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

FREEDOM FROM RELIGION FOUNDATION, INC.	§	
Plaintiff,	§	
	§	
-vs-	§	**CASE NO. 1-16: CV-00233**
	§	
GOVERNOR GREG ABBOTT, in his official and individual capacities, and ROD WELSH, Executive Director of the Texas State Preservation Board, in his official capacity,	§	
Defendants.	§	

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUPPORTING BRIEF

MOTION

The Plaintiff, Freedom From Religion Foundation, Inc., moves the court for summary judgment on the remaining issue of viewpoint discrimination.

The Court previously denied the Defendants' Motion for Summary Judgment on FFRF's claim that the Defendants violated FFRF's First Amendment speech rights by summarily removing FFRF's previously-approved display from the State Capitol. The Court determined that disputed issues of fact still remained as to the question of viewpoint discrimination. The parties have subsequently engaged in additional discovery, however, which makes clear that the remaining issue can be resolved by summary judgment on the basis of undisputed facts.

Summary judgment is warranted because the Defendants removed FFRF's display on the basis of its communicative content. This constitutes undeniable viewpoint discrimination, a conclusion recently re-affirmed by the United States Supreme Court in *Matal v. Tam*, 137 S. Ct. 1744 (2017).

This Motion is supported by the accompanying Brief In Support of Motion and Appendix of Evidentiary Support. The Motion is also supported by the previously submitted evidence (Dock. Nos. 33.1 and 35.1), as well as the previous joint stipulated facts (Dock. No. 33).

Finally, Plaintiff's counsel has inquired of Defendants' counsel whether the Motion would be opposed. A response has not yet been received, but Plaintiff's counsel fully anticipates that the Motion is to be opposed.

BRIEF IN SUPPORT OF MOTION

I. INTRODUCTION.

The Defendants undeniably removed FFRF's Bill of Rights/Winter Solstice display because of its communicative content. Governor Abbott's letter to John Sneed, the Executive Director of the State Preservation Board, on its face takes issue with FFRF's purported message. The letter to Sneed, moreover, was not sent inadvertently, nor does it misstate the Governor's position. Although the Governor may not have drafted the letter in the first instance, he knowingly approved the letter and he subsequently took prideful ownership of the letter in a tweet posted on the Governor's personal account. Finally, the Executive Director of the State Preservation Board acknowledges that he acted upon the Governor's letter, in part, because he considered the Governor to have a better feel for the "sensibilities" of his constituency. Based on these undisputed facts, the question of viewpoint discrimination cannot be disputed as a matter of fact or law. This case presents a textbook example of viewpoint discrimination.

The Governor's tirade about the indecency of FFRF's display exemplifies precisely why such censorship is odious to the principles underlying the First Amendment. In the first place, assuming the Governor could accurately measure the sensitivities of his constituency, that is not a basis for stifling dissent. In fact, however, in this case, the Governor apparently does not

accurately read the public's reaction to FFRF's display. Other than the objection of Governor Abbott's Office, no known objection was made to FFRF's display while it stood in the Texas State Capitol. The Defendants' paternalism, therefore, was gratuitous and more accurately reflects the Defendants' own autocratic views, which is a standard antithetical to basic First Amendment principles. Finally, FFRF's display quite frankly is objectively innocuous, contrary to the Governor's claim of outright indecency.

The Defendants' personal sense of decency and propriety, regardless of sincerity, is not a defense to viewpoint discrimination in any public forum. The Defendants' acknowledge that the public areas of the State Capitol have been opened to diverse views and perspectives. The Defendants argue, however, that allegedly offensive perspectives should not be voiced, but instead limited to those evincing carnival conviviality. However well-intentioned the Defendants may be, such constraints on speech are not defensible, including because such limitations operate in reality to mute unpopular or troublesome perspectives.

II. STATEMENT OF FACTS.

A. Governor Abbott's Letter Demanding Removal Of FFRF's Display.

Governor Abbott sent a letter to John Sneed, Executive Director of the Texas State Preservation Board, on December 22, 2015, demanding removal of a previously-approved display in the State Capitol by FFRF. (Davis Dep. Ex. 3.) Governor Abbott's letter begins by attacking FFRF's display as a "juvenile parody." The letter states:

> It has come to my attention that State Preservation Board staff approved an application by the 'Freedom From Religion Foundation' to display an exhibit on the ground floor of the Capitol. The exhibit is entitled 'Bill of Rights [N]ativity and Winter Solstice [D]isplay.' The exhibit places the bill of rights in a manger and shows three founding fathers and the Statue of Liberty worshipping one of America's founding documents as a replacement for Jesus Christ. This juvenile parody violates the Preservation Board's regulations and should be removed immediately.

Governor Abbott's letter continues by criticizing FFRF's alleged "spiteful message." In particular, Governor Abbott states:

> First, far from promoting morals and the general welfare, the exhibit deliberately mocks Christians and Christianity. The Biblical scene of the newly born Jesus Christ lying in a manger in Bethlehem lies at the very heart of the Christian faith. Subjecting an image held sacred by millions of Texans to the Foundation's tasteless sarcasm does nothing to promote morals and the general welfare. To the contrary, the Foundation's spiteful message is intentionally designed to belittle and offend, which undermines rather than promotes any public purpose a display promoting the bill of rights might otherwise have had. The Board has allowed and should continue to allow diverse viewpoints to be expressed in Capitol displays. But it has no obligation to approve displays that purposefully mock the sincere religious beliefs of others.

(Davis Dep. Ex. 3.)

Governor Abbott continues in his letter to Sneed to denounce FFRF as an organization whose private purpose is supposedly antithetical to the public's purpose. Governor Abbott writes as follows:

> Third, the general public does not have a "direct interest" in the Freedom From Religion Foundation's purpose. That organization is plainly hostile to religion and desires to mock it----or, more accurately, to mock our Nation's Judeo-Christian heritage. But it is erroneous to conflate the foundation's private purpose with the public's purpose. lf the Foundation simply wanted to promote the Bill of Rights or even to promote the supposed virtues of secularism, its effort might have some public purpose. But it is hard to imagine how the general public ever could have a direct interest in mocking others' religious beliefs.

(Davis Dep. Ex. 3.) Governor Abbott concludes his letter, "as Chairman of the State Preservation Board," by opining that "the Constitution does not require Texas to allow displays in its Capitol that violate general standards of decency and intentionally disrespect the beliefs and values of many of our fellow Texans." (Davis Dep. Ex. 3.)

The State Preservation Board subsequently advised FFRF that it would deny any future application by FFRF to display the same exhibit which was removed in 2015. The Preservation Board noted, however, that an exhibit by FFRF "would be welcomed" without the content that Governor Abbott previously considered offensive. The State Preservation Board wrote as follows:

> Thus, in addition to the space availability constain8 discussed above, please be aware that any application to display the same exhibit which was removed last year will be denied for failure to satisfy the public purpose requirement. On the other hand, an exhibit that celebrates the Bill of Rights and the Winter Solstice without mocking the sincerely held religious beliefs of other Texans would be welcome in the exhibition areas of the Capitol. Such an exhibit would be approved, provided the limited exhibition space available can accommodate it.

(Davis Dep. Ex. 7.)

The allegedly "indecent" exhibit displayed by FFRF is shown as follows:

B. Governor Abbott's Involvement.

Governor Abbott's letter to John Sneed, Executive Director of the Texas State Preservation Board, explains what about the FFRF exhibit prompted discussion and request to

Sneed from the Governor's office to take the FFRF display down. (Reed Dep. at p. 34, L. 15-17 and p. 35, L. 18-21.) Governor Abbott's letter to Sneed came about after the Governor's staff noticed the FFRF display, discussed it, and ultimately recommended a letter from the Governor that the display be removed. The Governor then was briefed on the staff's work on the letter and "the Governor approved the letter." (Reed Dep. at p. 41, L. 8- p. 42, L. 8.)

Governor Abbott was first alerted to the FFRF display by staff, and told that a letter was being drafted to Sneed at the Preservation Board that would recommend that the Board remove the exhibit/display. Governor Abbott approved that the letter be sent. (Reed Dep. at p. 58, L. 14-20.) Governor Abbott subsequently boasted on his personal Twitter account that he had demanded that the FFRF display be removed. (Reed Dep. at p. 50, L. 6- p. 52, L. 23.) (*See also* Reed Dep., Ex. 3.)

Governor Abbott's Office thought that the FFRF display did not satisfy the public purpose requirement in the Texas Administrative Code because it purportedly mocked other people's religious views and was, in that respect, considered intolerant of other people's viewpoints. "And therefore, because it was intolerant of other people's viewpoints, it did not serve the public purpose because the office felt that the public purpose is served by a diversity of viewpoints and not a stunting or mocking of other people's viewpoints." (Reed Dep. at p. 59, L. 7-18.) The Office of the Governor "felt that the general welfare is supported by a diverse set of viewpoints, and a display or exhibit which mocks any particular viewpoint is contrary to the general welfare because the general welfare is served by a diverse set of viewpoints." (Reed Dep. at p. 62, L. 7-12.) Governor Abbott's Office considers the Governor's letter to make clear that it perceived "that the purpose of the [FFRF] exhibit or display was to mock other people's religious views, and that making fun of or attempting to put down other people's religious or

nonreligious views is not in the direct interest of the general public." (Reed Dep. at p. 68, L. 21-p. 69, L. 2.)

Governor Abbott's letter "is a recommendation that the Preservation Board remove an exhibit or display that had previously been approved, based upon the Texas Administrative Code." (Reed Dep. at p. 72, L. 5-8.) According to Governor Abbott's Office, the letter to Sneed is a recommendation to remove the FFRF display, but the Board takes action as a collective body. "To elaborate, this letter [to Sneed] was not part of a meeting or -- was not part of a meeting or committee hearing. It was done by himself [the Governor], not in conjunction with the other members of the State Preservation Board. And it's a -- obviously it's a -- it says it pretty clearly that it's a -- it's a recommendation to John Sneed that he decide to remove the display." (Reed Dep. at p. 76, L. 10-22.) Without question, however, Governor Abbott's letter asks Sneed to remove the FFRF display. (Reed Dep. at p. 77, L. 4.) The letter to Sneed was a staff-generated idea that was eventually approved by the Governor. (Reed Dep. at p. 77, L. 22-24.)

Governor Abbott has only ever requested removal of FFRF's display for failing to meet the public purpose requirement, but no other displays. (Reed Dep. at p. 81, L. 13-18.)

Governor Abbott's office considered specific content in FFRF's display to have prompted the Governor's letter. "It was clear from the exhibit in those -- that this mocking of the nativity scene -- that it was not an expression of an independent viewpoint. Rather, it was mocking another viewpoint. It was putting down another viewpoint. And the purpose of these exhibits [in the Capitol] has to be, you know, a public purpose. And mocking another viewpoint is not a public purpose. In fact, it's, you know, contrary to public purpose. We should be tolerant of viewpoints and not mocking viewpoints." (Reed Dep. at p. 84, L. 24 - p. 85, L. 8.) The Governor's office objected to FFRF's display because it "took a traditional religious scene and,

you know, basically mocked it by replacing all the key components of that scene by other things rather than the things that are typically in that scene, nativity scene. (Reed Dep. at p. 84, L. 16-21.)

Other than with respect to FFRF's display, Governor Abbott's role in approval or scheduling of exhibits for display in the Capitol is generally extremely limited, *i.e.*, primarily a function of the staff of the Preservation Board. (Reed Dep. at p. 90, L. 15-18.) Governor Abbott's Office does not know of any other instance in which the Governor's office has been involved in the removal of an exhibit or display from the Capitol, except the FFRF display. (Reed Dep. at p. 91, L. 23-25.) The Governor's Office did not receive any complaints about the FFRF display while it was exhibited in the Capitol. (Reed Dep. at p. 104, L. 3-6.)

In the final analysis, according to Governor Abbott's Office, "the manner in which it [FFRF's display] does not comply with the general purpose requirement is that it mocks another person's viewpoint." (Reed Dep. at p. 111, L. 25 - p. 112, L. 2.) Governor Abbott's Office thinks that the FFRF display "belittles and mocks another person's viewpoint. And I think we said that if you're -- you're mocking or belittling another person's viewpoint, you're not complying with the general purpose requirement in the Texas Administrative Code. The general purpose is served by a diverse set of viewpoints, not on putting down somebody else's." (Reed Dep. at p. 113, L. 8-15.)

C. John Sneed Involvement.

John Sneed, Executive Director of the Texas State Preservation Board, and the Preservation Board staff, generally are the ones that approve or disapprove applications for exhibits or displays in the State Capitol. (Reed Dep. at p. 114, L. 12-14.) Sneed was the

Executive Director of the Texas Preservation Board, for eight years, including in December of 2015. (Sneed Dep. at p. 6, L. 17-22.)

Sneed instructed his staff to remove FFRF's display in response to receiving a letter from the Office of the Governor. (Sneed Dep. at p. 8, L. 8-14.) According to Sneed, as the Executive Director of the Preservation Board, he took the action that was requested and recommended by Governor Abbott. (Sneed Dep. at p. 9, L. 21-p. 10, L. 5.)

In terms of the process for approving requests to display in the State Capitol, Board members, like the Governor, are not usually themselves directly involved. (Sneed Dep. at p. 13, L. 8-15.) Sneed had never received a letter requesting that a display be removed from the State Capitol previous to receiving Governor Abbott's letter demanding removal of FFRF's display. (Sneed Dep. at p. 13, L. 16-22.)

When FFRF first filed an application to display in the Capitol, FFRF's proposed signage included language that Sneed considered objectionable, whereupon FFRF modified its requested display to the satisfaction of Sneed. (Sneed Dep. at p. 40, L. 1- p.43, L. 8.) Sneed's initial concern related to signage with words "to the effect that people who believe in God were -- were enslaved or slaves." (Sneed Dep. at p. 45, L. 6-9.) According to Sneed, those key words about God and enslavement were not part of FFRF's modified exhibit application. (Sneed Dep. at p. 45, L. 13-16.) After modification, Sneed was directly involved in giving the go ahead as to FFRF's display. (Sneed Dep. at p. 46, L. 10-13.)

But according to Sneed, some of the rules for approving displays "are fairly broad and subject to interpretation. I have an interpretation. Anyone else can have a different interpretation. In this case, the individual who is elected by the people of the State of Texas [Governor Abbott], who has run statewide for five or six times, maybe seven, who probably has

visited every county in the State of Texas, he knows the people of Texas and their beliefs and their sensitivities far more than I do. Far more. And that was a major thought process of mine in reading this letter. This man, he -- he knows Texas." (Sneed Dep. at p. 49, L. 10-22.) Nonetheless, Sneed is not aware of any objection to the FFRF display, other than the Governor's objection. (Sneed Dep. at p. 50, L. 20- p. 51, L. 1.)

According to Sneed, the vast majority of exhibits that are proposed to be placed in the Capitol are things like art exhibits, health-related exhibits, sometimes history-related or preservation exhibits, but Sneed did not understand those types to be a requirement for approval. (Sneed Dep. at p. 53, L. 11-20.) Sneed is unaware of any application for display ever being rejected for any reason, other than on the basis of rules against financial or commercial gain and campaign political advertising. (Sneed Dep. at p. 54, L. 18- p. 55, L. 55.)

Sneed oversaw a fairly limited review process by the State Preservation Board in approving display requests. "You know, our -- our role in looking at exhibits was, did we have available space; was it too large, too small for the space they wanted to go into; were they properly filling out paperwork; were -- had they been good actors or bad actors in the past as far as taking care of their exhibits. That's overwhelmingly what we look for." (Sneed Dep. at p. 59, L. 13-19.) In approving FFRF's display, Sneed considered any controversy about FFRF's display to be substantially muted by FFRF's signage modification. (Sneed Dep. at p. 61, L. 1-17.)

Sneed disclaims any personal responsibility for removing FFRF's display as Executive Director of the State Preservation Board, explaining that "what I did was follow the request of my superior [Governor Abbott]. (Sneed Dep. at p. 65, L. 15- p. 66, L. 5.) Sneed points to Governor Abbott's letter as his motivation in removing FFRF's display. "It was my belief that

the governor was in a better position than me to determine what -- in this specific case of this exhibit -- what was or was not appropriate as it related to the viewpoint of Texans." (Sneed Dep. at p. 71, L. 14-19.) With respect to FFRF's display, according to Sneed, Governor Abbott "has a better understanding of what the people of Texas think, what they believe than I do." (Sneed Dep. at p. 72, L. 15-17.)

Sneed does not believe that the Preservation Board generally applied an educational function criteria. "Every exhibit, by its nature, affects people in different ways, just like going to a museum. And one person gets one thing out of an exhibit and, you know, the person standing next to him gets something else out of it." (Sneed Dep. at p. 73, L. 18- p. 74, L. 1.) Sneed is not aware of any exhibit rejected by the Preservation Board for failure to have a sufficiently educational purpose. (Sneed Dep. at p. 74, L. 3-7.)

Until Sneed received Governor Abbott's letter requesting removal, Sneed was satisfied with the approval of FFRF's display. (Sneed Dep. at p. 80, L. 20-p. 81, L. 3.) Sneed also acknowledges that an exhibit that celebrates the Bill of Rights and the Winter Solstice would still be welcomed in the exhibition area of the Capitol if it did not include the elements previously considered to be mocking. (Sneed Dep. at p. 92, L. 1-7.)

D. General Process For Exhibit Approval.

Robert Davis is the Events and Exhibits Coordinator for the State Preservation Board, which position he has held for about four and a half years. (Davis Dep. at p. 5, L. 12-17.) In reviewing applications for display, as far as giving approval, many requests such as a school district showing student art contest winners were routinely granted without other staff involvement. (Davis Dep. at p. 8, L. 5-20.)

Applications involving what Davis considered controversial matter were few. Davis could only recall the FFRF display and the Thomas More Society nativity display as examples. (Davis Dep. at p. 11, L. 6-12.)

In terms of stating a public purpose in a display application, Davis generally accepted whatever the applicant stated, noting that "I'm not a sensor." (Davis Dep. at p. 20, L. 22.) Davis does not recall ever having rejected an application for display on the grounds that it had no obvious public purpose. (Davis Dep. at p. 23, L. 21.)

Davis also has never been involved in the decision to remove previously-approved exhibits from the Capitol, and the FFRF situation is the only instance in which he was involved in physically removing an approved display. (Davis Dep. at p. 24, L. 15-24.) John Sneed directed Davis to remove the FFRF display, something that Sneed had never done before. (Davis Dep. at p. 25, L. 13-21.) Sneed directed Davis to remove FFRF's display "right now" or "as fast as you can." (Davis Dep. at p. 26, L. 19-20.) Davis is not aware that Governor Abbott has ever asked to have any other display or exhibit removed from the Capitol other than FFRF's display. (Davis Dep. at p. 31, L. 6-11.)

Davis also does not recall Sneed indicating that he should not approve FFRF's display, but he did suggest a disclaimer of State sponsorship. (Davis Dep. at p. 37, L. 14-p. 38, L. 11.) According to Davis, such disclaimers are useful to indicate that displays are not those of the State Preservation Board. (Davis Dep. at p. 39, L. 1-4.)

In evaluating applications for display, Davis generally follows a policy of allowing diverse viewpoints to be expressed in the Capitol, as he did with the FFRF display for which he did not request any substantive changes before approval. (Davis Dep. at p. 41, L. 12-19.) In fact, Davis does not usually consider applications in terms of promoting morals or general

welfare. (Davis Dep. at p. 45, L. 1-4 and L. 12-16.) In processing applications for events or display in the Capitol, whether a display educates also is not a criteria utilized in decision-making. (Davis Dep. at p. 46, L. 10-15.)

For his part, John Sneed, State Preservation Board Executive Director, never subsequently criticized Davis for approving FFRF's display "because I [Davis] wasn't alone in approving it. Our agency [Preservation Board] approved it." (Davis Dep. at p. 49, L. 22-25.) Other than such factors as size restrictions and date availability, Davis does not recall any other particular discussion about the FFRF application, as to which Sneed told him "good to go we can approve that one." (Davis Dep. at p. 51, L. 16-p. 52, L. 5.)

By comparison to FFRF's display, moreover, Davis does not necessarily see an educational purpose to the Thomas More nativity display. (Davis Dep. at p. 53, L. 17-24.) The Thomas More nativity application described its public purpose as a "citizens' exercise of free speech. (Davis Dep. at p. 69, L. 17- p. 70, L. 5.) According to Davis, the Preservation Board gets lots of exhibits based on free speech claims. (Davis Dep. at p. 70, L. 6-14.) Davis indicates that the Preservation Board considered exercise of free speech, as with the nativity scene, to be an appropriate public purpose for display in the Capitol. (Davis Dep. at p. 71, L. 24- p. 72, L. 10.)

According to Davis, the Preservation Board is not the sponsor of displays in the State Capitol. Thus, for example, Davis does not consider an application from Texas NORML advocating legalization of marijuana to be inappropriate in terms of satisfying the public purpose criteria, although controversial. (Davis Dep. at p. 90, L. 14 - p. 92, L. 4.)

Davis did not receive any complaints about FFRF's display before its removal. (Davis Dep. at p. 56, L. 15- p. 57, L. 5.) After FFRF's display was initially installed, Davis "didn't hear word one about that display from anybody." (Davis Dep. at p. 97, L. 13-14.)

Ultimately, in reviewing applications, Davis pretty much limits his role to excluding displays involving commercial promotion or campaign-related activities. (Davis Dep. at p. 114, L. 25- p. 115, L. 6.) Once an applicant has obtained sponsorship, however, applications are generally "on cruise control to being approved in some way, shape, or form except for aesthetic changes and logistic details." (Davis Dep. at p. 115, L. 10-17.)

In the end, in terms of Davis' role and the role of the Preservation Board, Davis understands that they are not to act as censors in the process. (Davis Dep. at p. 116, L. 5-10.)

III. CENSORSHIP BASED UPON COMMUNICATIVE CONTENT IS PROHIBITED BY THE FIRST AMENDMENT.

Viewpoint discrimination is a subset of content discrimination that is prohibited in all classifications of public forum. *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2230 (2015). Viewpoint discrimination which is based on the specific motivating ideology or the opinion or perspective of the speaker "is a more blatant and egregious form of content discrimination." *Id.* Thus, in *Reed*, the Supreme Court struck down a municipal code that applied differing restrictions to signs depending upon whether they were "ideological," "political," or a "temporary directional sign." *Reed* is notable in that it clarified the content-based inquiry and arguably expanded the universe of content discrimination.

The "crucial first step" in analyzing a speech claim is to evaluate a restriction on its face, without regard for the purpose of the restriction. *Id.* at 22-28. "Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 227. Content-based regulations include laws regulating speech "by

particular subject matter" or "by its function or purpose." *Id.* "Government discrimination among viewpoints -- or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker -- is a 'more blatant' and 'egregious form of content discrimination.'" *Id.* at 230 *citing Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819, 829 (1995). In the end, content-based regulations, according to the Court in *Reed*, are those that cannot be justified without reference to the content of the regulated speech as well as those adopted by the Government because of disagreement with the message the speech conveys. *Id.* "A speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230.

"Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Co. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *see also Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005). "Speech cannot be . . . punished or banned, simply because it might offend" those who hear it. *Forsyth Co.*, 505 U.S. at 134-135.

In fact, even "disparaging" speech is protected from viewpoint discrimination by would-be government regulators. In *Matal v. Tam*, 137 S. Ct. 1744 (2017), the United States Supreme Court considered a provision in the Lanham Act which prohibited the registration of trademarks "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." Analogizing the situation to a limited public forum for private speech, the Supreme Court reaffirmed that even offensive speech is protected from viewpoint discrimination:

> Potentially more analogous are cases in which a unit of government creates a limited public forum for private speech. See, *e.g.*, *Good News Club v. Milford Central School*, 533 U.S. 98 –107 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 831 (1995) ; *Lamb's Chapel*, 508 U.S., at 392–393. See also *Legal Services Corporation v. Velazquez*, 531 U.S. 533 –544 (2001). When government creates such a

> forum, in either a literal or "metaphysical" sense, see Rosenberger, 515 U.S., at 830, some content- and speaker-based restrictions may be allowed, see *id*., at 830–831. However, even in such cases, what we have termed "viewpoint discrimination" is forbidden. *Id*., at 831.
>
> Our cases use the term "viewpoint" discrimination in a broad sense, see ibid., and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.
>
> We have said time and again that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U. S. 576, 592 (1969) . See also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("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"); *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46 –56 (1988); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) ; *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) ; *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 –514 (1969); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) ; *Edwards v. South Carolina*, 372 U.S. 229 –238 (1963); *Terminiello v. Chicago*, 337 U.S. 1 –5 (1949); *Cantwell v. Connecticut*, 310 U. S. 296, 311 (1940); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 161 (1939) ; *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) .
>
> For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.

Id. at 1763.

The Supreme Court in *Tam* rejected the Government's claimed interest in preventing speech that offends. Such a proposition, according to the Court, "strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Id.* at 1764.

Put more benignly, restricting speech to "happy-talk" does not avoid the prohibition on viewpoint discrimination. *Id.* at 1765.

Justice Kennedy's concurrence in the Supreme Court's *Tam* decision also provides analysis instructive to the present case. Justice Kennedy spoke specifically to the Government's claim that restrictions on speech could be insulated from viewpoint discrimination by tying censorship to the reaction of the speaker's audience:

> The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience. The Court has suggested that viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs, *Reed*, *supra*, at ___–___ (slip op., at 11–12), but viewpoint discrimination need not take that form in every instance. The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.
>
> Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message. And it is the government itself that is attempting in this case to decide whether the relevant audience would find the speech offensive. For reasons like these, the Court's cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed. See *ante*, at 23 (collecting examples).

Id. at 1766-67.

These then are the principles that are applicable to determining whether the Defendants' struck down FFRF's display based on prohibited viewpoint discrimination.

IV. FFRF'S DISPLAY WAS UNDENIABLY CENSORED BECAUSE OF ITS CONTENT AND VIEWPOINT.

FFRF's Bill of Rights/Winter Solstice display undisputedly was banished from the Capitol due to its content and viewpoint. In his letter demanding the removal of FFRF's display,

Governor Abbott criticized its viewpoint in great detail, calling FFRF's message "tasteless sarcasm," and claimed that it "promotes ignorance and falsehood." The Executive Director of the State Preservation Board, moreover, acceded to Governor Abbott's censorship demand, in part, because he considered the Governor to have a good feel for the "sensitivities" of the people of Texas, so as to know what would offend or not offend. The facts of this case, in short, define the very essence of viewpoint discrimination -- without any subtlety.

FFRF's Bill of Rights display, moreover, undeniably is constitutionally protected speech, contrary to the Defendants' motivating premise. The display is not obscene, nor is it defamatory or libelous. The display does not advocate imminent lawless action. *See Brandburg v. Ohio*, 395 U.S. 444, 447 (1969). It does not include "fighting words" that would "tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). In fact, contrary to Governor Abbott's rant, FFRF's Bill of Rights display does not mock or disparage Christian beliefs or religious convictions, though that would be permissible under relevant Supreme Court precedent. FFRF's display, instead, alludes to the traditional nativity scene in order to emphasize the importance of the Bill of Rights as a foundational document.

Governor Abbott's own personal involvement in ordering the removal of FFRF's display is not too attenuated to impose even personal liability. Again, the evidence is undisputed, that Governor Abbott knowingly approved the letter sent to the State Preservation Board demanding the removal of FFRF's display. Then, shortly thereafter, Governor Abbott boasted on his Twitter account that he had demanded removal of FFRF's display ostensibly because it was offensive. Governor Abbott's actions, therefore, are certainly sufficient to create personal liability under Section 1983, which liability is established by an intentional act which causes a deprivation of constitutional rights. "The requisite causal connection is satisfied if [Defendants] set in motion a

series of events that [Defendants] knew or reasonably should have known would cause others to deprive [Plaintiff] of [their] constitutional rights." *Martinez v. Carson*, 697 F.3d 1252, 1255 (10th Cir. 2012). Indeed, "Section 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961); see also *McKinley v. City of Mansfield*, 404 F.3d 418, 438-39 (6th Cir. 2005).

Governor Abbott's decision to personally approve the letter sent to the State Preservation Board demanding removal of FFRF's display set in motion a natural chain of events whereby the Executive Director, John Sneed, ordered the immediate removal of FFRF's display, lickety split, upon receipt of Governor Abbott's request as Chairman of the Board of the State Preservation Board. For his part, the Executive Director confirms that Governor Abbott's letter did set in motion such a causal reaction.

Governor Abbott's letter, in short, constituted personal involvement by the Governor, not just *respondeat superior* involvement. The Governor authorized and initiated the removal of FFRF's display as a result of blatant and egregious viewpoint discrimination, beyond dispute. As a result, the Defendants should be determined liable for violating FFRF's constitutional rights, in their official capacities, and Governor Abbott should also be held liable in his individual capacity.

V. CONCLUSION.

For all of the above reason, the Court should conclude that the Defendants violated FFRF's First Amendment rights as a result of impermissible viewpoint discrimination.

Dated this 27th day of July, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed electronically via the Court's CM/ECF system on this the 27th day of July, 2017, which will send notification to the following:

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