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

FREEDOM FROM RELIGION FOUNDATION, INC., PLAINTIFF,	§	
V.	§	CAUSE NO. 1:16-CV-233-LY
GOVERNOR GREG ABBOTT AND ROD WELSH, EXECUTIVE DIRECTOR OF THE TEXAS STATE PRESERVATION BOARD, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS.	§	

MEMORANDUM AND ORDER AFTER REMAND

Before the court is the above styled and numbered cause, which the Court of Appeals for the Fifth Circuit remanded to this court with instructions regarding two First Amendment issues. *See Freedom From Religion Found., Inc. v. Abbott*, 955 F.3d 417, 421 (5th Cir. 2020). First, the circuit vacated the court's judgment on Plaintiff's First Amendment freedom-of-speech claim and instructed this court to consider Plaintiff's request for injunctive relief and render appropriate prospective relief. Second, the circuit reversed the court's grant of summary judgment on Plaintiff's unbridled-discretion claims, clarified the application of the unbridled-discretion doctrine in the context of a limited public forum, and instructed the court to apply the clarified standard in the first instance.

Following remand, this court ordered the parties to submit briefing on the two issues (Doc. #105).[1] Plaintiff Freedom From Religion Foundation, Inc. (the "Foundation") argues that it is entitled to prospective relief on the First Amendment freedom-of-speech claim and that Title

[1] Before the court are Plaintiff's Brief Regarding Court of Appeals Mandate Upon Remand (Doc. #110), Defendants' Brief on Remand (Doc. #111), Plaintiff's Declaration of Richard L. Bolton (Doc. #117), and the associated responses. The court also ordered supplemental briefing on the United States Supreme Court's decision in *Uzuegbunam v. Preczewski*, ___ U.S. ___,141 S. Ct. 792 (2021) and has considered Plaintiff's Supplemental Brief Regarding *Uzuegbunam* (Doc. #125) and Defendants' Supplemental Brief (Doc. #124).

13, Section 111.13 of the Texas Administrative Code (the "Rule") violates the First Amendment by allowing the exercise of unbridled discretion. Defendants Greg Abbott, Governor of Texas and Chairman of the State Preservation Board (the "Board") and Rod Welsh, the Board's Executive Director, argue that because the Board amended the Rule after the circuit's remand, the case is moot and there is no ongoing violation of federal law allowing relief under *Ex parte Young*.[2] Having considered the briefs following remand, the parties' proposed orders, and the record in this case, the court will grant prospective declaratory and injunctive relief on Plaintiff's First Amendment freedom-of-speech claim, grant Defendants' motion for summary judgment on Plaintiff's unbridled-discretion claims, and order that Plaintiff take nothing on the unbridled-discretion claims.

Background

This dispute centers around a "Bill of Rights nativity exhibit" (the "Exhibit") that the Foundation displayed in the Texas Capitol building from December 18, 2015, to December 22, 2015. The Exhibit featured Benjamin Franklin, Thomas Jefferson, George Washington, and the Statue of Liberty gathered around a manger containing the Bill of Rights. To gain permission to display the Exhibit, the Foundation submitted an application to the Board. The Board is the state agency tasked with maintaining and preserving the Texas Capitol building and grounds. The Board's application process required a recommendation from the Governor, the Lieutenant Governor, or a member of the Texas Senate or House of Representatives. Texas Representative Donna Howard provided the recommendation, and the Board approved the Foundation's application. At the request of the Capitol Events and Exhibits Coordinator, the statement "Private display, not endorsed by the state" was added to a banner accompanying the Exhibit.

[2] 209 U.S. 123 (1908).

On December 22, 2015—the day before the Exhibit was to be taken down—Governor Abbott sent a letter to then Executive Director of the Board John Sneed urging him to "remove this display from the Capitol immediately." The letter stated that because the Exhibit "purposefully mock[ed] the sincere religious beliefs of others," it did not satisfy a provision in the Rule requiring that Capitol exhibits promote a "public purpose." Specifically, the letter noted that: "[s]ubjecting an image held sacred by millions of Texans to the Foundation's tasteless sarcasm does nothing to promote morals and the general welfare;" "the exhibit promotes ignorance and falsehood insofar as it suggests that George Washington, Benjamin Franklin, and Thomas Jefferson worshiped (or would worship) the bill of rights in the place of Jesus;" and "it is hard to imagine how the general public *ever* could have a direct interest in mocking others' religious beliefs." The Board removed the Exhibit the same day.

On July 21, 2016, the Foundation submitted an identical application to again display the Exhibit in the Capitol. Several weeks later, Sneed stated in a letter response 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 February 25, 2016, the Foundation filed this action against Governor Abbott and Sneed in both their individual and official capacities. The complaint alleges: (1) a free-speech claim under the First Amendment; (2) an equal-protection claim under the Fourteenth Amendment; (3) a claim under the Establishment Clause of the First Amendment; (4) a claim of unbridled discretion under the First Amendment; and (5) a due-process claim under the Fourteenth Amendment. The Foundation seeks declaratory and injunctive relief, including an injunction preventing Defendants "from excluding the Plaintiff's exhibit at issue from future display" and a declaration "that the criteria to approve exhibits for display in the State Capitol,

facially and/or as applied by the Defendants, violate the Free Speech Rights protected by the First Amendment."

Procedural History

On May 13, 2016, Defendants moved to dismiss the action for failure to state a claim. The court subsequently dismissed the claims against Sneed in his individual capacity on qualified-immunity grounds. Defendants moved for summary judgment on August 19, 2016, and Plaintiff moved for summary judgment on August 24, 2016. The court granted Defendants summary judgment on the Foundation's equal-protection, due-process, and unbridled-discretion claims on December 20, 2016. Both parties filed additional motions for summary judgment on the remaining claims on July 27, 2017.

On October 13, 2017, the court granted summary judgment in favor of the Foundation on its First Amendment freedom-of-speech claims against Governor Abbott and Rod Welsh, who had succeeded Sneed as Executive Director of the Board, in their official capacities. The court dismissed the Establishment Clause claim against Governor Abbott in his individual capacity on qualified-immunity grounds. The court found that there remained a material issue of fact as to the Foundation's Establishment Clause claims against Governor Abbott and Welsh in their official capacities and the Foundation's freedom-of-speech claim against Governor Abbott in his individual capacity.

On May 11, 2018, the parties filed a joint stipulation voluntarily dismissing the remaining claims. The court dismissed the claims on May 14, 2018. On June 19, 2018, the court rendered a final judgment that granted judgment in favor of the Foundation on the First Amendment freedom-of-speech claim and declared that "Defendants violated [the Foundation's] First Amendment rights and engaged in viewpoint discrimination as a matter of law when the

[Foundation's] exhibit was removed from the Texas Capitol building under the circumstances of this case." Defendants appealed, arguing that the court lacked jurisdiction to enter retrospective relief and that, after the Supreme Court's decision in *Matal v. Tam*,[3] the court also lacked jurisdiction to enter prospective relief. The Foundation cross-appealed the judgment's lack of prospective injunctive relief and the court's summary-judgment dismissal of the Foundation's unbridled-discretion claims. On June 1, 2020, the circuit vacated and reversed this court's previous judgment and remanded two issues to this court.[4]

On May 22, 2020, the Board had published proposed amendments to the Rule at issue in this case. After the circuit remanded the case, the Board published the final amendments to the Rule (the "Revised Rule"), which took effect on July 20, 2020. According to the preamble to the Revised Rule, the amendments "are designed to make clear that all future exhibits in the exhibit areas of the Capitol and Capitol Extension will be adopted as government speech." 45 Tex. Reg. 3406 (2020), *adopted by* 45 Tex. Reg. 4968, 4968 (2020) (State Pres. Bd., Exhibitions in the Capitol and Capitol Extension). The Revised Rule and its effects on this case lie at the heart of the parties' arguments on remand.

Mootness

Defendants argue that the Revised Rule renders this case moot because the Revised Rule "close[s] the Capitol exhibit spaces as any type of public forum, reserving them instead for government speech." Plaintiff argues that the Revised Rule constitutes "litigation posturing" and that the changes do not address the harmful conduct at issue, so there remains a live controversy that gives the court jurisdiction. The court agrees that the case is not moot. Because the Board cannot *ipse dixit* change the First Amendment status of the Capitol exhibit area and because the

[3] 137 S. Ct. 1744 (2017).

[4] *See supra* p. 1.

changes do not otherwise address the gravamen of the remaining issues on remand, the court has jurisdiction to render appropriate relief for the Foundation's First Amendment freedom-of-speech claim and decide the remaining unbridled-discretion issue.

A case becomes moot—and therefore no longer satisfies the "case" or "controversy" requirements of Article III of the Constitution—when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)). Defendants argue that the Revised Rule "moots the only controversy before the Court because that controversy presupposes the existence of a limited public forum that no longer exists."

The First Amendment prohibits laws that "abridge[e] the freedom of speech." U.S. CONST. amend. I. However, the Supreme Court has held that "the government need not permit all forms of speech on property that it owns and controls." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Accordingly, the Supreme Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). The different types of First Amendment forums—which include traditional public forums and limited public forums—implicate varying levels of constitutionally acceptable restrictions on speech. This court found that the Capitol exhibit area constitutes a limited public forum. The court will now evaluate whether the Revised Rule changes the area's First Amendment forum status.

Defendants argue that the Revised Rule closes the Capitol exhibit area as a limited public forum and adopts all exhibits as government speech. If an exhibit constitutes government

speech, First Amendment protections do not apply. *Matal*, 137 S. Ct. at 1757 ("[t]he Free Speech Clause . . . does not regulate government speech.") (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009)). The Revised Rule contains a new provision that reads: "Any exhibit approved and scheduled pursuant to this section by the office of the State Preservation Board is hereby adopted as government speech." 13 Tex. Admin. Code § 111.13(b) (State Pres. Bd., Exhibitions in the Capitol and Capitol Extension). The Revised Rule also requires a statement from the exhibit's sponsoring state official confirming "that the exhibit meets the criteria and is appropriate for adoption as government speech." *Id.* § 111.13(d)(3)(D). However, the Board cannot simply declare the First Amendment status of the Capitol exhibit area. *See U. S. Postal Serv. v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 133 (1981) ("Congress, no more than a suburban township, may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums"); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002) ("The government cannot simply declare the First Amendment status of property regardless of its nature and its public use."). Therefore, the court must look to the substantive changes in the Revised Rule to determine the First Amendment status of the Capitol exhibit area.

The Revised Rule amends the Rule in several ways, including: (1) removing the exhibit-fee requirement; (2) limiting a state official's sponsorship to exhibits "proposed by his or her constituents;" (3) requiring that an exhibit show "a statement identifying the State Official Sponsor and indicating the approval of the office of the State Preservation Board;" and (4) removing the word "morals" from the definition of "public purpose." 13 Tex. Admin. Code § 111.13(a)–(c) (State Pres. Bd., Exhibitions in the Capitol and Capitol Extension). Besides these changes and the Revised Rule's declaration that "[a]ny exhibit . . . is hereby adopted as

government speech," the Board's application-and-selection process remains much the same as it was when this court concluded that the Capitol exhibit area constitutes a limited public forum. In reaching this conclusion, the court evaluated and rejected Defendants' argument that the exhibits constituted government speech under the original Rule. The court conducted the three-step government-speech analysis outlined by the Supreme Court in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[5] and found that: (1) the Texas government had not historically used the Capitol exhibit area to speak; (2) a reasonable person would not find that the Capitol exhibits are the voice of the government; and (3) the Board retains final approval authority over Capitol exhibits. The first two factors weighed in favor of a private-speech determination, while the third factor weighed in favor of a government-speech determination. The court concluded that the exhibits did not constitute government speech because the first two factors outweighed the third. Since the court's 2016 forum analysis, the Supreme Court has noted that *Walker* "likely marks the outer bounds of the government-speech doctrine." *Matal*, 137 S. Ct. at 1760. The court will nonetheless determine if the substantive changes in the Revised Rule convert the exhibits to government speech.

The Revised Rule does not affect the first factor in the *Walker* analysis, as the Capitol exhibit area's history has not changed since the court's 2016 analysis. For the second factor, Defendants argue that because the Revised Rule "expressly adopts Capitol exhibits as [government speech]," a reasonable observer would interpret the speech as conveying a message on the government's behalf. However, a reasonable observer of the Capitol exhibit area likely would not reference the Texas Administrative Code to note that the Board "expressly adopts" the exhibits as government speech.

[5] 576 U.S. 200 (2015).

Additionally, Defendants argue that the Revised Rule's requirement that an exhibit include a statement (1) "identifying the State Official Sponsor" and (2) "indicating the approval of the office of the State Preservation Board" impacts the second *Walker* factor. The first facet of the statement does not affect the court's analysis because the Board in 2015 likewise instructed the Foundation to include a sign that identified the sponsor. Defendants argue that the second facet of the statement—which indicates "approval" of the Board—mirrors the facts in *Walker*, where the Supreme Court noted that "[t]he governmental nature of the plates is clear from their faces: The State places the name 'TEXAS' in large letters at the top of every plate."[6] *See* 576 U.S. at 212. However, a statement of the Board's approval, as opposed to a standalone governmental mark, merely indicates that the Board has consented to the display of a message that is not its own. A statement indicating state approval of another party's message would not lead a reasonable observer to "routinely—and reasonably—interpret [the exhibit] as conveying some message on the [State's] behalf." *See id.* (quoting *Summum*, 555 U.S. at 471). The Revised Rule does not prevent exhibit creators from including signage or explanatory language about the purpose of the exhibit or the creator of the exhibit, which would also weigh against a reasonable observer interpreting the exhibit as conveying a message on the state's behalf. Moreover, a statement "indicating the approval of the office of the State Preservation Board" fits squarely into the Supreme Court's warning in *Matal*, which noted that "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." 137 S. Ct. at 1758.

[6] At issue in *Walker* were statements individuals requested on "vanity" automobile license plates issues by the State of Texas.

Finally, the court's analysis of the third factor—whether the state maintains control over the messages conveyed—remains unchanged, as the Board continues to retain final approval authority over the exhibits in the Capitol exhibit area. But this factor does not outweigh the first two factors. Therefore, the court concludes that the Revised Rule does not impact the court's previous finding that the Capitol exhibit area constitutes a limited public forum.

Defendants also argue that the changes to the original Rule, regardless of the forum's First Amendment status, moot the case. The Foundation, on the other hand, argues that the changes are mere "litigation posturing" that do not address the harmful conduct at issue. "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC*, 568 U.S. at 91 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). Defendants' mootness arguments mirror those in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida*, where the City of Jacksonville argued that the case was moot after it repealed a challenged ordinance and replaced it with a similar ordinance. 508 U.S. 656, 662 (1993). The Supreme Court compared the new ordinance with the "gravamen of petitioner's complaint" and found that "[t]here is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. Nor does it matter that the new ordinance differs in certain respects from the old one." *Id.* The Court therefore held that the case was not moot.

The gravamen of the Foundation's remaining claims is that (1) Defendants engage in First Amendment viewpoint discrimination in applying the Board's rules to exclude its Exhibit and (2) the Board's rules violate the First Amendment by delegating overly broad discretion to government officials. The Revised Rule, like the revised ordinance in *Associated General*

Contractors, continues the challenged conduct in the same fundamental way. The Revised Rule attempts to *ipse dixit* change the First Amendment status of the Capitol exhibit area so the state may "select messages it wishes to associate with" and avoid the constraints of the First Amendment. By attempting to adopt the exhibits as government speech, Defendants hope to remove any protections against viewpoint discrimination and gain unfettered discretion over the types of messages displayed. As in *Associated General Contractors*, there is no "mere risk" that the state will repeat its allegedly wrongful conduct—it has shown in the Revised Rule that it has done exactly that. This court therefore concludes that the case is not moot and that the court has jurisdiction to decide the two remanded issues.

Prospective relief on the Foundation's First Amendment freedom-of-speech claim

Regarding the first issue on remand, the circuit vacated the court's judgment and instructed the court to (1) consider the Foundation's request for injunctive relief and (2) render appropriate prospective relief. Although the Eleventh Amendment typically bars private suits against states, the circuit concluded that the Foundation's First Amendment freedom-of-speech claim falls within the *Ex parte Young*[7] exception to sovereign immunity. Defendants argue that *Ex parte Young* cannot apply "because—with the relevant forum now closed—any relief . . . would necessarily be retrospective." However, the Capitol exhibit area still constitutes a limited public forum, despite the Board's attempts to declare it otherwise. Therefore, the circuit's determination that "[the Foundation's] suit falls within the *Ex parte Young* exception to sovereign immunity" controls. *See NiGen Biotech, L.L.C. v. Paxon*, 804 F.3d 389, 394–95 (5th Cir. 2015).

The Foundation seeks "[j]udgment against each Defendant enjoining the Defendants from excluding the Plaintiff's exhibit at issue from future display in public areas of the Texas

[6] 209 U.S. 123 (1908).

State Capitol." The Foundation requests a judgment stating that "Defendants accordingly are enjoined from excluding Plaintiff's Exhibit from the Texas State Capitol in the future." Defendants object to the Foundation's request, arguing that the requested injunction is not narrowly tailored because it does not consider exhibit space availability, time limits, or other regulatory restrictions.

A party seeking an injunction must show: (1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest. *Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 824 F.3d 507, 533 (5th Cir. 2016). First, the Foundation prevailed on the merits on its First Amendment freedom-of-speech claim and established an ongoing violation of federal law. *Freedom From Religion Found.*, 955 F.3d at 424, 426. Second, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Third, Defendants have not presented sufficient evidence demonstrating how or if an injunction will damage their interests. Although Defendants previously objected to an injunction based on issues of exhibit space availability, time limits, and other regulatory requirements, the Foundation later agreed that the Board could consider time and space criteria in scheduling the Exhibit. Finally, with respect to the fourth element, "[i]njunctions protecting First Amendment freedoms are always in the public interest." *Id.* at 298. The court will therefore grant the Foundation's request for injunctive relief and will enjoin Defendants from excluding the Foundation's Exhibit from display in the designated exhibit area of the Texas Capitol Building and the Capitol Extension. Defendants may, however, consider time

limitations, space limitations, or other logistical display considerations related to Title 13, Section 111.13 of the Texas Administrative Code when scheduling the Exhibit for display. The court will also grant prospective declaratory relief that Defendants violate the Foundation's First Amendment rights and engage in viewpoint discrimination as a matter of law when they exclude the Foundation's Exhibit based on the perceived offensiveness of its message, as was the case here.

Unbridled-discretion claim

With regard to the second issue on remand, the circuit reversed the court's grant of summary judgment on Plaintiff's unbridled-discretion claims, clarified the application of the unbridled-discretion doctrine in the context of a limited public forum, and instructed this court to apply the clarified standard in the first instance. The Foundation argues that the requirement in the Rule and the Revised Rule that an exhibit have a "public purpose" lacks objective and definite standards, giving state officials unbridled discretion to discriminate against certain viewpoints. Defendants argue that the public-purpose standard "no longer exists" because "there is no longer a limited public forum."

But the Capitol exhibit area still constitutes a limited public forum. A limited public forum is a place that the government opens for public expression of particular kinds or by particular groups. *See Freedom From Religion Found.*, 955 F.3d at 426. The government can restrict speech in a limited public forum if the restriction (1) is reasonable in light of the purpose served by the forum and (2) does not discriminate against speech on the basis of viewpoint. *Id.* at 427. Restrictions that lack "neutral criteria to [e]nsure that the licensing decision is not based on the content or viewpoint of the speech being considered," on the other hand, violate the First

Amendment under what is known as the unbridled-discretion doctrine. *Id.* (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988)).

The court addressed the first prong of the circuit's unbridled-discretion analysis—whether the restriction is "reasonable in light of the purpose served by the forum"—under the previous Rule that then required an exhibit serve "public purpose," which the Rule defined as:

> The promotion of the public health, education, safety, *morals*, general welfare, security, and prosperity of all of the inhabitants or residents within the state, the sovereign powers of which are exercised to promote such public purpose or public business. The chief test of what constitutes a public purpose is that the public generally must have a direct interest in the purpose and the community at large is to be benefitted. This does not include activities which promote a specific viewpoint or issue and could be considered lobbying. Political rallies, receptions, and campaign activities are prohibited in the public areas of the Capitol.

13 Tex. Admin. Code § 111.13(a)(3) (2019) (State Pres. Bd., Exhibitions in the Capitol and Capitol Extension), *repealed by* 45 Tex. Reg. 4968 (2020) (emphasis added). The Revised Rule eliminates the word "morals" from the definition and clarifies that the definition also applies to the "Capitol Extension," but the public-purpose requirement otherwise remains the same. *See* 13 Tex. Admin. Code § 111.13(a)(3) (2020) (State Pres. Bd., Exhibitions in the Capitol and Capitol Extension). The court concluded that the public-purpose requirement "provides the Board a reasonable framework with which to accept or deny exhibit applications in the limited forum context." Because the Board did not significantly change the public-purpose requirement in the Revised Rule, the court again concludes that the restriction is reasonable in light of the Capitol exhibit area's purpose.

Second, the court must determine whether the public-purpose requirement contains neutral criteria sufficient to prevent "viewpoint-based censorship." In doing so, the court "'must consider the [government]'s authoritative construction[]' of the standard." *Freedom From*

Religion Found., 955 F.3d at 429 n.2 (quoting *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992)). The court may not presume that the government will "act in good faith and adhere to standards absent from the ordinance's face." *Id.* (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988)).

The court finds that the public-purpose requirement contains neutral criteria sufficient to prevent viewpoint discrimination. Unlike the laws and regulations courts have struck down in the past, the public-purpose requirement offers a robust definition of what constitutes a "public purpose," and it even gives the Board a "chief test" for determining what constitutes a public purpose. *Cf. Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 387 (4th Cir. 2006) (striking down school policy that imposed "no guidelines" on school's discretion to approve flyers); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1069–70 (4th Cir. 2006) (striking down fee waiver policy based on "the district's best interest"); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 572–74 (7th Cir. 2001) (striking down policy requiring events to "benefit[] the public as a whole"); *Lewis v. Wilson*, 253 F.3d 1077, 1078–81 (8th Cir. 2001) (striking down policy allowing denial of custom license plates contrary to "public policy"). The record reflects that before the dispute involving the Foundation's Exhibit, the Board had only rejected applications and exhibits that violated the Rule's prohibitions on commercial gain and political campaigning. Former Board Executive Director Sneed noted that members of the Board—including the Governor—usually do not participate in the exhibit approval process. Sneed noted that the Board's approval process does not usually rely upon the public-purpose requirement, but instead considers the size of the exhibit, the available space, and whether the paperwork is correctly filled out. For the Exhibit at issue, the Board approved the Foundation's application and allowed its display for almost the entire

agreed-upon period, notwithstanding the public-purpose requirement. The crux of the First Amendment issues in this case stem not from the rules themselves, but from Governor Abbott's letter demanding that the Board take down the Exhibit. When Sneed ordered the exhibit taken down, he did so to "follow the request of [his] supervisor." The court finds that the prospective declaratory and injunctive relief on the Foundation's freedom-of-speech claim will offer redress for the actions of individual state officials. Therefore, the court need not strike down a regulation that admittedly does not usually factor into the Board's approval process.[8] The court concludes that the public-purpose requirement contains sufficient criteria to avoid viewpoint-based discrimination and grants Defendants' summary judgment on the Foundation's unbridled-discretion claims.

Conclusion

Having determined appropriate declaratory and injunctive prospective relief on Plaintiff's First Amendment freedom-of-speech claim and having concluded that summary judgment should be granted in favor of Defendants on Plaintiff's unbridled-discretion claims,

IT IS ORDERED that judgment is rendered in favor of the Foundation on its First Amendment freedom-of-speech claim.

IT IS FURTHER ORDERED AND DECLARED that Defendants violate the Foundation's First Amendment rights and engage in viewpoint discrimination as a matter of law when they exclude the Foundation's Exhibit based on the perceived offensiveness of its message.

IT IS FURTHER ORDERED that Defendants are enjoined from excluding the Foundation's Exhibit from display in the designated exhibit area of the Texas Capitol Building and the Capitol Extension. **IT IS DECLARED** that Defendants may, however, consider time

[7] The Supreme Court has noted that "[f]acial invalidation is, manifestly, strong medicine." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998).

limitations, space limitations, or other logistical display considerations related to Title 13, Section 111.13 of the Texas Administrative Code when scheduling the Exhibit for display.

IT IS FINALLY ORDERED that Defendants' Motion for Summary Judgment (Doc. #31) is **GRANTED** with respect to Plaintiff's unbridled-discretion claims and that Plaintiff **TAKE NOTHING** on its unbridled-discretion claims.

SIGNED this 5th day of May, 2021.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE