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

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants fully support the values of free speech and the even-handed application of the law. And Defendants are proud to sponsor a diverse array of viewpoints through displays inside the Texas Capitol that promote public purposes. Plaintiff Freedom from Religion Foundation ("FFRF"), however, did not want to promote a "public purpose." It is undisputed that FFRF wanted to *denigrate* the views of a portion of the public—namely, Christians—by intentionally mocking the manger and the birth of Jesus Christ. Nothing in the First or Fourteenth Amendments requires the State to support a private foundation's efforts to mock others' religious beliefs. Therefore, FFRF's legal claims fail as a matter of law.

STATEMENT OF RELEVANT FACTS[1]

Texas's State Preservation Board ("Board") is an agency established to, *inter alia*, "preserve, maintain, and restore the Capitol, the General Land Office Building, their contents, and their grounds." TEX. GOV'T CODE §§ 443.001, 443.007(a)(1). The Board must "approve all changes to the buildings and their grounds," and "may adopt rules concerning the buildings, their contents, and their grounds." *Id.* §§ 443.007(a)(4); (b). The Board "consists of the governor, lieutenant governor, speaker of the house of representatives, one senator appointed by the lieutenant governor, one representative appointed by the speaker of the house of representatives, and one member [of the public] appointed by the governor." *Id.* § 443.003(a). "The board functions performed by" these elected officials "are additional functions of their other public offices." *Id.* § 443.003(c). The Governor is the Board's Chairman, and the "executive director [] serves under the sole direction of the board." *Id.* §§ 443.004(a); 443.0051(a). "The executive director shall," *inter alia*, "direct and coordinate the

[1] Defendants' summary judgment proof is included in this motion's Appendix, cited as "Appx. __."

activities of the architect of the Capitol, the curator of the Capitol, and other board employees[.]"*Id.* § 443.051(b)(2).

Exhibits are permitted in three indoor spaces in the Capitol: the Ground Floor Rotunda, and the North and South Central Galleries. Appx. Tab 2. The rules governing "Exhibitions in the Capitol and Capitol Extension," promulgated under to the Board's authority under Government Code § 443.007(b), are set out in 13 Texas Administrative Code § 111.13. In particular, exhibit requests must be accompanied by the "recommendation of a state official sponsor." 13 TEX. ADMIN. CODE § 111.13(c)(3)(D). The State officials eligible to sponsor exhibits are the Governor, the Lieutenant Governor, a senator, or a member of the House of Representatives. *Id.* § 111.13(a)(4). Exhibit applications are evaluated by the Board's Capitol Events and Exhibits Coordinator and approved for placement in the designated area for up to one week. By law, exhibits must further "[t]he 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." *Id.* § 111.13(a)(3). With this provision, the State adopts the content of Capitol exhibits—the Board "exercises the sovereign powers" of the State "to promote [the exhibition's] public purpose." *Id.*

On February 4, 2015, Sam Grover, Staff Attorney at FFRF, contacted Robert Davis, the current Capitol Events and Exhibits Coordinator, to inquire about the requirements to exhibit inside the Capitol. Appx. Tab 4. On May 29, 2015, FFRF wrote to Texas legislators, seeking a sponsor for an exhibit "that celebrates freethought and the United States as the First among nations to formally embrace the separation of state and church." Appx. Tab 5. FFRF did not attach a rendering of what its exhibit would look like. According to the documents produced in discovery, two State officials expressed interest in sponsoring such an exhibit—Reps. Elliott Naishtat and Donna Howard.

On May 29, Naishtat's Chief of Staff Julia Dale offered to support the exhibit described in FFRF's letter. Appx. Tab 6. On June 29, FFRF sent Dale its original exhibit application and requested the Representative's signature to complete it. This original application described FFRF's exhibit as depicting life-sized "figures celebrating the December 15 nativity of the Bill of Rights," accompanied by a 4'x7' banner that read "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." Appx. Tab 10 at FFRF15.[2]

Upon receipt of this rendering, Rep. Naishtat's office determined to withdraw its support. Dale informed Grover at FFRF of this decision via email on July 7, 2015, in the following exchange:

> Grover: [I'm] wondering if Rep. Naishtat has had a chance to submit our display application…I know that our local people are anxious to learn if we have been approved[.]
>
> Dale: The application has not been submitted…**I should have seen your application first, because I spoke too soon about Rep. Naishtat being your sponsor**, for which I apologize.
>
> Grover: The application states "applications are considered incomplete without a letter of sponsorship from a State Official Sponsor"…is Rep. Naishtat still willing to sponsor our display…?
>
> Dale: As I said, I spoke too soon, Rep. Naishtat is declining to be a sponsor.

Appx. Tab 11 (emphasis supplied). FFRF has not sued Rep. Naishtat or his staff for disagreeing with its "nativity" or offering to support it, then withdrawing that support upon learning of its content.

Moments after Rep. Naishtat withdrew his support, FFRF contacted Rep. Howard's office. *Compare* Appx. Tab 11 (Rep. Naishtat's office confirming it would not sponsor FFRF's exhibit at 11:51 AM on July 7), *with* Appx. Tab. 12 (FFRF responding to Rep. Howard's offer of sponsorship at 12:16 PM on July 7), *and* Appx. Tab 9 (Rep. Howard's original offer of support). Like Rep. Naishtat, Rep.

[2] Citations that begin "FFRF" are to bates-numbered documents produced by FFRF in discovery.

Howard expressed concerns about FFRF's exhibit after reviewing it. As her Chief of Staff, Scott Daigle, wrote to FFRF on July 10, "Rep. Howard has always been fairly permissive with regard to sponsoring exhibits or events…However, **she has always stopped short of sponsoring items whose message, she feels, in some way negates the beliefs of others.**" Appx. Tab 13 (emphasis supplied). Daigle concluded, "she is uncomfortable with the language currently presented on the banner." *Id.* FFRF responded:

> FFRF is very thankful for your willingness to work with us, despite your reservations about the specific message we proposed for our banner…We have plenty of other banners that we have displayed in the past. I've attached a picture of another option, which ties into the Bill of Rights theme **and may be more palatable**. We could also develop something new and simple, like "Happy Winter Solstice; At this Season of the Winter Solstice, we honor reason and the Bill of Rights (adopted December 15, 1791); Keep Church & State Separate; (smaller text) On behalf of Texas members of the Freedom From Religion Foundation.

Appx. Tab 14 (emphasis supplied). Howard was comfortable with the "new and simple" language, and after revising its application to suit her, FFRF submitted it to the Board on July 20, 2015. Appx. Tab 16. This revised exhibit eliminated the speech originally proposed to accompany the "nativity," substituting the "new and simple" language. FFRF has not sued Rep. Howard for disagreeing with FFRF's original banner, for refusing to sponsor it as originally proposed, or for refusing to "**sponsor[] items whose message, she feels, in some way negates the beliefs of others**." Appx. Tab 13.

Howard's office submitted the signed sponsorship form that afternoon, and FFRF was thus able to complete its application that day. Appx. Tab 15 at FFRF39; Appx. Tab 10 (FFRF's July 7, 2015 exhibit application). In submitting the faux nativity application, FFRF attested "I have read the State Preservation Board Policy for Exhibits in the Ground Floor Rotunda and the Capitol Extension and agree to comply with this policy." *Id.* at FFRF29. Under the policy, the exhibitor agrees "to hold harmless, indemnify and defend the S[tate] P[reservation] B[oard], the State of Texas, all of its officers, employees and agents from and against any and all costs, damages, fees, expenses, or liability of any type or nature." Appx. Tab 2 (incorporating by reference Appx. Tab 3). The final version of FFRF's

"nativity" depicts "Benjamin Franklin, Thomas Jefferson, George Washington, and the Statue of Liberty gathered around the Bill of Rights, which was placed in a manger." Appx. Tab 1, ¶ 68.

FFRF designed its faux nativity to mock Christians and the crèche. FFRF's President admitted as much in writing to Jake Fortin, the artist who drew the exhibit, stating "[w]e think the Bill of Rights 'Nativity' is brilliant, **as it very gently is most irreverent, while 'revering' what should be honored instead.**" Appx. Tab 18 (emphasis supplied). FFRF arranged for local member Arturo De Lozanne, who had "contacted FFRF about the [Christian] nativity scene that was erected in the Texas capitol" the previous December, to install its faux nativity. Appx. Tab 7. According to FFRF, though a Christian nativity "is seemingly legal under the capitol's policy for displays," De Lozanne was an ideal person to handle instillation, as he had "expressed interest in testing the forum by erecting a freethought display in the Capitol." *Id.* De Lozanne further acknowledged that the faux nativity would likely be offensive, and that the State might remove it. He wrote, "[i]t would be great to have a group of people there [for setup] because I'm sure the news will be present…I can do the setup and takedown (**assuming it survives**)." Appx. Tab 19 (emphasis supplied).

After previewing the Ground Floor Rotunda, De Lozanne wrote to FFRF:

> I did not see the nativity scene last year so I did not know where exactly in the building they [the Christian nativity] were. Turns out it is a pretty ugly (I think) but quite central room right in the middle of the capitol. No windows and it is a thoroughfare room where they put all kinds of display all year round. [Davis] told me that they allow only one display per room at that you were the first to apply so you got that main room (**you got them bumped!**)[.]

Appx. Tab 22 (emphasis supplied). Grover replied, "I'm secretly pleased that we booted the [Christian] nativity from its prominent location...I know I shouldn't be so spiteful, but hey, I'm human. After our display goes up this year, I bet that…[l]ots of religious groups will try to flood the forum." *Id.*

FFRF's exhibit went on display in the Ground Floor Rotunda on December 18, 2015, and the Board made an aesthetic change to the exhibit that evening. Appx. Tab 23. On December 22—one day before FFRF's exhibit was scheduled to be taken down—the Governor wrote the Executive

Director "as Chairman of the State Preservation Board," calling for removal of the exhibit for failure to satisfy the "public purpose" requirement. Appx. Tab 24. Because it was "intentionally designed to belittle and offend," the Governor noted that FFRF's exhibit "undermines rather than promotes any public purpose." *Id.* The Governor further explained that, rather than "spread[ing] a secular message in an effort to educate the public about nonreligious viewpoints," FFRF exhibit "denigrates religious views held by others," and "[t]here is nothing 'educational' about that." *Id.* After informing at least one member of the Board, the Executive Director had FFRF's exhibit removed from the Ground Floor Rotunda for return to FFRF. Appx. Tab 1 ¶¶ 86–87.

FFRF has applied to display an exhibit identical to the one that was removed in 2015 again in 2016, with Rep. Howard as the State official sponsor. Appx. Tab 25. Writing to FFRF and Rep. Howard's office on August 18, 2016, the Executive Director reiterated:

> As the Governor, who is Chairman of the State Preservation Board, explained in a letter to me last December, the 'nativity' exhibit that the FFRF sponsored last year does not promote a public purpose….Thus, in addition to [] space availability constraints…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.

Appx. Tab 27.

STANDARD FOR SUMMARY JUDGMENT

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. *Celotex*, 477 U.S. 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 the 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, the 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.* at 248, 252 ("mere existence of a scintilla of evidence" insufficient to defeat summary judgment).

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).[3] 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 the plaintiff's evidence is "merely colorable" or is not "significantly probative." *Anderson*, 477 U.S. at 249–50.

ARGUMENT AND AUTHORITY

The question presented is whether FFRF has a constitutional right to demand State support for its efforts to mock Christians. It is undisputed that Defendants will accept any exhibit application—regardless of its religious or non-religious content or viewpoint—so long as it promotes a "public purpose" without denigrating others or their beliefs. Thus, FFRF can maintain this litigation *only* by showing that the Constitution licenses them to demand State support for their efforts to mock

[3] *See also Matsushita Elec. v. Zenith Radio*, 475 U.S. 574, 586 (1986) (party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts").

others. Their claims fail as a matter of law.

A. FFRF's claims under the Free Speech Clause fail as a matter of law.

i. Capitol exhibitions are subject to the "government speech" analysis, and therefore do not implicate the Free Speech Clause.

FFRF's First Amendment claim should be rejected because Capitol exhibits are properly evaluated as government speech, and therefore do not implicate the Free Speech Clause. It is settled that while the Free Speech Clause "restricts government regulation of private speech," "it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 467 (2009); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). In determining whether expressive conduct constitutes government speech, the Supreme Court considers three factors. *E.g., Summum*, 555 U.S. at 470–72; *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2251 (2015). First, it considers history—that is, whether the government has historically used the particular media to speak. Second, it considers whether the expressive conduct is likely to be identified with the State. Finally, it considers the degree of control the government has maintained over the type of expressive conduct in issue.

The Supreme Court articulated these factors in *Summum*, where the plaintiff, a religious organization, wished to donate a monument for display in a city park, alongside other privately donated displays (including a Ten Commandments monument). 555 U.S. at 465. The Court concluded that privately funded monuments on the City's property were subject to the government speech analysis, first considering that, historically, "[g]overnments have long used monuments to speak to the public." *Id.* at 470. The Court reasoned, "[j]ust as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land." *Id.* at 470–71.

Second, the Court noted that public parks are "closely identified in the public mind with the government unit that owns the land." *Id.* at 472. Because parks "commonly play an important role in

defining the identity that a city projects to its own residents and to the outside world…cities and other jurisdictions take some care in accepting donated monuments." *Id.* Thus,

> Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

Id. Finally, the Court considered that the city had maintained "control" in selecting the monuments by maintaining "final approval authority" over whether a monument would be installed in the park and by "set[ting] forth the criteria" used in selecting monuments. *Id.* at 473.[4]

The Court applied these factors in *Walker v. Sons of Confederate Veterans*, where the plaintiffs asked the Texas Department of Motor Vehicles to approve a specialty license plate featuring a Confederate flag. Applying *Summum*, the Court concluded that specialty plates are subject to the government speech analysis. The Court first noted that license plates have historically been a vehicle for government speech. 135 S. Ct. at 2248. Next, the Court considered the likelihood that observers would associate the plates with the State, recognizing 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[.]" *Id.* at 2248. Like the monuments in *Summum*, "'persons who observe' designs on [specialty plates] 'routinely—and reasonably—interpret them as conveying some message on the [State's] behalf.'" *Id.* at 2249 (quoting *Summum*, 555 U.S. at 471) (alteration in *Walker*). After all, the Court reasoned, "a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate." *Id.* Finally, the Court considered that, "like the city government in *Summum*, Texas 'has "effectively controlled" the messages [conveyed] by exercising "final approval

[4] *See also Walker*, 135 S. Ct. at 2247 (*Summum* "rejected the premise that the involvement of private parties in designing the monuments was sufficient to prevent the government from controlling which monuments it placed in its own public park.").

authority" over their selection."' *Walker*, 135 S. Ct. at 2249 (quoting 555 U.S. at 473; *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. at 560–561).

Capitol exhibits have the same indicia of government speech as the monuments in *Summum* and license plates in *Walker*. First and foremost—a factor not present in *Summum* or *Walker*—Texas law adopts Capitol exhibits as the sovereign's speech. In particular, the State "exercise[s]" its "*sovereign powers*" by adopting the exhibits and using them to "*to promote [their] public purpose or public business*." 13 TEX. ADMIN. CODE § 111.13(a)(3) (emphasis supplied). Moreover, historically, governments have used signs and displays in statehouses to speak to the public. An individual passing through the Capitol will likely and reasonably identify displays in the exhibition areas with the State. Like the parks in *Summum*, the halls of the Capitol "commonly play an important role in defining the identity that [the State] projects to its own residents and to the outside world," and as such, the State may "take some care in accepting donated" exhibits. 555 U.S. at 472. Indeed, one can hardly conceive of a place more identified with Texas than the halls of the Capitol building itself.

Finally, Texas exerts direct control over the selection and content of Capitol exhibits, in several ways. First, applications are not even considered unless accompanied by a signature of sponsorship from a State official. 13 TEX. ADMIN. CODE § 111.13(a)(4). And if, after recommendation from such sponsor, the exhibit is approved, the exhibitor must surrender to the State unilateral authority to make "aesthetic changes" to the exhibit,[5] must agree that "all exhibits are subject to cancellation," and must sign a liability release. Appx. Tab 2 (incorporating by reference Appx. Tab 3).

There is also specific evidence that the State exercised direct control over the content of the exhibit at issue here. For instance, a July 21, 2015 email from the Capitol Events & Exhibits Coordinator to FFRF specified not only that FFRF's exhibit must be accompanied by a sign, but also

[5] 11 TEX. ADMIN. CODE § 111.13(c)(5) ("Once erected, the office of the State Preservation Board reserves the right to require the exhibitor to make aesthetic changes to the exhibit.")

dictated the content of that sign. Appx. Tab 15.[6] Similarly, FFRF revised its exhibit in an attempt to secure sponsorship. Appx. Tab 14. FFRF further relinquished control of the exhibit to the Board when its representative signed the exhibition agreement. Appx. Tab 16 at FFRF29 (incorporating Appx. Tab 3). Because all three of the *Summum* factors suggest that Capitol exhibits are properly considered under the government speech framework, the Free Speech Clause of the First Amendment is not implicated, and Defendants are entitled to summary judgment on FFRF's claims thereunder.[7]

ii. Even if Capitol exhibits implicate private speech, the Capitol's exhibition areas are a non-public or limited public forum, upon which the State can impose reasonable, non-viewpoint based restrictions.

To the extent the Court finds that FFRF's exhibit is properly evaluated as private speech, the Board's restriction of that speech is subject to only minimal scrutiny—which it readily survives—because the exhibit spaces inside the Capitol are government property, reserved for exhibits that further a "public purpose." As such, they constitute a nonpublic or limited public forum.

In the First Amendment context, the Supreme Court has delineated three types of "fora" for expressive conduct on government property: the traditional public forum, designated public forum,

[6] In small text, the sign says "[s]ponsored by Rep. Donna Howard. Private display, not endorsed by the state." Appx. Tab 17. This does not change the fact that the presence of an exhibit in the Capitol has the effect of associating the State with the content of that exhibit. *E.g., Summum*, 555 U.S. at 469. Indeed, like the plaintiffs in *Walker*, securing the imprimatur of the State is exactly why FFRF wants to place its exhibit in the Capitol, instead of a nearby shopping mall. 135 S. Ct. at 2249.

[7] It is also noteworthy that the exhibition areas inside the Capitol are a finite resource. Exhibitions are not permitted throughout the Capitol—this would prevent the building from effectively functioning as the seat of government. Instead, only the Ground Floor Rotunda and the North and South Central Galleries are made available, and only for exhibits of a public purpose. The Court in *Summum* noted that forum analysis is misplaced when the venue for communication can only accommodate a limited number of speakers. 558 U.S. at 478–79. FFRF itself acknowledged that the exhibition areas in the Capitol are a scarce resource, otherwise they would not have celebrated "bump[ing]" the Christian nativity from an exhibition area with more exposure. Appx. Tab 22. As the Court recognized in *Summum,* the fact that the space is limited means that the State has to exercise control and discretion in choosing which displays to adopt. This further demonstrates that forum analysis is inapposite here.

and limited public forum.[8] *Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings C. of the L. v. Martinez*, 561 U.S. 661, 679 n.11 (2010). Traditional public fora include such areas as public streets and parks "'which have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Summum*, 555 U.S. at 469 (citations omitted). *Designated* public fora are created by government action when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Christian Legal Soc'y,* 561 U.S. at 679 n.11. Government restrictions on speech in traditional and designated public fora must satisfy strict scrutiny. The government may limit the time, place, and manner of speech in these fora so long as the restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open alternatives for communication. *E.g., Burson v. Freeman*, 504 U.S. 191, 197 (1992).

By contrast, the government creates a limited public forum when it opens its property for expression, but the forum is "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Christian Legal Soc'y*, 561 U.S. at 679 n.11. Restrictions on speech in a limited public forum are subject to a much lower level of scrutiny than in a traditional or designated public forum. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001). In limited public forums, "a government entity may impose restrictions on speech" so long as those restrictions "are reasonable and viewpoint-neutral." *Christian Legal Soc'y*, 561 U.S. at 679 n.11. Restricting speech based on its content is permissible in a limited public forum, to the extent the restriction serves the purpose of the limited public forum. *E.g., Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 829–30 (1995).

[8] In addition to limited public forums, courts have recognized a nearly identical forum deemed a "nonpublic forum." *See Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 347 (5th Cir. 2001) ("Public property that is not by tradition or designation open for public communication is governed by nonpublic forum standards."). Regardless of whether a forum is deemed "limited public" or "nonpublic", the scrutiny applied to speech restrictions in such fora is the same: such restrictions are constitutional if they are reasonable and viewpoint-neutral. *Id.*

As an initial matter—to the extent that Capitol exhibits are properly evaluated as private speech—it cannot be disputed that the Capitol's three exhibition areas constitute, at most, a nonpublic or limited public forum. Indeed, the space is not "generally open" to all who wish to exhibit, either by tradition, or by the government opening it up for that purpose. Thus, it is not a traditional or designated public forum. Instead, exhibitors must obtain a State official sponsor, and satisfy the Board's application and "public purpose" requirements. By requiring that exhibits obtain a State official sponsor, and promote a "public purpose," the government has created a forum "limited to use by certain groups or dedicated solely to the discussion of certain subjects," namely, official sponsored exhibits of a public purpose. *Christian Legal Soc'y*, 561 U.S. at 679 n.11. Thus, to the extent forum analysis applies, the exhibit areas are a nonpublic or limited public forum. Exclusion of FFRF's exhibit satirizing the birth of Christ is constitutional if it is "reasonable and viewpoint-neutral." *Christian Legal Soc'y*, 561 U.S. at 679 n.11. It is both.

First, the Defendants reasonably refused to display a faux nativity scene designed to mock and belittle others' religious beliefs. The Governor, as the Board's chairman, provided the reasoned justification for rejecting FFRF's display, explaining that Texas law defines "public purpose" 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.

11 TEX. ADMIN. CODE § 111.13(a)(3); s*ee also id.* § 111.13(c)(2) ("Exhibitions must be for a public purpose as defined in subsection (a)(3) of this section."). The Governor then explained that "[t]he 'Bill of Rights Nativity' violates this legal standard in three ways," and specifically articulated those ways. Appx. Tab 24.

Second, precedent forecloses any argument that removing FFRF's exhibit (and presumably, declining to approve it for 2016)[9] is "viewpoint" discrimination. Appx. Tab 1, ¶¶ 73, 105. In *NEA v. Finley*, 524 U.S. 569 (1998), Congress directed the National Endowment for the Arts to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in awarding grants. *Id.* at 572. And the Supreme Court rejected plaintiffs' argument "that the provision is a paradigmatic example of viewpoint discrimination because it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency." *Id.* at 580. The Court held that the statute permissibly guided NEA's discretion in administering a limited grant program, while doing nothing "to prohibit the funding of certain classes of speech." *Id.* at 581.

Likewise here, Defendants seek to promote broad public purposes, rather than disrespectful and mocking derision. Nothing in the law or Defendants' enforcement of it prohibits state support of certain classes of speech.[10] To the contrary, as the Governor noted, "[t]he 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." *Id.* And as the Executive Director reiterated in his recent letter to Rep. Howard, "the Board welcomes all viewpoints and messages to the Texas Capitol. It simply insists that those viewpoints be expressed in a respectful manner befitting the halls of State government." Appx. Tab 27.

The record further demonstrates that FFRF intended its exhibit to mock, belittle, and demean those of different beliefs, underscoring Governor Abbott's conclusion that it does not benefit "the community at large." 11 TEX. ADMIN. CODE § 111.13(a)(3). FFRF's initial application declares "[t]here

[9] Exclusion of FFRF's identical exhibit in 2016 is, in fact, the basis of this lawsuit—had FFRF not applied to place an identical exhibit in the Capitol in 2016, this case would be moot.

[10] Indeed, it cannot be that the First Amendment would require Texas to display an exhibit mocking the prophet Muhammad or the Buddha, or promoting racism, in the Capitol. Under this theory, a racist group could force Texas to install in the Capitol an exhibit denigrating an entire race of people.

are no gods," and refers to religious individuals as "enslave[d]" by "myth & superstition." Appx. Tab 10 at FFRF15. Upon seeing this message, and perceiving FFRF's intent, Rep. Naishtat withdrew his sponsorship. Appx. Tab 11. Even Rep. Howard, who did ultimately sponsor FFRF's exhibit, noticed this intent, and insisted on a change to the signage because it "negate[d] the beliefs of others." Appx. Tab 13. FFRF's own statements emphasize an intent to denigrate Christians through the use of Capitol exhibit space. Sam Grover was "secretly pleased" that the Christian nativity displayed in 2015 was not in a "prominent location." Appx. Tab 22. FFRF's president made clear that the intent of the Bill of Rights "nativity" was to be "most irreverent," and to instruct its viewers to "'rever[e]' what should be honored instead [of religion]." Appx. Tab 18. The FFRF member who installed the exhibit delighted in the fact that it enjoyed more prominent placement than the Christian nativity, and noted a possibility that FFRF's exhibit might not "survive," given its offensive content. Appx. Tab 19.

Plainly, FFRF knew its exhibit insulted Christians—in fact, FFRF designed its exhibit to do just that. Accordingly, by refusing to allow it to be displayed in the Capitol, the Defendants applied a permissible content-based restriction, which also serves the State's legitimate interest in not associating itself with speech that demeans a number of its citizens. While the First Amendment protects disruptive, disrespectful, demeaning, sarcastic and belittling speech, it does not compel the State of Texas to provide a forum for exhibits that convey such messages in its three exhibition areas inside the Capitol. As the Defendants have repeatedly made clear, an exhibit that expresses FFRF's views without mocking those of a different view is welcome in the Capitol exhibition areas. Plainly, the Defendants' actions were both reasonable and viewpoint neutral. *See, e.g., Barr v. Lafon,* 538 F.3d 554, 572 (6th Cir. 2008) (school ban that barred students form wearing Confederate Flag was viewpoint neutral); *see also id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), for the proposition that "a blanket ban on the use of 'odious racial epithets' by 'proponents of all views' constitutes mere content-based regulation, while a ban on the use of racial slurs by one group of speakers but not 'those

speakers' opponents' constitutes viewpoint-discrimination"). Thus, there is no evidence of viewpoint discrimination, and Plaintiffs' First Amendment claim fails as a matter of law.

iii. Regardless of the First Amendment analysis applicable to Capitol exhibits, Defendants are entitled to summary judgment on FFRF's overbreadth and vagueness claims.

If Capitol exhibits are evaluated as government speech, Plaintiffs' overbreadth and vagueness claims under the Free Speech Clause fail, because government speech does not implicate the Free Speech Clause. *See, e.g., Summum*, 558 U.S. at 481. Even if Capitol exhibits are private speech, the doctrines of vagueness and overbreadth apply only to punitive regimes, where the risk of punishment *chills* protected speech. *See, e.g., Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 597, 604 (1967) (statute requiring termination of public employment for "treasonable or seditious" utterances unconstitutionally vague under First Amendment because statute did not define "treasonable" or "seditious." Where "one must guess what conduct or utterance may lose him his position…one necessarily will 'steer far wider of the unlawful zone'" of speech.) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Because there is no punitive measure at issue here, FFRF is not refraining from speaking for fear that measure will be imposed—its speech is not being "chilled." In fact, FFRF already has submitted an identical application for an identical exhibit for December 2016. Moreover, the Supreme Court has rejected vagueness claims to even broader statutes. *E.g.*, *Finley*, 524 U.S. at 588–90. Thus, Defendants are entitled to summary judgment on FFRF's vagueness and overbreadth claims.

B. FFRF's claim under the Establishment Clause fails as a matter of law.

Defendants are entitled to summary judgment on FFRF's Establishment Clause claim for three reasons. First, Defendants have "a secular purpose." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). In particular, Defendants seek to promote "the public health, education, safety, morals, general

welfare, security, and prosperity of all of the inhabitants or residents within the state." 13 TEX. ADMIN. CODE § 111.13(a)(3). There is nothing sectarian about that.

Second, the "principal or primary effect [of Defendants' conduct does 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 permissible if it does not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion"). Defendants do nothing to advance religion: they do not solicit any displays for the Capitol, much less sectarian ones, and they have no control over which groups choose to apply for an exhibit.[11] Defendants merely accept applications for exhibits that serve the "public purposes" specified in the Administrative Code. And it is undisputed that Defendants previously have accepted and will continue to accept displays from religious and non-religious groups on equal terms as long as they satisfy the law's "public purposes" without mocking others. *E.g.*, Appx. Tab 27. That is the opposite of advancing religion; that is 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).

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 sincerely held religious beliefs of many Texans; and (2) removing all religious displays, even those that serve public purposes without mocking or belittling others. Both of those options rest on the sort of

[11] After a display is approved and constructed on the Capitol grounds, it becomes government speech for all of the reasons given above. But much as federal courts are limited to the cases and controversies that private parties choose to press, U.S. CONST. art. III, § 2, Defendants are limited to adopting those messages that private parties choose to present in an exhibit application.

hostility toward religion that the Supreme Court has expressly held outside of the Establishment Clause's ambit. The first of FFRF's options would also require the State, on request, to put up displays that disparage Buddha or Muhammad. And the second of FFRF's options would require Texas "to purge from the public sphere all that in any way partakes of the religious" and 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 prohibits 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. As in *Lynch*, there is no evidence of coordination between the State and sectarian authorities and no commingling of public and sectarian funds. *See id.* at 684. Thus, FFRF's Establishment Clause claim fails as a matter of law.

C. FFRF's claim under the Equal Protection Clause fails as a matter of law.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 215 (1982)). Unless a plaintiff identifies a comparator who is similarly situated in all relevant respects, but was treated differently, he cannot recover under the Equal Protection Clause. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

FFRF has referenced the Texas Nativity Scene Project and the Thomas Moore Society, alleging each has supported Christian nativity scenes in the Capitol. Even assuming FFRF proves this, neither of these putative comparators is similarly situated to FFRF, because there is no evidence that either sponsored an exhibit containing a pejorative, belittling, or "most irreverent" reference to any belief system. *Contra* Appx. Tab 18 ("[FFRF] think[s] the Bill of Rights 'Nativity' is brilliant, as it very

gently is most irreverent, while 'revering' what should be honored instead."). Thus, there is no similarly situated exhibitor, and FFRF's equal protection claim fails. *Nordlinger*, 505 U.S. at 10.

D. FFRF's claim under the Due Process Clause fails as a matter of law.

FFRF's "procedural" due process claim the Defendants removed its pejorative exhibit "without any pre-deprivation or post-deprivation procedures" also fails as a matter of law. Appx. Tab 1, ¶ 121. Such claim requires a plaintiff to demonstrate deprivation of a constitutionally protected interest in liberty or property. *Lollar v. Baker*, 196 F.3d 603, 607 (5th Cir. 1999); *Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir. 1992); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). FFRF does not have a constitutionally protected property or liberty interest in placing an exhibit that mocks the birth of Christ in the Capitol, keeping such exhibit in the Capitol, or challenging the decision to remove it. Defendants did not confiscate the exhibit and deprive FFRF of property; the Board only removed it from public display. Thus, FFRF has not been deprived of any constitutionally protected liberty or property interest, and Plaintiff has presented no evidence or legal authority otherwise.[12] Defendants are entitled to judgment as a matter of law.

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

By signing the Revised Application, FFRF agreed to comply with the Board's Policy for Exhibitions in the Capitol. Appx. Tab 16 (incorporating by reference Appx. Tab 3). Under this agreement, FFRF, the exhibit holder, agrees 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." Appx. Tab. 3. All of FFRF's claims fall within this indemnification clause, and were waived by agreement.

[12] Even if FFRF had been deprived of a constitutionally protected interest, it was on notice that "all exhibits are subject to cancellation," and therefore still does not have a due process claim. Appx. Tab 2 (incorporating by reference Appx. Tab 3).

Clarity is a threshold issue in determining the whether a constitutional right has been validly waived. *E.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972). FFRF *explicitly* agreed to hold the Defendants harmless from and against any and all damages or liability of any type through the Policy's indemnification provision. Appx. Tabs 16, 3. This broad provision plainly encompasses FFRF's constitutional violation claims as well as their claims for nominal damages. Waivers—including those of constitutional rights—are valid where they are voluntary, knowing, and intelligent.[13] FFRF voluntarily submitted to the Board's policies as a condition of placing an exhibit within the Capitol. The agreement was signed by FFRF's attorney, a sophisticated actor, who knew that the agreement contained a blanket indemnity provision. And as a nonprofit whose business is to promote separation of church and state, including through litigation and the posting of displays and banners around the country, FFRF has the acumen and experience to understand the significance of the agreement, upon which its use of the exhibition space in the Capitol was conditioned. Thus, even if FFRF's legal claims had merit, it is foreclosed from any recovery against the Defendants.

F. Governor Abbott is entitled to Qualified Immunity as a matter of law.

Finally, Defendant Abbott re-urges and incorporates by reference the argument that the individual capacity claims against him should be dismissed under the doctrine of qualified immunity. Defendants' Motion to Dismiss Amended Compl. at 4–8 (Doc. 17). Indeed, as a survey of the continuum between government speech, nonpublic fora, limited public fora, designated public fora, and traditional public fora makes clear, any of the Governor's actions certainly did not violate a "clearly established" constitutional right, as required to overcome qualified immunity. Thus, he is at the very least entitled to summary judgment dismissing the individual capacity claims against him.

[13] Ruling on a corporate property rights dispute, the Supreme Court recognized that the standard for waiver might be different in certain non-constitutional civil contexts, but still applied the voluntary-knowing-intelligent test. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972).

CONCLUSION & PRAYER

For the forgoing reasons, Plaintiff's claims fail as a matter of law, and the Defendants respectfully move the Court to enter summary judgment in their favor.

Dated this 19th day of August, 2016.

Respectfully submitted,

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