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 EXECUTIVE DIRECTOR OF TEXAS STATE PRESERVATION BOARD, *Defendants.*	§	

DEFENDANTS' SECOND MOTION[1] FOR SUMMARY JUDGMENT

INTRODUCTION

In 2016, the Court held that Defendants' offered a reasonable and lawful explanation for taking down a temporary Capitol display erected by Plaintiff Freedom From Religion Foundation ("FFRF"). That explanation—embodied in a letter from the Office of the Governor to the Executive Director of the State Preservation Board—was that FFRF's display violated state law by mocking Christians, belittling the views of people who disagree with FFRF, and seeking to offend rather than promoting a public or educational purpose. The Court nonetheless declined to enter summary judgment against two of FFRF's claims and allowed FFRF to pursue a second round of discovery to determine whether Defendants' letter was a sham—that is, to determine whether Defendants offered that letter as a cover-up for some alternative, unarticulated, invidious purpose.

That second round of discovery has now ended. Defendants have offered FFRF extensive discovery opportunities—including, most notably, a Rule 30(b)(6) deposition of the Office of the

[1] Pursuant to the Court's orders, this is the second motion for summary judgment Defendants have filed in this case. To the extent that Defendants' original Motion for Summary Judgment, filed August 19, 2016, addresses claims that remain live, Defendants incorporate those arguments by reference as if fully set forth herein. Doc. 31.

Governor on the first day of the Special Session. FFRF also has deposed the former executive director of the State Preservation Board and a second member of the Preservation Board's staff. Defendants have answered extensive written discovery. And counsel for both parties have conducted extensive meet-and-confer discussions over the course of many weeks.

All of that effort has resulted in precisely nothing. There is not a shred of evidence that Governor Abbott witnessed FFRF's exhibit, wrote the letter requesting its removal, directed anyone to write that letter, or approved that letter with any unarticulated malicious intent. To the contrary, the Governor's Deputy Chief of Staff testified in a sworn declaration that *staff* noticed the exhibit, *staff* recommended removing the exhibit, *staff* drafted the letter regarding the exhibit, *staff* auto-penned that letter, and *staff* delivered the letter to the Preservation Board. Further, John Sneed testified in his deposition that he never discussed this (or any other official business) with the Governor. And there is no evidence that Defendants acted unilaterally or in concert to squelch FFRF's viewpoint. To the contrary, the record is replete with evidence that Defendants repeatedly have welcomed FFRF to erect a display and express its views in the Capitol as long as it does not mock, belittle, or disparage others.

Thus, the only open question is whether FFRF has a First Amendment right to put up a display in the Texas State Capitol that mocks, belittles, and disparages simply for the sake of being offensive. No court in the country has ever has recognized such a right. And this Court should not be the first.

FACTUAL AND PROCEDURAL HISTORY[2]

On December 21, 2015, the Office of the Governor sent a letter to John Sneed, who at that time was Executive Director of the Texas State Preservation Board ("Board"). The letter observed that an exhibit placed in the Ground Floor Rotunda of the Texas Capitol at FFRF's request violated

[2] The factual and procedural history of this case has been briefed to the Court, so Defendants do not recite it here. This information is set forth in detail in Defendants' original Motion for Summary Judgment filed August 19, 2016. Doc. 31. As summary judgment proof, Defendants rely upon the appendix to their August 2016 Motion for Summary Judgment, cited as "2016 Appx. _," and the Appendix hereto, cited as "2017 Appx. _."

the Texas Administrative Code because—rather than furthering a public purpose, as required by law—it denigrated and mocked the sincerely held views of others. *See* Doc. 31 at 2-6; 13 TEX. ADMIN. CODE §111.13(a)(3). The letter was initiated by staff members in the Governor's office. The letter was written by the Governor's legal team. The Governor himself was not even aware of the FFRF exhibit or the staff's letter regarding it until he was briefed some days later. After he was briefed, the Governor approved the letter. Staff auto-penned the letter with the Governor's signature. Doc. 64-1.[3]

The Governor's staff was not alone in noticing that FFRF's exhibit was offensive. John Sneed, too, was offended by FFRF's first proposed exhibit—which is why Sneed rejected it.[4] Sneed eventually approved a revised exhibit application from FFRF, but did so without noticing its pejorative content.[5] Sneed also testified that, once he saw the exhibit on display in the Capitol and noticed the manger, he immediately had concerns about the exhibit.[6] And after Sneed received the December 21st letter, he spoke with Representative Charlie Geren, who also recognized that the exhibit should be removed.[7] After seeing the contents of the exhibit for what they were, speaking with Representative Geren, and receiving the December 21st letter, Sneed had the Board's staff remove the exhibit.

After the Board removed the exhibit from display in the Capitol, FFRF sued the Governor and the Board's Executive Director, both individually and in their official capacities. *See* Docs. 1 (Complaint); 15 (1st Amend. Complaint). FFRF challenged the exhibit's removal under the First Amendment (raising claims under the Free Speech Clause, Establishment Clause, and unbridled discretion doctrine), as well as Equal Protection and Due Process Clauses. Doc. 15.

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[3] *See also* 2017 Appx. Tab 3, 30(b)(d) Deposition of Office of the Governor, and pincites, *infra* nn. 34-39.
[4] 2017 Appx. Tab 2, Transcript of Deposition of John Sneed at 39:19-40:21.
[5] *Id.* at 47:9-14.
[6] *Id.* at 47:15-48:4.
[7] *Id.* at 18:7-21.

On May 13, 1016, Defendants moved to dismiss. Doc. 17. After a hearing on the motion, the Court dismissed the individual capacity claims against Sneed,[8] and ordered the parties to conduct discovery and file cross motions for summary judgment and responses. Doc. 28. (Order); 31 (Defendants' MSJ); 33 (FFRF's MSJ); 35 (FFRF's Br. Opp. Defendants' MSJ); 36 (Defendants' Resp. to FFRF's MSJ).[9] On December 20, 2016, the Court ruled on the cross motions, dismissing all of FFRF's claims except those under the Free Speech and Establishment Clauses. Doc. 38. The Court held that the Defendants were entitled to judgment as a matter of law *if* they took down FFRF's exhibit for the reasons articulated in the December 21, 2015 letter. *See* Doc. 38. The Court nonetheless held that it was an open factual question whether Defendants—in fact—were motivated by the reasons articulated in that letter or instead were motivated by some secret, unarticulated, invidious purpose to silence FFRF's viewpoint. Doc. 38 at 18, 20. On that basis, the Court declined to rule on Governor Abbott's qualified immunity argument. Doc. 38 at 24 n.7. FFRF was permitted further discovery into whether the letter was a sham cover-up for invidious discrimination against FFRF. Doc. 38 at 18, 20.

FFRF, however, did not pursue additional discovery until April 2017. It began by attempting to notice the deposition of Governor Abbott himself—before serving any written discovery, and before taking the 30(b)(6) deposition of the Office of the Governor that Defendants proposed. FFRF also sought to depose John Sneed, who had since been dismissed from the case entirely. *See* Doc. 28. The parties exchanged correspondence and competing motions regarding the propriety of deposing the highest-ranking elected official in the State, as well as the former Executive Director of the Preservation Board, a high-ranking State official.[10] Governor Abbott also moved for judgment and

[8] Effective August 31, 2016, Sneed retired from State service and his role as Executive Director. The State Preservation Board's current Executive Director, Rod Welsh, replaced Sneed as an official capacity defendant. *See* FED. R. CIV. P. 25(d).
[9] Notably, Defendants never sought relief from the Court or otherwise contested the sufficiency of Defendants' responses during this first phase of Discovery, which included production of a significant number of documents.
[10] *See* Docs. 41 (Governor Abbott's Mot. for Protective Order); 42 (Mot. to Quash Subpoena to Non-Party John Sneed); 45 (Brief in Opp. to Docs. 41 & 42); 52 (Reply in Support of Doc. 41); 53 (Reply in Support of Doc. 42).

qualified immunity on the pleadings, based upon lack of direct involvement with the exhibit's removal. *See* Docs. 49 (Mot. for Judgment & Qualified Immunity on the Pleadings); 52 (Reply in Support).

On June 6, 2017, the Court held a hearing on these competing motions, and granted Sneed's Motion to Quash in part, allowing Sneed's deposition to proceed for the limited purpose of determining "why [FFRF's exhibit] was removed."[11] The Court withheld judgment on the Governor's Motion for Judgment and Qualified Immunity on the Pleadings and Motion for Protective Order, pending Sneed's testimony.[12] The Court reiterated what it identified as the sole remaining factual question here: "if you go to trial, that's what it's going to be limited to: How [FFRF's exhibit] got there and how it got off."[13] Finally, the Court indicated that "as soon as [Sneed's] deposition is taken, I'd like the lawyers just to send me a letter, with a copy to each other, with your positions so that I could then make a determination on these pending motions."[14]

FFRF has deposed John Sneed on the question the Court found relevant.[15] FFRF has also conducted a 30(b)(6) deposition of the Office of the Governor.[16] The parties have exchanged additional written discovery. Defendants have submitted a post-deposition letter brief, as requested by the Court, and have further augmented the record with an affidavit from the Governor's Deputy Chief of Staff, John Reed Clay. Docs. 64; 64-1. With all of these additions to the record, there is still no evidence that Defendants engaged in "viewpoint discrimination," or had anything but a "secular purpose" for removing FFRF's exhibit. Doc. 38 at 18, 20. Instead, the record shows that FFRF's exhibit was removed because it did not comply with the applicable public purpose requirement. As a

[11] 2017 Appx. Tab 1, Transcript of June 6, 2017 Hearing at 22:6-7.
[12] *Id.* at 26:13-15.
[13] *Id.* at 26:7-9; *see also* Doc. 63 (June 6, 2017 Order).
[14] 2017 Appx. Tab 1 at 26:21-24.
[15] *See* 2017 Appx. Tab 2, Transcript of Deposition of John Sneed.
[16] 2017 Appx. Tab 3, Transcript of 30(b)(6) Deposition of the Office of the Governor.

result, FFRF's claims under the Free Speech and Establishment Clauses fail as a matter of law, summary judgment should be entered for Defendants, and this case should be dismissed.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A movant who would not bear the burden of proof at trial need not present evidence to put the plaintiff's claims in issue. *Id.* at 325. Rather, a defendant need only "point[ ] out…that there is an absence of evidence to support the nonmoving party's case." *Id.* Once defendant meets this obligation, the burden shifts to the plaintiff to produce competent evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256–57 (1986). To survive summary judgment, a plaintiff must demonstrate a genuine issue of material fact as to each element of every disputed claim. *Id.* at 247–48. A genuine issue of material fact exists "if the evidence is such that a reasonable jury could enter a verdict for the nonmoving party." *Id.*

To meet her summary judgment burden, a plaintiff cannot rely on unsupported or conclusory assertions, speculation, or subjective belief. *Lawrence v. Fed. Home Loan Mortg. Corp.*, 808 F.3d 670, 673 (5th Cir. 2015); *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 403 (5th Cir. 2001). Rather, she "must go beyond the pleadings and come forward with specific facts" demonstrating a genuine issue for trial—and the evidence must be admissible. *Brandon*, 808 F.3d at 270 (citation and quotation marks omitted); *Mersch v. City of Dall., Tex.*, 207 F.3d 732, 734–35 (5th Cir. 2000). The evidence is viewed in the light most favorable to the nonmovant. *First Am. Title Ins. Co. v. Cont'l Cas. Co.*, 709 F.3d 1170, 1173 (5th Cir. 2013). But "[w]here critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming that it mandates judgment in favor of the movant, summary judgment is appropriate." *Alton v. Tex. A&M Univ.*, 168 F.3d 196, 199 (5th Cir. 1999). Summary judgment also is proper when a plaintiff's evidence is "merely colorable" or is not "significantly probative." *Anderson*, 477 U.S. at 249–50.

ARGUMENT AND AUTHORITY

I. The record shows that FFRF's exhibit was removed from the Capitol for failure to comply with the applicable public purpose requirement, and not on the basis of viewpoint. FFRF's claim under the Free Speech Clause fails as a matter of law.

In ruling on the parties' 2016 cross motions for summary judgment, the Court determined that the spaces in the Capitol set aside for exhibits of a public purpose "constitute, at most, a limited public forum." Doc. 38 at 15 (citing, *inter alia*, 13 TEX. ADMIN. CODE §111.13(a)(3)). In a limited public forum, "the government may restrict speech as long as the restrictions are 'reasonable in light of the purpose served by the forum' and do 'not discriminate against speech on the basis of viewpoint.'" Doc. 38 at 15 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (citation omitted); citing *Pleasant Grove City v. Summum*, 555 U.S. 467, 470 (2009); *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 758 (5th Cir. 2010)).

In a limited forum, First Amendment jurisprudence distinguishes between (permissible) content discrimination, and (impermissible) viewpoint discrimination. Content discrimination, or discrimination based on subject matter, may be "permissible if it preserves the purposes of that limited forum." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). But viewpoint discrimination, or discrimination based on a speaker's opinion, or perspective is "presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* While courts "accept the validity and reasonableness of the justifications offered by [the government] for excluding [certain groups from the nonpublic forum], those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view." Doc. 38 at 17 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811-12 (1985)) (alterations original).

In 2016, the Court concluded that "reasonable grounds existed for Defendants' exclusion of FFRF's exhibit" from the Capitol, because "it was reasonable to believe FFRF's display, and its satirical view of the traditional nativity scene, would not benefit the community at large." Doc. 38 at 16 (citing

13 TEX. ADMIN. CODE §111.13(a)(3); *Cornelius v. NAACP*, 473 U.S. at 818 (quotation omitted)). But the Court surmised that the "problems with FFRF's exhibit would have been apparent to the Board as soon as it reviewed FFRF's application…and [it] could have excluded the exhibit on those grounds at that point." Doc 38 at 18. Thus, the Court concluded, "because the Board initially found FFRF's exhibit had a 'public purpose' and only excluded the exhibit when Governor Abbott sent his letter of criticisms, a genuine issue of material fact exists regarding whether Defendants engaged in viewpoint discrimination." This precluded summary judgment on the Free Speech claim. Doc. 38 at 18.

Yet, even after granting FFRF *two* bites at the discovery apple, there is no evidence to support this conclusion. *Celotex*, 477 U.S. at 325 (to prevail on summary judgment, defendant need only "point[] out…that there is an absence of evidence to support the nonmoving party's case.") In fact, the record demonstrates that (1) FFRF's exhibit was problematic all along, and was only approved because its pejorative content was not immediately apparent on the face of the application; and (2) FFRF's exhibit was not removed on the basis of viewpoint, but instead, because its mocking and satirical content did not serve a public purpose.

First, FFRF's intent has always been to "test the forum"[17] by placing a "most irreverent"[18] and "controversial"[19] exhibit in the Capitol. Consistent with this incendiary aim, FFRF's first proposed exhibit could not even secure the required legislative sponsor, because it included an "offensive"[20]

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[17] 2016 Appx. Tab 7.

[18] 2016 Appx. Tab 18.

[19] 2017 Appx. Tab 4, Deposition of Annie Laurie Gaylor at 41:19-21. *See also* Doc. 31 at 5-6 and 2016 Appx. citations therein (detailing the evidence of FFRF's intent in applying to place an exhibit in the Texas Capitol).

[20] 2017 Appx. Tab 2, Sneed Depo at 39:19-40:21 (Q. What do you recall about the approval process for this particular display? A. Application was received, an application for an exhibit that was not placed in the Capitol. I raised concerns about it, thought it was offensive, thought it would -- it was one that clearly was a concern to me. I asked that it be brought to the attention of the sponsor of the exhibit, Elliott Naishtat, or at least the office that had been approached to be the sponsor. From what I recall, his office looked at that initial exhibit -- proposed exhibit and declined to be the sponsor. Then some days later, the application came back from the office of Representative Donna Howard. And I, again, asked. And best of my recollection, I may have placed the phone call myself to ensure that Representative Howard knew what she was being asked to sponsor. And at that point, I believe she contacted FFRF and said this was something that she – I'm going to recall generally what her comments were -- that she did not think this was something that she could support being placed in the Capitol. And that was the first iteration of the exhibit application from FFRF.)

banner likening sectarian beliefs to slavery.[21] John Sneed objected to that exhibit, communicated his objections to other staff members at the Board, and communicated his objections to Representatives Naishtat and Howard.[22] Without complaining or filing a lawsuit, FFRF modified this exhibit application and again submitted it to Representative Howard for sponsorship.[23]

After multiple attempts, FFRF secured a legislative sponsor for a new exhibit that did not analogize religious faith to slavery.[24] But the Board has never found that disparaging exhibits meet the "public purpose" requirement. Rather, the exhibit ultimately placed in the Capitol only received Board approval because its pejorative content was not apparent in the low-quality image submitted with the application. Sneed testified that, in approving FFRF's revised exhibit, "[i]t was lost on me that there was -- what I later discovered was a manger where the copy of the Bill of Rights had been placed,"[25] at least in part because the proposed artwork on the application was not "a very good copy."[26] The exhibit's failure to comport with the public purpose requirement is emphasized by Sneed's testimony that, "later, after I realized what it was…it was concerning to me."[27] At that point, Sneed took no action because "what had been done at that point had been done. The exhibit had been approved."[28]

The record also establishes that—even if the Board had changed its position on whether FFRF's exhibit satisfied the public purpose requirement—it did not do so on the basis of viewpoint.

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[21] *Id.* at 41:7-20 (Q. Do you recall that there was some signage that went with that first application that had language that you thought was of concern? A. Mm-hmm. That contained the word "slave," yes. Q. "Slave" or "enslaved"? Some version of it. A. Somewhere in that was the letters that spelled out S-L-A-V-E. Q. Okay. And is that what -- is that what you brought to Representative Howard's attention, then? A. No. I -- I brought the photo of the proposed exhibit to her attention.) *See also* Doc. 31 at 3-4 and 2016 Appx. citations therein (detailing FFRF's failed efforts to obtain legislative sponsorship of its "slavery" exhibit from Representatives Elliot Naishtat and Donna Howard, and the changes FFRF made to its exhibit to ultimately secure Representative Howard's sponsorship).
[22] 2017 Appx. Tab 2, Sneed Depo at 39:19-40:21.
[23] *See* Doc. 31 at 3-4 and 2016 Appx. citations therein.
[24] Doc. 31 at 3-4 and 2016 Appx. citations therein; 2017 Appx. Tab 2, Sneed Depo at 45:13-16 ("[F]rom the best that I can recall, all the words, certainly those keywords about God and enslaved or slave, whatever the word was, were not a part of the second exhibit.")
[25] 2017 Appx. Tab 2, Sneed Depo at 47:12-14.
[26] *Id.* at 47:9-11.
[27] *Id.* at 47:15-17.
[28] *Id.* at 47:18-19.

Rather, the Governor's letter articulating the reasons FFRF's exhibit violated the public purpose requirement confirmed Sneed's "concerns" about its content.[29] Sneed's testimony makes clear that he acted based on the reasons articulated in the Governor's letter, and not for any other purpose:

> Q. And in regard to the removal, though, of that display, what was your role?
> A. I gave instructions to staff to remove the display.
> Q. And what prompted you to do that?
> A. Receiving a letter from the Office of the Governor.[30]

When prodded about his motives, Sneed testified that, as the Board's Executive Director, he "took the action that was requested and recommended…[b]y the letter, outlined in the letter from the Office of the Governor."[31] This establishes that the reasons outlined in the Governor's letter were the reasons that FFRF's exhibit was removed from display in the Capitol.

FFRF's effort to obfuscate this inquiry by attempting—without any evidence—to impute improper motives to Governor Abbott himself cannot save its case. Sneed, the individual who ultimately called for the exhibit's removal, testified that, as the Board's Executive Director, he "never had a conversation with the Governor on this or any other matter."[32] Rather, Sneed testified that "[t]he interaction I had with Governor Abbott during my tenure at the preservation board was in social settings at the Governor's mansion, and we talked about how wonderful the governor's mansion is."[33]

Testimony from Governor Abbott's senior staff, as well as the 30(b)(6) deposition of the Office of the Governor, confirm Sneed's account. This testimony establishes that it was the Governor's staff—and not the Governor—who noticed FFRF's exhibit,[34] identified the exhibit's

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[29] *Id.* at 47:15-17.
[30] 2017 Appx. Tab 2, Sneed Depo at 8:6-9, 12-14
[31] *Id.* at 10:4-5, 8-9.
[32] *Id.* at 38:2-10.
[33] *Id.*
[34] 2017 Appx. Tab 3, 30(b)(6) Depo at 11:24-12-1 (Q. And how was staff alerted to the presence of the display in the Capitol? A. Staff walked by it.)

failure to comport with the public purpose requirement,[35] drafted the letter to Sneed,[36] and autopenned the Governor's signature.[37] The Governor did not read the letter before it was transmitted to Sneed.[38] His only involvement was to approve the staff's recommendation after a short phone call.[39]

Moreover, the reasons that the Office of the Governor called for the exhibit to be taken down are reflected in "the letter[, which] embodies the final determination of the office's view on the—on the display. And it's very clear from the letter that the office felt it did not satisfy the public purpose criteria in the Texas admin[istrative] code."[40] In particular,

> [T]he office thought that the exhibit or display didn't satisfy the public purpose requirement in the Texas Administrative Code, because it was essentially mocking other people's religious views and was, in that respect, 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. And the exhibit had the effect of mocking viewpoints.[41]

Consequently, there is no genuine issue of material fact regarding why FFRF's exhibit was removed. Uncontroverted testimony from both Sneed and the Office of the Governor establishes that the reasons in the December 22, 2015 letter to John Sneed were the reasons that FFRF's exhibit was removed. These are the reasons the Office of the Governor, who is Chairman of the State Preservation Board, called for removal of the exhibit, and these are the reasons that Sneed, as the Board's Executive Director, heeded that call. There is no basis, on this record, to support a finding of

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[35] *Id.* at 68:21-69:2 ("What I think the letter makes clear is that it was manifest from FFRF's exhibit or display, that the purpose of the 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."); 85:1-8 ("[FFRF's exhibit] 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 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.")

[36] *Id.* at 77:23-24 ("the letter was a staff-generated idea that was eventually approved by the [G]overnor.")

[37] Doc. 64-1, Declaration of John Reed Clay, Jr., at ¶5.

[38] *Id.* at ¶6.

[39] *Id.; see also* 2017 Appx. Tab 3, 30(b)(6) Depo at 42:7-8 ("I know the governor approved the letter.")

[40] 2017 Appx. Tab 3, 30(b)(6) Depo at 60:3-7.

[41] *Id.* at 59:7-18. *See also id.* at 111:19-21 (the Office of the Governor's objection to FFRF's exhibit "is a legal one," namely, the exhibit's failure to comply with the Texas Administrative Code.")

viewpoint discrimination. Accordingly, Defendants are entitled to judgment as a matter of law on FFRF's Freedom of Speech Clause claim.

II. FRFF's Establishment Clause claim fails as a matter of law.

The Establishment Clause commands that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The three-part test applicable in Establishment Clause cases was articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The government does not run afoul of the Establishment Clause if (1) it has a secular purpose, (2) the principal or primary effect of its action neither advances nor inhibits religion, and (3) it does not foster an excessive government entanglement with religion. *Id.*; *see also, e.g., Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

In 2016, the Court denied Defendants' Motion for Summary Judgment on FFRF's Establishment Clause claim based on the same factual question it identified in the Free Speech context: whether Defendants removed FFRF's exhibit for the reasons articulated in the December 21, 2015 letter, or whether Defendants instead used that letter as an excuse to hide an unarticulated, pernicious, and unconstitutional purpose under *Lemon*. Doc. 38 at 20.

The Court noted that, in evaluating whether the government has a secular purpose, "the government's 'stated reasons will generally get deference[,]' [b]ut the secular purpose 'has to be genuine, not a sham, and not merely secondary to a religious objective.'" *Id.* (quoting *McCreary Cty. v. ACLU*, 545 U.S. 844, 901 (2005)). Thus, the Court considered viewpoint neutrality as a proxy for secular (and in this case specifically, public) purpose. The Court held that because "Defendants claim the exhibit was excluded because it did not adhere to the requirement that Capitol displays promote a 'public purpose[,]' and because "a genuine issue of material fact exists regarding whether Defendants engaged in viewpoint discrimination and excluded FFRF's exhibit with the purpose of silencing anti-religious speech[,]…there is a fact issue with regard to whether Defendants' purpose was predominantly secular[.]" Doc. 38 at 20.

But as the evidence above shows, Defendants acted with a secular purpose—in particular, to ensure that exhibits in the Capitol are consistent with the public purpose requirement in the Texas Administrative Code. As explained in Part I,[42] *supra*, FFRF's exhibit was approved after multiple revisions. Furthermore, that approval was based upon a copy that did not make its satirical content apparent. Upon realizing what that the exhibit contained a mockery of the traditional Christian nativity, Sneed was concerned, but took no action since the exhibit had been approved. A member of the Governor's Staff saw the exhibit and believed it violated the public purpose requirement. The Governor's legal team drafted a letter to Sneed explaining why the exhibit violated the public purpose requirement, and the Governor approved his staff's recommendation to send the letter to Sneed during a brief phone call. Sneed had the exhibit removed based upon the contents of that letter. Nowhere did discrimination against the exhibit's viewpoint enter into that judgment. There is no question that the exhibit's violation of the Texas Administrative Code—and not the exhibit's viewpoint—caused the exhibit's removal. The first prong of *Lemon* is satisfied.

Second, the "principal or primary effect [of removing FFRF's exhibit did not] advance or inhibit religion." *Lynch*, 465 U.S. at 679; *see also Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014) (government conduct does not violate Establishment Clause if it does not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion"). Rather, the effect of Defendants' conduct was simply to remove from the State Capitol an exhibit that was designed to offend, mock, and belittle Texans without promoting any public purpose. The effect of removing the display made the Capitol more welcoming to other viewpoints, not less. As the 30(b)(6) witness for the Office of the Governor testified, the FFRF display was:

> 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

[42] *See supra* nn. 34-39 and accompanying text.

> mocking of other people's viewpoints. And the exhibit had the effect of mocking viewpoints.[43]

Indeed, it is undisputed that previous Capitol exhibits and events have involved a wide range of viewpoints (most of them sectarian, though some have included information or components related to particular religions).[44] Such exhibits are approved where they satisfy the public purpose and other applicable requirements—without satirizing, belittling, or deliberately mocking others.[45] This case is unique only insofar as the Board has not—at least in the recollection of Mr. Sneed, its Executive Director for eight years—ever been involved in a contentions exhibit application.[46] FFRF's exhibit was unique from the very start in its striking mockery of religion.[47]

This reflects scrupulous adherence to "[t]he guiding principle [of] government neutrality toward religion." *Van Orden v. Perry*, 351 F.3d 173, 178 (5th Cir. 2003), *aff'd*, 545 U.S. 677 (2005). The required government neutrality "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673. Indeed, "[a] relentless and all pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Here, however, FFRF would force the State to choose between two hostile-to-religion options: (1) allowing a display that mocks the

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[43] 2017 Appx. Tab 3, 30(b)(6) Depo at 59:11-18.

[44] 2017 Appx. Tab 5, Transcript of Deposition of Robert Davis at 92:5-15 (Q. Do you recall any -- any displays other than the FFRF display by atheists or agnostics or free-thinkers? A. I don't think they've applied. We have approved Buddhist exhibits before. Q. You've what? A. Buddhist exhibits. Q. Uh-huh. A. I don't think I've had a Hindu exhibit, but we have had events with the -- with the Hindu community and other religions other than Christianity.)

[45] *E.g.*, 2016 Appx. Tab 27; 2017 Appx. Tab 5, Davis Depo at 23:20-24:1 (Q. Have you ever rejected an application on the grounds that it had no obvious public purpose? A. I don't recall ever doing that. Like I said earlier, we -- the first point of contact, someone will usually kind of talk to me and give me information about what they're trying to do. And if I tell them at that time that I'm not sure if it's going to fly, a lot of times they'll decide to go elsewhere to display it."); 106:16-109-19 (describing standard review of exhibit applications by the Board's executive staff).

[46] 2017 Appx. Tab 2, Sneed Depo at 60:16-17.

[47] 2017 Appx. Tab 5, Davis Depo at 102:17-103:4 (A. [Reading from FFRF's first exhibit application] "At this season of the Winter Solstice, let reason prevail. There are no gods, no devils, no angels, no heaven or hell. There is only our natural world. Religion is but myth & superstition that hardens hearts and enslaves minds." And then it says "Freedom From Religion Foundation, FFRF.org." Q. And what are the dimensions? A. Seven feet wide by four feet tall. Doesn't give a width. Q. Okay. Had you ever in your time at the preservation board seen an exhibit application like this? A. Not – no[.])

Christian faith; and (2) removing all religious displays, even those that fulfill the public purpose requirement without mocking or belittling others.

Both of these options reflect the sort of hostility toward religion that the Supreme Court has expressly rejected. The first would also require the Board, on request, to install a display mocking Buddha, Muhammad, or the Menorah in the halls of the State Capitol. And the second would require Texas "to purge from the public sphere all that in any way partakes of the religious[,]" which would "promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring). The Establishment Clause forbids rather than empowers FFRF to put the State to that unconstitutional choice.

Third, Defendants have not "create[d] an excessive entanglement of government with religion." *Lynch*, 465 U.S. at 679. In the context of displays on government property, the Supreme Court has evaluated "entanglement" in terms of whether there is ongoing, day-to-day interaction between church and state over the display, and whether there is a substantial expense to the public associated with the display's placement. *Lynch*, 465 U.S. at 684. Here, as in *Lynch*, there is no evidence of coordination between the State and sectarian authorities, and no evidence of commingling of public and sectarian funds. *See id.* at 684. (In fact, FFRF has not even alleged that either of these elements is present here). FFRF's Establishment Clause claim fails as a matter of law.[48]

III. Any claim FFRF might otherwise have had was waived by agreement.

In 2016, the Court rejected Defendants' arguments that FFRF waived its constitutional claims by signing the Preservation Board's application. Doc. 38 at 7 n.2. Given additional evidence revealed

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[48] To the extent FFRF seeks to bring an "offended observer" claim under the Establishment Clause, related to the 2014 traditional nativity scene, it failed to plead it, lacks standing to assert it, and such claim is moot. That is, FFRF's pleadings in this case do not raise an offended observer claim. The pleadings also do not identify any individual who observed the 2014 traditional nativity scene and was thereby injured, as necessary to establish standing for an "offended observer" claim under the Establishment Clause. Moreover, because that traditional nativity scene was removed long ago, such claim would be moot, in any event. *See, e.g., Staley v. Harris County*, 485 F.3d 305 (5th Cir. 2007) (dismissing as moot after Harris County removed from public display a bible and monument).

in discovery, Defendants reassert that claim here. Under the agreement applicable to its display, FFRF agreed to "indemnify and hold harmless" the Board, the State of Texas, and all officers, agents, and employees thereof (including the Defendants), "from and against any and all costs, damages, fees, expenses, or liability of any type or nature related to the same," except when caused by negligence. 2016 Appx. Tab 16 (incorporating by reference 2016 Appx. Tab 3). As the Court noted, "Constitutional rights may be waived contractually if done so voluntarily, intelligently, and knowingly, i.e., with full awareness of the legal consequences." Doc. 38 at 7 n.2 (citing *D.H Overmyer Co., Inc. v. Frick Co.,* 405 U.S. 174, 187 (1972); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) ("There is a presumption against the waiver of constitutional rights, . . . and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'") (citation omitted).

The Court rejected the argument that this standard was satisfied here because of the negligence exception, and because "the record does not provide any other evidence—besides the Policy's language—FFRF voluntarily, intelligently, and knowingly waived a constitutionally protected right." *Id.* (citation omitted). But FFRF Staff Attorney Sam Grover, who executed the agreement on behalf of FFRF, provides evidence of a voluntary, intelligent, and knowing waiver. Indeed. not all display applications that FFRF submits are submitted by attorneys,[49] but this one was. Mr. Grover is a graduate of Boston University School of Law[50] and a licensed attorney.[51] Mr. Grover reviewed the terms of the State Preservation Board's criteria for displays in the Capitol carefully before signing the application,[52] including the relevant provisions of the Texas Administrative Code,[53] and the indemnity provision.[54]

[49] 2017 Appx. Tab 6, Transcript of Deposition of Sam Grover at 25:10-13.
[50] *Id.* 11:4-5.
[51] *Id.* at 11:13-16.
[52] *Id.* at 35:15-25; 37:23-24.
[53] *Id.* at 36:1-4.
[54] *Id.* at 35:3-37:5.

Mr. Grover understands that FFRF is not suing for negligence in this case.[55] And both FFRF and Mr. Grover routinely apply to place displays on government property,[56] and work on litigation involving displays on government property.[57] Mr. Grover's decision to accept the terms of the exhibit agreement evidence a voluntary, intelligent, and knowing waiver of the right to sue the Defendants for "any and all costs, damages, fees, expenses, or liability of any type or nature." FFRF should be held to the consequences of waiving those claims in this action.

IV. Governor Abbott is entitled to qualified immunity as a matter of law.

Finally, regardless of the Court's determinations on the issues above, Governor Abbott re-urges—and incorporates by reference—the arguments that the individual capacity claims against him should be dismissed under the doctrine of qualified immunity. Docs. 49 (Motion for Judgment and Qualified Immunity on the Pleadings); 59 (Reply in Support of Motion for Judgment and Qualified Immunity on the Pleadings); 64 (Supplemental Letter Brief on Qualified Immunity). *See also* Docs. 17 (Motion to Dismiss) at 4-8; 31 (Motion for Summary Judgment) at 20. In any event, Governor Abbott submits that such a ruling is appropriate before he is ordered to sit for a deposition or testify at any trial in this cause. *See* Docs. 49, 59, 64. Indeed,

> "[a]llowing pretrial depositions, especially those taken adversely of the governmental official to ferret all of his actions and the reasons therefor, either for the purpose of being able to plead more specifically, or for use in the prospective trial would defeat and frustrate the function and purpose of the . . . qualified immunity ostensibly conferred on the official."

Carr v. Calogero, 987 F.2d 772 (5th Cir. 1993) (*per curFiam*) (table), 1993 WL 67171, at *2 (quoting *Elliot v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985)).

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[55] *Id.* at 37:2-5.
[56] *Id.* at 23:13-22.
[57] *Id.* at 22:20-25; 26:8-11; 27:1-3, 15-25.

CONCLUSION & PRAYER

For the forgoing reasons, FFRF's claims fail as a matter of law, and Defendants respectfully move the Court to enter summary judgment in their favor. And Defendants yet again re-urge that Governor Abbott is entitled to qualified immunity.

Dated this 27th day of July, 2017.

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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, causing service upon all counsel of record.

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