IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., *Plaintiff,*	§ § § §	
v.	§	NO. 1-16:CV-00233-SS
GOVERNOR GREG ABBOTT AND ROD WELSH,[1] EXECUTIVE DIRECTOR OF TEXAS STATE PRESERVATION BOARD, *Defendants*.	§ § § § §	

DEFENDANT GREG ABBOTT'S MOTION FOR PROTECTIVE ORDER

Pursuant to Federal Rules of Civil Procedure 26(c) and 30(d)(3), Governor Greg Abbott respectfully moves for protection from a deposition noticed by the Plaintiff in the above-captioned cause. A copy of this notice is attached to and made part of this motion as Exhibit A.

INTRODUCTION

Defendants intend to provide Plaintiff with all the non-privileged information it needs to pursue its legally viable claims. That pursuit should start with written discovery to collect relevant information and to narrow the issues in dispute. And in this case, Defendants have offered to answer extensive written discovery—including interrogatories, requests for admission, and even a deposition on written questions—that would obviate any need to take the oral deposition of Texas's chief executive officer. Defendants have already assisted Plaintiff in its pursuit of

[1] John Sneed, who was Executive Director of the Preservation Board when this lawsuit was filed, was initially named as a defendant in this lawsuit, along with Governor Abbott. The individual capacity claims against Director Sneed were dismissed by the Court on June 21, 2016 (Doc. 28). Pursuant to Federal Rule of Civil Procedure 25(d), "[a]n action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name[.]" Because Rod Welsh is now Executive Director of the State Preservation Board, he takes Director Sneed's place as an official capacity defendant in this cause.

discovery by disclosing that Governor Abbott did not write or sign the letter that forms the core of Plaintiff's complaint. *See* Exhibit B, at 2 (disclosing that staff identified the need to remove the display, wrote the letter, and signed it with an auto-pen). Finally, to the extent that disclosure was insufficient, Defendants offered to work with Plaintiff to establish the facts in some written form that Plaintiff would find sufficient.

Plaintiff has rebuffed all of those offers, however, and jumped straight to demanding the Governor's oral deposition. Plaintiff's only basis for that demand is its lawyer's "belie[f] [that Governor Abbott] had some first-hand involvement in the actions in question." Exhibit B, at 2. Given that Defendants have not had a chance to answer a single interrogatory or request for admission, and given that Plaintiff cannot point to a single document to substantiate that "belie[f]," it is not clear how Plaintiff's counsel formed it. What is clear, given that Plaintiff has refused every less-invasive discovery alternative, is that deposing the Governor is at best a fishing expedition and at worst harassment.

That is not the way parties compel oral depositions of high-ranking, statewide-elected government officials. As explained below, special legal rules apply in these circumstances. Before Governor Abbott can be subjected to a deposition, it is *Plaintiff's* burden to prove the "exceptional circumstances" that warrant it. That is an extremely high standard. And Plaintiff has not come close to meeting it.

BACKGROUND

On December 21, 2015, Governor Abbott sent a letter to the Executive Director of the Texas State Preservation Board ("Board"). The letter observed that an exhibit placed in the Capitol Rotunda at the request of Plaintiff Freedom From Religion Foundation ("FFRF") violated the Texas Administrative Code because it was offensive and derogatory and did not promote a public

purpose. After the Board removed the offensive exhibit, FFRF sued the Governor and the Executive Director of the Board. The Court has dismissed all but two of FFRF's claims. Doc. 38.[2] The Court allowed Plaintiff to pursue discovery into (1) whether Defendants engaged in "viewpoint discrimination," *id.* at 18, and (2) whether Defendants had a "secular purpose" for removing Plaintiff's exhibit, *id.* at 20.

On April 10, 2017, FFRF served Governor Abbott's counsel via email with a notice of deposition for April 25, 2017. *See* Exhibit A. Between April 6 and 13, 2017, the Defendants made extensive efforts to resolve this issue without the Court's intervention. A chronological copy of counsel's correspondence is attached to and made part of this motion as Exhibit B. Those colloquies can be summarized as follows:

- Defendants disclosed that Governor Abbott did not draft or personally sign the December 2015 letter;
- Defendants disclosed that Governor Abbott has no unique personal knowledge of any fact that is in any way relevant to this dispute;
- Defendants offered to prove those facts through written requests for admission;
- Defendants offered to prove those facts through written interrogatories;
- Defendants offered to prove those facts through a deposition of the Governor's Office on written questions;
- Defendants offered to prove those facts through some other written instrument;
- Defendants agreed to negotiate in good faith over any non-oral-deposition alternative Plaintiff might identify; and

[2] A more detailed statement of the relevant factual background is set forth in the Court's Order partially granting and partially denying the Defendants' Motion for Summary Judgment. (Doc. 38).

- Plaintiff rejected every single offer and demanded an oral deposition of the Governor.

See Exhibit B, at 1.

ARGUMENT & AUTHORITIES

"It is a settled rule in this circuit that exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted." *In re F.D.I.C.*, 58 F.3d 1055, 1060 (5th Cir. 1995) (internal quotation marks and citation omitted). That rule is so serious and settled that a violation of it gives rise to mandamus. *See id.*

The "exceptional circumstances" standard imposes a heavy burden on the Plaintiff in this case. In particular, FFRF "must show (1) the official's testimony is necessary to obtain relevant information that is not available from another source; (2) the official has first-hand information that cannot reasonably be obtained from other sources; (3) the testimony is essential to the case at hand; (4) the deposition would not significantly interfere with the ability of the official to perform his government duties; and (5) the evidence sought is not available through less burdensome means or alternative sources." *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1049 (E.D. Cal. 2010). Not only can Plaintiff not meet that standard, Plaintiff has not even tried. Moreover, as Defendants will soon show in a Motion for Judgment on the Pleadings under Rule 12(c), Plaintiff's claims against the Governor are legally baseless. The Court should resolve the legal issues raised in that Rule 12(c) motion first; if there are any legal claims left, the second step should be written discovery; in no event is it appropriate to depose the highest-ranking official in the State of Texas.

A. The *Morgan* Doctrine Creates a High Legal Hurdle for Plaintiff

Plaintiff has not noticed a normal deposition, and this is not a normal protective-order motion.[3] When it comes to deposing someone like Governor Abbott, the Federal Rules of Civil

[3] Federal Rule 30 generally provides for broad access to persons during the discovery process, *see* FED. R. CIV. P. 30(a), and the party opposing the deposition generally bears the burden of proving good cause for a protective order,

Procedure and decades of federal precedent impose an overwhelming presumption *against* the deposition. And it is Plaintiff's sole obligation to overcome that presumption by proving "exceptional circumstances."

That rule is called the *Morgan* doctrine. *See United States v. Morgan*, 313 U.S. 409 (1941). In that case, the district court erroneously allowed plaintiffs to depose the Secretary of Agriculture. *Id.* at 421-22. There was no doubt that the Secretary had information that was highly relevant to the dispute: the plaintiffs were challenging the price ceilings that the Secretary imposed on the Kansas City Stockyards. *Id.* at 413. And there was no doubt that the Secretary had unique personal knowledge of the facts central to the legal dispute: the Secretary personally reviewed the market evidence, personally refused evidence favorable to the plaintiffs, and personally set price ceilings that harmed the plaintiffs. *Id.* at 422. So there is no doubt that, but for the fact that he was a high-ranking government official performing an official government act, the Secretary not only would have been deposable but also would have been the plaintiffs' star witness. Still, the Supreme Court emphatically held "the short of the business is that the Secretary should never have been subjected to this examination." *Id.*

In the 76 years since *Morgan*, high-ranking government officials' immunity from depositions has expanded far and wide. It now applies as a matter of law to governors. *See, e.g.*, *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982); *Shirley v. Chestnut*, 603 F.2d 805 (10th Cir. 1979); *Thomas*, 715 F. Supp. 2d 1012. It also applies to officers who exercise narrower executive powers—such as the directors of the Federal Deposit Insurance Corporation, the inspector general of the Railroad Retirement Board, the administrator of the Small Business Administration, members of the Youth Division of the United States Board of Parole, and the Comptroller of

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see Williams ex rel. Williams v. Greenlee, 210 F.R.D. 577, 579 (N.D. Tex. 2002). As explained in this motion, the opposite is true when a party tries to depose someone like Governor Abbott.

Currency. *See In re F.D.I.C.*, 58 F.3d 1055 (FDIC directors); *In re Office of Inspector General, Railroad Retirement Board*, 933 F.2d 276 (5th Cir. 1991) (inspector general of RRB); *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226 (9th Cir. 1979) (SBA administrator); *United States Bd. of Parole v. Merhige*, 487 F.2d 25 (4th Cir. 1973) (Youth Division members); *Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968) (comptroller). But it extends much further than that. At the federal level, the immunity extends down to various staffers and regional administrators at the Labor Department, appeals officers at the Internal Revenue Service, regional directors for the National Labor Relations Board, and a deputy chief of staff at the Environmental Protection Agency. *See Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575 (D.C. Cir. 1985) (Labor Department staff); *Mullins v. United States*, 210 F.R.D. 629 (E.D. Tenn. 2002) (IRS appeals officers); *Ahearn v. Rescare West Virginia*, 208 F.R.D. 565 (S.D. W. Va. 2002) (NLRB regional directors); *Low v. Whitman*, 207 F.R.D. 9 (D.D.C. 2002) (EPA deputy chief of staff). And below the federal level, it extends even further to university chancellors and myriad local officials like mayors, deputy mayors, sheriffs, police superintendents, and county commissioners. *See Lederman v. New York City Dept. of Parks and Recreation*, 731 F.3d 199 (2d Cir. 2013) (mayor and deputy mayor); *Braga v. Hodgson*, 605 F.3d 58 (1st Cir. 2010) (sheriff); *Bogan v. City of Boston*, 489 F.3d 417 (1st Cir. 2007) (mayor); *Bituminous Materials, Inc. v. Rice County, Minn.*, 126 F.3d 1068 (8th Cir. 1997) (county commissioners); *Olivieri v. Rodriguez*, 122 F.3d 406 (7th Cir. 1997) (police superintendent); *Milione v. City University of New York*, 950 F. Supp. 2d 704 (S.D.N.Y. 2013) (chancellor), *aff'd*, 567 Fed. Appx. 38 (2d Cir. 2014); *Buono v. City of Newark*, 249 F.R.D. 469 (D.N.J. 2008) (mayor).

"The reason for requiring exigency before allowing the testimony of high officials is obvious. High ranking government officials have greater duties and time constraints than other

witnesses." *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993). It is not just that high-ranking government officials are busy; given the breadth of their executive powers and duties, such officials often take official actions that lead to litigation from someone. If every person aggrieved by any of those actions could thereby hail the official into a 7-hour deposition, our government officials would do nothing but sit for depositions. As one district court put it:

> The . . . doctrine recognizes that, left unprotected, high-ranking government officials would be inundated with discovery obligations involving scores of cases where the public official would have little or no personal knowledge of material facts. Left unchecked, the litigation-related burdens placed upon them would render their time remaining for government service significantly diluted or completely consumed.

United States v. Wal-Mart Stores, Inc., No. CIV.A.PJM-01-1521, 2002 WL 562301, at *1 (D. Md. Mar. 29, 2002); *see also Buono*, 249 F.R.D. at 470 n.2 ("Absent extraordinary circumstances, good cause exists to preclude the deposition of a high level government official because there is a public policy interest in ensuring that high level government officials are permitted to perform their official tasks without disruption or diversion."); *Alexander v. F.B.I.*, 541 F. Supp. 2d 273, 274 (D.D.C. 2008) ("Plaintiffs have no right, *per se*, to depose a person just because plaintiffs named the person as a party."). That alone is sufficient to warrant a protective order here.

But there are additional reasons—independent of the need to protect officials like the Governor from disruption or diversion—for entering a protective order in this case. As the immunity has grown and expanded in the 76 years since the Supreme Court's decision in *Morgan*, the federal courts also have recognized that high-ranking officials must be protected from depositions to protect the integrity of their decision-making processes: "*Morgan* has come to stand for the notion that as for high-ranking government officials, their thought processes and discretionary acts will not be subject to later inspection under the spotlight of deposition. Decision-makers enjoy a mental process privilege." *Wal-Mart*, 2002 WL 562301, at *1. As the Fourth

Circuit held:

> The judiciary, the courts declare, is not authorized to probe the mental processes of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others—results demanded by the exigencies of the most imperative character. No judge could tolerate an inquisition into the elements comprising his decision—indeed, such an examination of a judge would be destructive of judicial responsibility—and by the same token the integrity of the administrative process must be equally respected.

Franklin Sav. Ass'n v. Ryan, 922 F.2d 209, 211 (4th Cir. 1991) (internal quotation marks, emphasis, alterations, and citations omitted). That mental-process privilege provides an independent bar against deposing high-ranking officials; indeed, it bars depositions even after they leave office. *See, e.g.*, *SEC v. Committee on Ways and Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199 (S.D.N.Y. 2015) (former director of the health subcommittee of the House Committee on Ways and Means); *United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309 (D.N.J. 2009) (former EPA officials); *Wal-Mart*, 2002 WL 562301 (former chair of the Consumer Product Safety Commission).

The mental-process privilege attaches to high-level officials' decision-making even where, as here, the officials' motives are at issue. The Supreme Court, for example, has held that those motives must be judged by objective indicia in all but the most extraordinary of cases:

> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 268 (1977); *see also id.* at 267 n.18 ("This Court has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-131 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore

usually to be avoided."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) (arguing that First Amendment cases turn on objective, not subjective, indicia of governmental motive); *cf. Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288, 297 (D.P.R. 1989) ("It does not follow . . . that because Dr. Apote's [an aide to the President of the Senate of Puerto Rico] documents are discoverable that he himself is automatically subject to a deposition. The reason being that the Speech or Debate Clause provides for testimonial and use immunity.").

Finally, the high-ranking official immunity from deposition is necessary to protect government leaders from harassment. Given the prominence of their positions, high-ranking officials generally and elected high-ranking officials particularly are targets for abusive legal processes. That makes the vigilant enforcement of the *Morgan* doctrine all the more important. As the Fourth Circuit held, "the *Morgan* doctrine 'allows officials to perform their duties without fear of harassment from lawsuits.'" *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1139 (10th Cir. 1999) (quoting STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 868 (3d ed. 1992) (alteration omitted)); *cf. Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C-05-4374-MMC, 2007 WL 205067, at *3 (N.D. Cal. Jan 25, 2007) ("Virtually every court that addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment."); *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 181 (Tex. 2000) (orig. proceeding) (The apex doctrine addresses the potential for harassment" that exists when a large organization "is routinely subjected to litigation.").

B. Plaintiff Has Not Come Close To Meeting Its Burden To Establish "Exceptional Circumstances"

1. To overcome Governor Abbott's immunity from deposition, FFRF bears the burden

of proving "exceptional circumstances." Various courts have used various tests to determine when the deposition-seeking party has shown "exceptional circumstances." But one court recently summarized the doctrine as follows:

> A party seeking the deposition of a high-ranking government official must show: (1) the official's testimony is necessary to obtain relevant information that is not available from another source; (2) the official has first-hand information that cannot reasonably be obtained from other sources; (3) the testimony is essential to the case at hand; (4) the deposition would not significantly interfere with the ability of the official to perform his government duties; and (5) the evidence sought is not available through less burdensome means or alternative sources.

Thomas, 715 F. Supp. 2d at 1049. Plaintiff has not come close to doing any of that.

To the contrary, Defendants have disclosed that Governor Abbott has *zero* unique first-hand information about this dispute. *See* Exhibit B, at 2. It was the Governor's staff—not the Governor—who discovered the offensive exhibit. *Id.* It was the Governor's staff—not the Governor—who drafted the letter on December 21, 2015. *Id.* And it was the Governor's staff—not the Governor—who signed the letter using an auto-pen. *Id.* Thus, it would be impossible for Plaintiff to prove that Governor Abbott's testimony is necessary to obtain relevant information that is not available from any other source. The Governor has no unique first-hand information, let alone does he have any information that is essential to this case.

That should be the end of the matter here, just as it was in *Hernandez v. Texas Department of Aging & Disability Services*, No. A-11-CV-856 LY, 2011 WL 6300852 (W.D. Tex. Dec. 16, 2011). There, Plaintiffs sought to depose then-Governor Rick Perry about letters he received from the United States Department of Justice. *Id.* at *1. As here, there was not a scintilla of evidence that the Governor personally read those letters or had any first-hand knowledge of anything that could not be discovered through alternative means. *Id.* at *2. Accordingly, the Court issued a protective order to bar the Governor's deposition. *Id.* at *4.

Moreover, a deposition would significantly interfere with the Governor's ability to perform

his official duties. Plaintiff unilaterally demanded the Governor's deposition on 15 days' notice, in the middle of the legislative session, without any consultation whatsoever regarding the Governor's schedule. Not only should be that alone be sufficient to justify a protective order under the high-ranking official immunity from depositions, it should be independently sufficient to quash Plaintiff's notice under Rule 45. *See* FED. R. CIV. P. 45(c)(3)(A)(i) ("On timely motion, the issuing court must quash or modify a subpoena that: (i) fails to allow a reasonable time to comply . . . .").

Nor can Plaintiff show that a deposition is the least-intrusive means for discovering whatever Plaintiff is fishing for. Defendants have offered to answer numerous avenues of written discovery—including interrogatories, requests for admission, and even a deposition on written questions. Plaintiff rebuffed all of those offers and instead insisted that the Governor sit for a deposition. Again, Plaintiff's steadfast refusal even to consider a less-invasive alternative to deposing the Governor is independently sufficient to justify a protective order under the *Morgan* doctrine.

In making the admissions and offers described above, the Governor already has done far more than the law requires. Under the *Morgan* doctrine, "a high-ranking government official should not—absent exceptional circumstances—be deposed or called to testify regarding the reasons for taking official action, 'including the manner and extent of his study of the record and his consultation with subordinates.'" *Lederman v. New York City Dept. of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (citing *Morgan*, 313 U.S. at 422). Thus, the Governor could refuse to answer questions regarding his level of involvement in this case or the extent to which he consulted with or relied on his staff. It is only out of professional courtesy and in an attempt to resolve this issue without this Court's involvement that the Governor has disclosed as much as he has. Obviously, those courtesies have gone unreciprocated.

2. The only basis Plaintiff has offered for its demand to depose the Governor is its counsel's unsubstantiated "belie[f]" that Governor Abbott was somehow personally involved in this case, and that his personal involvement was motivated by some improper purpose. Exhibit B, at 2. That assertion fails as a matter of law to justify deposing the Governor. "Allegations that a high government official acted improperly are insufficient to justify the subpoena of that official unless the party seeking discovery provides compelling evidence of improper behavior and can show that he is entitled to relief as a result." *In re United States (Holder)*, 197 F.3d 310, 314 (8th Cir. 1999). Were it otherwise, the high-ranking official's immunity from a deposition would not be worth much, because any plaintiff could simply assert (as FFRF does here) that its target acted with an improper purpose.

Three federal appellate cases more than sufficiently prove the point. First consider the Fifth Circuit's controlling decision in *In re FDIC*, 58 F.3d 1055. In that case, Pacific Union entered into an agreement to buy a tract of land in Texas. *Id.* at 1057. Because the transfer of that land was wrapped up in the federal savings and loan crisis, the sale required the approval of the FDIC. In September 1992, the FDIC approved the sale. *Id.* at 1057-58. In July 1993, however, the FDIC changed its mind, disapproved the sale to Pacific Union, and ordered instead that the land should be sold to the federal Fish and Wildlife Service. *Id.* at 1058. Pacific Union was obviously angered by the government's change of heart, and it sued to recover the almost $2 million in damages caused by the FDIC's actions. During discovery, the government admitted that three officials were personally responsible for the decision: the acting chairman of the FDIC, the Comptroller of the Currency, and the acting director of the Office of Thrift Supervision. *Id.* at 1059. Pacific Union noticed depositions for all three individuals, and a magistrate judge denied a motion to quash because the federal government had admitted that all three of the would-be deponents were

personally responsible for the decision to cancel Pacific Union's purchase of the land. *Id.* Crucially, Pacific Union argued (and the magistrate judge agreed) that the depositions were the only avenues available for plaintiff to prove its "allegations of misconduct (including conspiracy and cover-up) by government agencies and officials who grossly abused their power to deprive Pacific Union of its contract rights." *Id.* at 1061.

The Fifth Circuit issued a writ of mandamus and quashed the deposition notices. In doing so, the court held it was irrelevant that the would-be deponents had sent letters memorializing their decisions: "Agency leaders often send and receive correspondence relative to their actions. Their official conduct frequently affects—sometimes adversely—the property rights of private parties. This does not of itself subject them to the burdens of litigation discovery." *Id.* And the court held that Pacific Union's suspicions or allegations of a "conspiracy and cover-up" by the would-be deponents fell far short of the "exceptional circumstances" necessary to justify depositions. *Id.* at 1062. The record at most reflected that the officials changed their minds and canceled the sale to Pacific Union based on policy "preferences" and "political" motivations—purposes that fail as a matter of law to justify their depositions. *Id.*

This case follows *a fortiori* from *In re FDIC*. That precedent stands for the proposition that writing a letter—even one that changes the government's position 180 degrees, to the plaintiff's detriment—is insufficient to warrant the deposition of the letter's signatory. Moreover, under *In re FDIC*, even if Governor Abbott had personal involvement in the decision to write the letter (as the would-be deponents in that case admitted they did), he *still* would be immune from a deposition notice. And finally, allegations of "conspiracy," "cover-up," or other improper motivations fall far short of the "exceptional circumstances" standard. Before noticing a deposition, Plaintiff must make "a strong showing of bad faith or improper behavior" that extends

well beyond an official's consideration of "policy" preferences and "political" motivations. *Id.* FFRF has not even attempted to make that showing here.

Next consider *Lederman*. In that case, the Second Circuit considered a nearly two-decade-long feud between the City of New York and "expressive-matter vendors." *See, e.g.*, *Lederman v. N.Y. City Dep't of Parks & Recreation*, No. 10 CIV. 4800 (RJS), 2010 WL 2813789, at *1-*4 (S.D.N.Y. July 16, 2010) (chronicling the feud from 1994 to 2010). "Expressive-matter vendors" sell things like books, art, sculpture, and photos in public places like sidewalks and parks. At first, the city banned art vendors while allowing other expressive-matter vendors (like book sellers) to operate virtually unfettered; the art vendors successfully challenged that policy and won relief under the First Amendment. *See Bery v. City of N.Y.*, 97 F.3d 689 (2d Cir. 1996). Thereafter, the city repeatedly tried to devise new ways to prevent or inhibit the activities of art vendors. After the city revised its rules in 2010, the art vendors again challenged them on several grounds. They argued that city officials plainly were attempting to circumvent the federal courts' decisions; that the officials were targeting people who sell art in some ways (like selling paintings) while exempting others (like collecting money for artistic performances); and that the officials were allowing "favored" artists to display their works in parks while banning disfavored ones from doing so. Plaintiffs raised claims under the First Amendment and the Fourteenth Amendment's Equal Protection Clause, in addition to raising claims for conspiracy and retaliation under the federal civil rights laws. *See Lederman v. N.Y. City Dep't of Parks & Recreation*, 901 F. Supp. 2d 464 (S.D.N.Y. 2012).

The motivations of the city officials were obviously central to the vendors' theory of the case. The lead plaintiff in the case, Robert Lederman, was a renowned First Amendment activist who clearly got under the skin of many city officials:

> [Lederman] gained international notoriety by his successful challenge to former Mayor Rudolph Giuliani's restrictive policies against artists during Giuliani's 'quality of life' campaign, as well as his artistic depictions of the former and current Mayors in political protest paintings. Lederman is a co-founder and president of A.R.T.I.S.T. (Artists' Response to Illegal State Tactics). During his nearly two decades of activism, Lederman has been arrested 44 times and not a single arrest has led to a conviction. Most of these arrests were ordered by high-ranking City officials, including former Mayor Giuliani . . . .

Br. for Plaintiffs-Appellants, *Lederman v. N.Y. City Dep't of Parks & Recreation*, No. 12-4333-cv, 2013 WL 504251 (2d Cir.), at *6-*7 (attached as Exhibit C). The plaintiffs presented summary-judgment evidence that city officials routinely arrested, harassed, and arbitrarily changed rules in an effort to "sweep" art vendors like Lederman out of city parks while allowing others to stay with impunity. *Id.* at *3-*14 (describing the city's "Art Wars"). And the plaintiffs presented evidence of bad blood or animus between city leaders and the art vendors:

> Venomous emails dating as far back as a decade . . . from [the park commissioner] to Lederman conclusively prove that [the commissioner] despised Lederman. In fact, [the commissioner] attributed Lederman for the [2010 revision to the law] in his statements to the press. [An assistant park commissioner's] contemporaneous Power Point presentation clearly illustrates the contempt he held for the artists. Even Mayor [Michael] Bloomberg emailed Lederman that 'all is not forgiven.'

Id. at *47 (joint appendix citations omitted). The plaintiffs used that evidence to demand depositions of Mayor Bloomberg and his former deputy. *Id.* at *51-*53.

The Second Circuit affirmed the protective order immunizing the mayor and his former deputy. *See Lederman*, 731 F.3d at 203-04. It did not matter that the lead plaintiff was a First Amendment activist who felt unfairly targeted—to wit, he was arrested 44 times and never prosecuted—by government officials he thought were bent on inhibiting his expression. It did not matter that he was the founder of an organization that existed to challenge government regulations by pushing the envelope of free expression. It did not matter that the officials' personal views might be considered relevant to Lederman's claim that the defendants intended to discriminate against his viewpoint, to conspire and retaliate against him, and to skirt the law in a decades-long

feud. And it did not matter that the mayor personally emailed the plaintiff and appeared to threaten him with vengeance. Lederman *still* was not entitled to depose the mayor or his former deputy.

Again, this case is easier. The Governor is an even higher-ranking official than a mayor or his former deputy. FFRF's allegations of "animus," *see* Doc. 15, ¶¶ 88-103, pale in comparison to the decades-long feud and the evidence of harassment in *Lederman* (which included "venomous" emails from city leaders and scores of arrests of artists). While the plaintiffs in *Lederman* could point to evidence that the mayor and deputy mayor were personally involved in the dispute—including through an email from Mayor Bloomberg to Lederman—the record here shows the exact opposite. *See* Exhibit B, at 2. And unlike FFRF, the plaintiffs in *Lederman* had exhaustively pursued other avenues of discovery before seeking to depose the mayor and his former deputy, *e.g.*, 901 F. Supp. 2d at 471, and they had no other way to get the information they wanted, *see* 2013 WL 504251, at *53. FFRF cannot win where the *Lederman* plaintiffs lost.

Finally, consider the First Circuit's decision in *Bogan*, 489 F.3d 417. In the late 1990s, the Grove Hall neighborhood in Dorchester was notoriously ridden with crime and poverty. To clean it up, Mayor Thomas Menino created the Neighborhood Development Corporation of Grove Hall ("NDC") to purchase properties in the area and redevelop them. One property owner—Albertha Bogan—refused to sell her home. In January 1999, NDC attempted to take Bogan's home as part of her personal bankruptcy. *See* Memorandum in Support of Plaintiffs' Opposition to Motion of City Defendants for a Protective Order, *Bogan v. City of Boston*, No. 02CV10522 RCL, at 5 (D. Mass.) (attached as Exhibit D). Bogan avoided the taking by refinancing the home in February 1999. *See id.* But almost immediately thereafter, either the mayor or the mayor's office instructed the city's inspectorial services department (along with the fire department and municipal power and gas companies) to enter Bogan's home and condemn it. *Id.* at 6. On March 24, 1999, the city

entered Bogan's home without a warrant or permission, purported to find 50 building code violations, and condemned the building. *Id.* at 5. Ms. Bogan was not home at the time, so the city officials gave her six-year-old daughter the condemnation notice and gave her 20 minutes to leave the property. *Id.* at 6. In June 1999, the Boston Housing Court overturned 49 of the 50 code citations and "reprimanded" the city for its actions against Bogan. *Id.* at 8.

Bogan sued the mayor, the city, and various other officials under 42 U.S.C. § 1983 and also raised numerous claims under state statutory and tort law. And Bogan presented evidence that Mayor Menino was personally involved in her injuries. The commissioner of the city's inspectorial services department admitted that he was instructed to enter Bogan's home by the "Menino Administration." Exhibit D, at 6. Moreover, on the day of the inspection, another inspectorial services employee wrote a note that said the mayor personally ordered it. *Bogan*, 489 F.3d at 423. And two days after Bogan and her family were evicted, Mayor Menino staged a press conference in front of Bogan's home, and he used city employees to pick up trash behind him to highlight his cleanup efforts. Exhibit D, at 7. Accordingly, Bogan noticed the mayor's deposition to gather facts surrounding his personal involvement in forcing her out of her home.

The First Circuit affirmed the protective order. Remarkably, the appellate court held that the inspectorial services employee's note "was sufficient to permit a factfinder to conclude that the Mayor ordered the inspection." *Bogan*, 489 F.3d at 424. Still, the *Morgan* doctrine and the high-ranking official's immunity is so strong that Bogan had to do even more to warrant deposing the mayor. In particular, the court held, Bogan must first exhaust every other available form of discovery to clarify the mayor's role. *See id.* (holding "the district judge did not abuse his discretion in issuing a protective order for Mayor Menino because the Bogans had not exhausted other available avenues of discovery").

Yet again, this case is easier. There is nothing remotely akin to the inspectorial services employee's note in this case. To the contrary, Governor Abbott was not involved in identifying Plaintiff's offensive display, in drafting the response to it, or even in signing that response. *See* Exhibit B, at 2. Whereas the *Bogan* plaintiffs completed an exhaustive discovery process (albeit not quite exhaustive enough), the Plaintiff here has refused every less-invasive alternative to a deposition. And while there was ample evidence that the mayor and his office actually did target Ms. Bogan—indeed, she won a money judgment and attorneys' fees based on the city's lawless conduct—there is no such evidence here.

* * *

As far as undersigned counsel's case research reveals, no sitting Governor in the history of Texas ever has been involuntarily subjected to a deposition. Plaintiff has not come close to proving the exceptional circumstances that would make this Governor the first.

CONCLUSION & PRAYER

For all of these reasons, the Court should enter a protective order preventing the deposition of Governor Abbott noticed in Exhibit A.

Dated this 17th day of April, 2017.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

The movant certifies that he, through his attorney, Assistant Attorney General Anne Marie Mackin, has endeavored to resolve this matter out of Court.

/s/Anne Marie Mackin
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that, on this the 17th day of April, 2017, a true and correct copy of the foregoing was filed electronically with the Court, causing electronic service upon all counsel of record.

/s/Angela V. Colmenero
Assistant Attorney General