20. Bilal created the video game as art and to stimulate thought, not for commercial sale. In interviews, he has said, among other things, that the video game is a commentary on the Iraqi situation; that he does not support terrorism, but believes that it is important for viewers to understand how U.S. policies encourage Iraqis to support terrorists; and that his artwork seeks to raise awareness about the Iraqi way of thinking and to create a platform for conversation.

21. Upon information and belief, Bilal taught art at the Art Institute of Chicago and was visiting RPI as an artist-in-residence at the time of the events at issue. In addition to his art, upon information and belief, Bilal lectures on the oppression of Saddam's regime in an effort to inform people of the complexities of the situation and the importance of peaceful conflict resolution.

22. The RPI Arts Department scheduled the art exhibit featuring Bilal's digital piece "Virtual Jihadi" to open on Wednesday, March 5, 2008 at 7:00 p.m. Bilal was scheduled to deliver a lecture on opening night.

23. Before the exhibit opened, however, campus critics issued blog commentaries denouncing the art exhibit, labeling the RPI Arts Department a "terrorist safe haven" and encouraging students and alumni to complain about "Virtual Jihadi" to the RPI administration.

24. On March 7, 2008, in the face of the controversy, the RPI administration said that it was closing the exhibit to investigate the allegations. The RPI administration later announced that it had decided not to reopen the exhibit on the Troy campus.

25. Following the closure of the RPI exhibit, Plaintiffs Media Alliance, Inc. and Stephen C. Pierce, invited Bilal to install his video game exhibit at the Sanctuary venue at 3361 Sixth Avenue in Troy, New York.

26. Bilal accepted the invitation. The Sanctuary scheduled the exhibit of “Virtual Jihadi” to run from March 11 through April 4, 2008, with an opening lecture featuring Bilal on the evening of March 10, 2008.

27. The situation, and the surrounding controversy, drew the attention of Rensselaer County Republican Majority Leader and Public Works Commissioner, Defendant Mirch.

28. On March 7, 2008, Defendant Mirch issued a press release (the “Press Release”) denouncing the upcoming exhibit and calling for a protest. Mirch used the power of his office as a Rensselaer County legislator to post the Press Release on the official Rensselaer County Legislature website (at [www.rensselaercounty.org](http://www.rensselaercounty.org)).

29. In the Press Release, Mirch said that “he is disgusted that a Troy organization would agree to host an exhibit that includes the portrayal of a suicide bomber sent to assassinate the President.” He said that he was “organizing a protest” of the exhibition for March 10, opening night, and that he was “hopeful” that the Sanctuary would “abandon plans for the exhibition.”

30. Mirch’s Press Release further stated:

“It is completely inappropriate for any organization in Troy to stage an exhibit that features a portrayal of suicide bomber sent to kill the President. The Sanctuary for Independent Media should cancel this exhibit immediately,” said Mirch.

“Allowing for the portrayal of the assassination of a president to be staged is wrong, un-American and destructive. I support free speech, but this exhibit goes beyond the bounds of what is decent or acceptable,” added Mirch.”

31. In the Press Release, Mirch said that he would lead the protest outside the Sanctuary at 5:30 p.m. on Monday night, March 10, 2008. He called on Troy residents “and anyone else to join” him in protesting the exhibit.

32. Reinforcing these statements, on Monday morning, March 10, 2008, Mirch made public comments on a WGY 810 AM radio show denouncing Bilal's artwork and the upcoming exhibit at the Sanctuary. During the radio show, Mirch called the video game "disgusting" and compared it to terrorist attacks on 9/11. Addressing Bilal, he stated, among other things, "I don't like your video and in my heart and my mind I believe it's terrorism."

33. Mirch said that he had not seen the exhibit that he had no plan to see it. Nevertheless, he knew that Bilal's artwork was protected First Amendment speech. Referring to the demonstration scheduled for that night, he asserted, "This is part of the two-way street of freedom of speech." Addressing Bilal, he said, "This is part of the dialogue. . . . You can call it art, I can call it terrorism." (Excerpts from the interview are posted on the YouTube web site at [www.youtube.com/watch?v=JUiR5NhpQPM&NR=1](http://www.youtube.com/watch?v=JUiR5NhpQPM&NR=1), at [www.youtube.com/watch?v=hq4xyVmdpuI&feature=related](http://www.youtube.com/watch?v=hq4xyVmdpuI&feature=related), and at [www.youtube.com/watch?v=0tIeF-4Afl0&feature=related](http://www.youtube.com/watch?v=0tIeF-4Afl0&feature=related)).

34. As Commissioner of Public Works of the City of Troy, Defendant Mirch is a policy-making official for the City of Troy with, upon information and belief, final decision-making authority with respect to building code matters.

35. On Monday morning, March 10, 2008, Don Albano, of the City of Troy Department of Public Works, visited the Sanctuary to conduct a previously unscheduled inspection of the building at 3361 Sixth Avenue, in Troy, New York. The Fire Marshall of the Troy Fire Department accompanied Albano on the inspection. When they left the building, Albano said that he had identified code violations, but did not, at that time, tell the Sanctuary not to host a public assembly.

36. On Monday evening, March 10, 2008, Bilal presented the opening lecture, as planned. A large group gathered outside the Sanctuary's building at 3361 Sixth Avenue, in Troy,

New York. Some held signs accusing the exhibit of supporting terrorism. The Troy Police Department provided plainclothes officers for the event.

37. Defendant Mirch was present at and participated in the public demonstration.

38. The following morning, Tuesday, March 11, 2008, the Sanctuary received a telephone message from the City of Troy, Bureau of Code Enforcement, stating that the Sanctuary could not use the building at 3361 Sixth Avenue, in Troy, New York as a place of assembly unless and until it corrected the alleged code violations. Specifically, the telephone message stated:

“I work for the City of Troy Code Enforcement. It’s regarding 3361 6th Ave.

“I was told to call you and speak to you about the front double doors that have not been replaced, and the existing 30-inch door and the existing 29-inch door that all need to be replaced to widths of 32 inches. The front doors are double doors and must swing out, they need panic hardware, all doors need panic hardware on them.

“We’re not going to be able to assemble anything down there, nobody’s going to be able to have any kind of assembly down there for anything until these violations have been corrected, so sometime today, this morning, I am going to put a placard on the front door stating that the place has been posted unfit and no, there should be no assembly there at all for any reason until these doors have been taken care of.”

39. On or around March 11, 2008, the Defendant City of Troy sent a written Notice of Violations regarding the building at 3361 Sixth Avenue, in Troy, New York. According to the Notice of Violations, the March 10, 2008 inspection had revealed the following alleged violations of Appendix K of the New York State Building Code:

- the front doors should swing out of the building;
- the existing 30” door in the rear of the first floor must be increased to at least 32” in width;
- the existing 29” door in the rear of the basement must be increased to at least 32” in width; and



- all exterior egress doors which are capable of being locked or latched must be retrofitted with panic and fire exit hardware.

40. The Notice of Violations directed that “the building shall not be used as a place of assembly until the previous four items are corrected.”

41. Prior to the Sanctuary’s occupancy, the building at 3361 Sixth Avenue had been in use as a church. When the Sanctuary first assumed occupancy of the building in 2005, and prior to that date, all of the conditions identified in the Notice of Violations were previously in existence in the building at 3361 Sixth Avenue in Troy, New York.

42. Under applicable provisions of the building code, an occupant continuing an existing use is not required to change items that existed legally when it occupied the building, unless it is doing other work. The Sanctuary continued an existing use and thus was not required to change items that existed legally during the prior use of the building as a church.

43. On September 28, 2005, the City of Troy Department of Public Works, Bureau of Code Enforcement issued a Certificate of Occupancy to the Sanctuary, thereby certifying that the property located at 3361 Sixth Avenue, in Troy, New York, was in compliance with the applicable zoning ordinance and building code requirements of the City of Troy and authorizing the Sanctuary’s occupancy and use of the building as a media facility.

44. It was not until March 10, 2008 -- the same day that Defendant Mirch publicly denounced Bilal’s art work and called upon Plaintiffs to cancel the exhibit -- that Defendants’ inspectors arrived at the building at 3361 Sixth Avenue, in Troy, New York to inspect for compliance with the building code requirements.

45. The following day, March 11, 2008, on the heels of Plaintiffs’ refusal to acquiesce in Defendant Mirch’s demands, the City of Troy inspectors gave notice to the Sanctuary that the

building at 3361 Sixth Avenue, in Troy, New York “shall not be used as a place of assembly” until the specified conditions were corrected.

46. Prior to that date, the City of Troy was aware of those conditions but had never asserted them as grounds for prohibiting public assembly at the building at 3361 Sixth Avenue, in Troy, New York.

47. The Defendants’ actions chilled Plaintiffs’ exercise of their First Amendment rights. As a result of the Defendants’ actions, Plaintiffs were required to close the Sanctuary’s operations for an extended period of time while they corrected the conditions identified in the Notice of Violations. In the meantime, Plaintiffs lost the ability to host other previously scheduled exhibits and workshops at the Sanctuary. In addition, the interference and disruption resulting from the Defendants’ actions caused Plaintiffs to forgo other valuable business opportunities that were available to them at that time.

48. On April 15, 2008, Plaintiff Media Alliance, Inc. served upon Mirch and the City of Troy a Notice of Claim and Intention to Sue pursuant to Section 50-e of the New York General Municipal Law (the “Notice of Claim”).

49. More than thirty days have elapsed since the service of the Notice of Claim.

#### AS AND FOR A FIRST CLAIM FOR RELIEF

(Pursuant to 42 U.S.C. § 1983 for Violation, under Color of State Law,  
of the Federal Constitutional Right to Freedom of Speech and Peaceable Assembly)

50. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth herein.

51. The First Amendment to the U.S. Constitution, which applies to the States under the Fourteenth Amendment, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or

the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

52. Defendants' actions, under color of state law, violated the Plaintiffs' rights of free speech and assembly under the First Amendment of the United States Constitution by misusing the local building codes, in retaliation for Plaintiffs' exercise of their constitutional rights, and by effectively closing the Sanctuary, thereby chilling Plaintiffs' exercise of these First Amendment rights.

53. The contours of these rights are sufficiently clear that a reasonable official would understand that what he or she is doing violates that right. Defendant Mirch knew or should have known that government-sponsored censorship in retaliation for the exercise of a First Amendment right is unlawful.

54. By virtue of the foregoing, the Defendants' actions violated Plaintiffs' rights under the First Amendment to the United States Constitution.

#### AS AND FOR A SECOND CLAIM FOR RELIEF

(Pursuant to 42 U.S.C. § 1983 for Violation, under Color of State Law,  
of the Federal Constitutional Right to Due Process and Equal Protection)

55. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth herein.

56. The Due Process and Equal Protection Clause of the United States Constitution, which applies to the States under the Fourteenth Amendment, states in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

57. The Defendants' actions, under color of state law, violated the Plaintiffs' rights under the Fifth and Fourteenth Amendment to the United States Constitution by misusing the

local building codes to close the Sanctuary in retaliation for Plaintiffs' exercise of their constitutional rights.

58. The Defendants' actions, under color of state law, deprived Plaintiffs of their constitutional liberty interest by portraying the Plaintiffs in a false light, in violation of Plaintiffs' Fifth and Fourteenth Amendment rights.

59. The contours of these rights are sufficiently clear that a reasonable official would understand that what he or she is doing violates that right. Defendant Mirch knew or should have known that government-sponsored censorship in retaliation for the exercise of a First Amendment right is unlawful.

60. By virtue of the foregoing, the Defendants' actions violated Plaintiffs' rights under the Due Process Clause and Equal Protection Clause of the United States Constitution.

#### AS AND FOR A THIRD CLAIM FOR RELIEF

(Pursuant to Article I §§ 6, 8, and 9 for Violation of the New York State Constitutional Right to Due Process, Freedom of Speech and the Right to Assemble)

61. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth herein.

62. The Defendants' actions, as described above, violated Plaintiffs' rights to due process under Article I, § 6, Plaintiffs' rights to freedom of speech under Article I, § 8, and Plaintiffs' rights to assemble under Article I, § 9 of the New York State Constitution.

63. By virtue of the foregoing, the Defendants' actions violated Plaintiffs' rights under Article I of the New York State Constitution.

AS AND FOR A FOURTH CLAIM FOR RELIEF

(For Abuse of Process and/or Governmental Power)

64. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth herein.

65. The Defendants misused the local building codes and the enforcement thereof to limit the exercise of Plaintiffs' constitutional rights, a purpose for which those codes were not designed.

66. By virtue of the foregoing, the Defendants' actions constitute the common law torts of abuse of process and/or governmental power.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs requests that this Court:

1. Declare that the Defendants' actions violated the First, Fifth and Fourteenth Amendments to the United States Constitution;

2. Declare that the Defendants' actions violated Article I, §§ 6, 8, and 9 of the New York State Constitution, as well as the common law of New York State;

3. Permanently enjoin the Defendants from any further retaliatory action against the Plaintiffs or citizens of the City of Troy, including by selectively enforcing the building code, to suppress the exercise of rights under the United States and New York Constitutions;

4. Award the Plaintiffs nominal damages based on the violation of constitutional rights under the United States Constitution and New York Constitution;

5. Award the Plaintiffs attorneys' fees pursuant to 42 U.S.C. § 1988; and

6. Grant such other and further relief as to this Court may seem just and proper.

Dated: Albany, New York  
June 8, 2009

Respectfully submitted,

s/ Cornelius D. Murray  
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