No. 18-50610

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INCORPORATED,

Plaintiff-Appellee-Cross-Appellant,

v.

GOVERNOR GREG ABBOTT, Chairman of the State Preservation Board;
ROD WELSH, Executive Director of Texas State Preservation Board,

Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court
for the Western District of Texas – Austin Division

BRIEF FOR APPELLEE-CROSS-APPELLANT

Richard L. Bolton
WI State Bar No. 1012552
Boardman & Clark LLP
1 S. Pinckney St., Ste. 410
P.O. Box 927
Madison, WI 53701-0927
(608) 257-9521
Attorneys for Appellee-Cross-Appellant

CERTIFICATE OF INTERESTED PERSONS

FREEDOM FROM RELIGION
FOUNDATION, INCORPORATED,

Plaintiff-Appellee-Cross-Appellant,

v. No. 18-50610

GOVERNOR GREG ABBOTT, Chairman of
the State Preservation Board;
ROD WELSH, Executive Director of
Texas State Preservation Board,

Defendants-Appellants-Cross-Appellees

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the out-come of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Defendants / Appellants / Cross-Appellees:
Governor Greg Abbott
Executive Director Rod Welsh

Counsel for Defendants / Appellants / Cross-Appellees:
Ken Paxton
Jeffrey C. Mateer
Kyle D. Hawkins
Andrew B. Davis (lead counsel)
Angela V. Colmenero (trial counsel)*
Anna Mackin (trial counsel)*
Austin R. Nimocks (trial counsel)*
Office of the Attorney General
* Denotes counsel no longer employed by the Office of the Attorney General

Plaintiff / Appellee / Cross-Appellant:

Freedom From Religion Foundation, Inc.

Counsel for Plaintiff / Appellee / Cross-Appellant:

Richard L. Bolton
Boardman & Clark, LLP
P.O. Box 927
Madison, Wisconsin 53701-0927

Lessie C. Gilstrap
Fritz, Byrne, Head & Gilstrap, P.L.L.C.
221 W. 6th Street, Suite 960
Austin, Texas 78701

Samuel Troxell Grover
Freedom From Religion Foundation
P.O. Box 750
Madison, Wisconsin 53701

/s/ Richard L. Bolton
Richard L. Bolton
Attorneys for Appellee-Cross-Appellant

STATEMENT REGARDING ORAL ARGUMENT

The Appellee, Freedom From Religion Foundation, Inc., agrees that oral argument may be beneficial to the Court's consideration of this matter.

/s/ Richard L. Bolton
Richard L. Bolton

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

STATEMENT REGARDING ORAL ARGUMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

I. INTRODUCTION 1

II. STATEMENT OF JURISDICTION 3

III. STATEMENT OF THE ISSUES 4

IV. STATEMENT OF THE CASE 4

A. DISTRICT COURT PROCEEDINGS. 4

B. DISTRICT COURT EVIDENCE. 7

1. Background To The Dispute. 7

2. FFRF Seeks Permit To Exhibit. 9

3. Governor Abbott Orders Removal Of FFRF's Exhibit. 12

4. Governor Abbott Singled Out FFRF For Its Viewpoint. 13

5. Approval Criteria Are Not Objective 16

V. SUMMARY OF THE ARGUMENT 18

VI. ARGUMENT 20

A. RESPONSE TO APPEAL ISSUE 20

1. The District Court's Declaration That Governor Abbott Engaged In Viewpoint Discrimination Operates Effectively As Prospective Relief Against Ongoing Misconduct, Which Declaration Is Not Barred By Eleventh Amendment Immunity. 20

a. A Declaration Of Unconstitutional Past Conduct That Is Ongoing Is Consistent With The *Ex Parte Young* Exception To Eleventh Amendment Immunity.....20

b. District Courts Have Authority To Grant Declaratory Relief As Well As Injunctive Relief.....24

c. The District Court Did Not Contravene The Eleventh Amendment.....25

B. CROSS APPEAL ISSUES.....31

1. FFRF Was Entitled To Injunctive Relief Based Upon The District Court's Holding That Governor Abbott Violated FFRF's First Amendment Free Speech Rights.....31

2. The State Preservation Board's Public Purpose Criterion For Exhibit Approval Gives Unfettered And Arbitrary Discretion To Government Officials In Violation Of The First Amendment 34

VII. CONCLUSION.....39

CERTIFICATE OF SERVICE 41

CERTIFICATE OF COMPLIANCE.....41

TABLE OF AUTHORITIES

Cases

Bode v. Kenner City,
303 F.Supp.3d 44 (E.D. LA 2018).....32

Broadstar Wind Systems Group Ltd. v. Stephens,
459 Fed. Appx. 351 (5th Cir. 2012) 22

Center For The Study Of Services v. U.S. Dept. Health And Human Services,
874 F.3d 287 (D.C. Cir. 2017).....24

Child Evangelism Fellowship of Maryland, Inc. v. Montgomery Co. Pub. Sch. Dist.,
457 F.3d 376 (4th 2006) 35

City of Lakewood v. Plain Dealer Publishing Co.,
486 U.S. 750 (1988).....35

Committee on Judiciary of U.S. House of Representatives v. Miers,
542 F.3d 909 (D.C. Cir. 2008).....24

Elrod v. Burns,
427 U.S. 347 (1976).....19

Ex parte Young,
209 U.S. 123 (1908)..... 2, 18, 20, 21, 22, 24, 25, 29, 30

Forsyth County, Ga. v. Nationalist Movement,
505 U.S. 123 (1992).....35

Green v. Mansour,
474 U.S. 64 (1985)..... 18, 21, 22, 29

Ingebretsen v. Jackson Pub. Sch. Dist.,
88 F.3d 274 (5th Cir. 1996) 33

K.P. v. LeBlanc,
729 F.3d 427 (5th Cir. 2013) 22

LeClerk v. Webb,
270 F.Supp.2d 779 (E.D. La. 2003) 20

Muckrock, LLC v. Center Intelligence Agency,
300 F.Supp.3d 108 (D.C. Dis. Col. 2018) 25

Niemotko v. Maryland,
340 U.S. 268 (1951).....36

Okpalobi v. Foster,
190 F.3d 337 (5th Cir. 1999) 20, 23

Opulent Life Church v. City of Holly Springs, Mississippi,
697 F.3d 279 (5th Cir. 2012) 32

P.R. Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.,
506 U.S. 139 (1993).....20

Papasan v. Allain,
478 U.S. 265 (1986).....22

Portillo v. Cunningham,
872 F.3d 728 (5th Cir. 2017) 31

Raj v. Louisiana State University,
714 F.3d 322 (5th Cir. 2013) 20

Sanchez- Espinoza v. Reagan,
770 F.2d 202 (D.C. Cir. 1985).....24

Seals v. McBee,
907 F.3d 885 (5th Cir. 2018) 23

Staub v. City of Baxley,
355 U.S. 312 (1958).....36

Steffel v. Thompson,
415 U.S. 452 (1974).....25

Thomas v. Chicago Park Dist.,
534 U.S. 316 (2002).....35

United Paperworkers Int. Union v. Champion Int. Corp.,
908 F.2d 1252 (5th Cir. 1990) 29

Verizon Maryland, Inc. v. Public Service Commission of Maryland,
535 U.S. 635 (2002).....21

Yarls v. Button,
905 F.3d 905 (5th Cir. 2018) 23

Statutes, Rules

28 U.S.C. § 1291 3
28 U.S.C. § 1331 3

Texas Administrative Code, Title 13, Part 7, Chp. 11, § 111.13(a)(3) 36

Regulations

F.R.C.P. 54(c) 31, 33

I. INTRODUCTION

This case is about censorship and exclusion of viewpoints from a public forum based on the personal disapproval of individual government officials, *i.e.*, the Appellants, Governor Greg Abbott and the Executive Director of the Texas State Preservation Board (hereinafter collectively "Governor Abbott"). Acting with autocratic impunity, Governor Abbott ordered the Freedom From Religion Foundation's (hereinafter "FFRF") display of a Bill of Rights and Winter Solstice Exhibit immediately removed from the Texas State Capitol, despite prior approval by the State Preservation Board.

The District Court agreed that Governor Abbott violated FFRF's free speech rights under the First Amendment. Governor Abbott does not dispute on appeal that he engaged in viewpoint discrimination against FFRF. Governor Abbott, instead, argues that the District Court's final judgment should be reversed on grounds of Eleventh Amendment immunity, *i.e.*, because the Court's final judgment purportedly has no prospective effect. Conceding on appeal the commission of prohibited censorship, Governor Abbott seeks to expunge the record to avoid prospective compliance with the United States Constitution.

Governor Abbott fails to recognize the prospective effect of the District Court's judgment. FFRF sought both declaratory and injunctive relief based on Governor Abbott's ongoing viewpoint discrimination. Critically for purposes of this appeal,

Governor Abbott does not dispute that the actions complained of by FFRF are ongoing. Indeed, the undisputed record evidence shows that Governor Abbott has not changed his position with respect to the FFRF display. The District Court's declaration of viewpoint discrimination, therefore, based upon the evidence that Governor Abbott improperly ordered the removal of FFRF's Exhibit, is not purely retrospective. On the contrary, even without ordering injunctive relief, the District Court's declaration is entirely consistent with the *Ex parte Young* exception to Eleventh Amendment immunity. A presumption exists in such cases that government officials will comply with the law going forward as declared by the District Court. That presumption is apparently misplaced as to Governor Abbott.

While declaratory relief in the case of ongoing constitutional violations was fully within the District Court's jurisdiction, the Court did abuse its discretion by not enjoining Governor Abbott, as requested by FFRF. Governor Abbott has shown stubborn intransigence that warranted a more coercive remedy than declaratory relief alone. The District Court denied FFRF's motion for injunctive relief apparently because the parties could not fully agree on all issues. The Court's irritation with the parties, however, was not a reasoned basis for the denial of FFRF's requested relief. In cases of First Amendment rights, moreover, permanent injunctive relief is the norm, not the exception.

Governor Abbott's insistence that the District Court's declaratory relief does not

bind him prospectively makes more significant the Court's failure to order injunctive relief. The District Court held that Governor Abbott violated FFRF's First Amendment rights, which violation is undisputedly ongoing. FFRF, therefore, is entitled to an effective remedy as requested.

Even without Governor Abbott's unconstitutional censorship, exclusion of FFRF's Exhibit would have been improper under State Preservation Board criteria for the permitting of exhibits in the Texas State Capitol. The criteria authorize unfettered and arbitrary discretion that is not cabined by objectively discernable standards. Such unfettered discretion violates the First Amendment, including by enabling viewpoint discrimination. The District Court erred, therefore, by upholding the vague and uncertain criteria, and thereby perpetuating Governor Abbott's viewpoint discrimination.

II. STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The Court entered final judgment disposing of all parties' claims on June 19, 2018. (ROA. 2026-27.) Governor Abbott filed a timely Notice of Appeal on July 13, 2018. (ROA. 2114.) On July 26, 2018, FFRF filed a timely Notice of Cross-Appeal. (ROA. 2122.) This Court has jurisdiction under 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUES

1. Did the District Court's Final Judgment, declaring that the exclusion of FFRF's Exhibit from the Texas State Capitol constituted viewpoint discrimination, violate the Eleventh Amendment where Governor Abbott's violation of the law is continuous and ongoing?

2. Did the District Court err by refusing to enter injunctive relief as a remedy for the ongoing violation of FFRF's First Amendment rights?

3. Does the "public purpose" standard for permitting displays in the Texas State Capitol give unfettered and arbitrary discretion to State officials in violation of the First Amendment?

IV. STATEMENT OF THE CASE

A. DISTRICT COURT PROCEEDINGS.

FFRF commenced this action after Governor Abbott arbitrarily removed FFRF's Exhibit from the Texas State Capitol. (ROA 1-14, 121-147.) FFRF alleged, in part, that Governor Abbott engaged in impermissible viewpoint discrimination. (ROA 121.) FFRF sued Governor Abbott and the Executive Director of the State Preservation Board in both their official and individual capacities. (ROA 122.) FFRF sought both declaratory and injunctive relief against Governor Abbott in his official capacity based on ongoing discrimination against FFRF. (ROA 140.) FFRF also alleged that criteria used by the State Preservation

Board to approve displays in the State Capitol give unfettered discretion to decisionmakers in violation of the First Amendment. (ROA 138.)

The parties filed early cross motions for summary judgment. (ROA 478-609, 611-779.) The Court granted in part and denied in part the motions for summary judgment. (ROA 864-887.) In particular, the Court denied summary judgment as to FFRF's viewpoint discrimination claim, but granted judgment dismissing FFRF's claim that the Texas permitting standards allow for unconstrained and unbridled discretion by State officials. (ROA 884-886.)

The parties later filed renewed cross motions for summary judgment after engaging in discovery. (ROA 1523-1729.) The District Court, upon due consideration, granted FFRF's motion for summary judgment holding that Governor Abbott engaged in viewpoint discrimination. (ROA 1986.) The Court, however, denied summary judgment on FFRF's individual capacity claim against Governor Abbott and Establishment Clause claims. (ROA 1992.)

The Court having found that Governor Abbott engaged in viewpoint discrimination in his official capacity, FFRF agreed to dismiss the remaining claims so that final judgment immediately could be entered. FFRF, accordingly, moved the Court to dismiss the remaining claims and to enter judgment in favor of FFRF on its First Amendment claim. (ROA 2001-2007.) Significantly, FFRF's Motion for Entry of Final Judgment specifically requested that Governor Abbott be

enjoined from excluding FFRF's Exhibit from the State Capitol. (ROA 2002.)

Governor Abbott agreed to dismissal of the remaining claims, but objected to entry of an injunction. (ROA 2009-2011.) He claimed that an appeal of liability was intended, and he also claimed that the scope of FFRF's proposed injunction was too broad. (ROA 2009.) In particular, Governor Abbott complained that the proposed injunction ostensibly did not allow the State Preservation Board to consider time and space constraints when scheduling FFRF's display. (ROA 2010.) FFRF thereupon agreed that the State Preservation Board could consider time and space criteria in scheduling FFRF's Exhibit, but still Governor Abbott objected. (ROA 2015-2017.)

The District Court subsequently held a hearing on FFRF's Motion for Entry of Judgment. (Dkt. No. 97.) The Court refused to grant FFRF's Motion at that time because the parties had not agreed to the form of injunctive relief. (Dkt. No. 97 at 5-6.) FFRF's counsel expressed hope that the parties could yet reach agreement on the form of an injunction, but Governor Abbott's counsel was doubtful. (Dkt. No. 97 at 5.)

The District Court accordingly denied FFRF's Motion, albeit with leave for the parties to jointly move for dismissal of the remaining individual capacity claim. (ROA 2019.) The parties thereafter still could not reach agreement on the form of an injunction, but they did file a joint motion to dismiss the remaining unresolved

claims. (ROA 2020-2024.)

The District Court granted the parties' motion to dismiss the remaining claims and then entered final judgment "in favor of FFRF on FFRF's First Amendment freedom of speech claim; and IT IS FURTHER DECLARED THAT Defendants violated FFRF's First Amendment rights and engaged in viewpoint discrimination as a matter of law when the FFRF's exhibit was removed from the Texas Capitol building under the circumstances of this case." (ROA 2026-2027.) The parties timely appealed and cross-appealed the District Court's final judgment. (ROA 2114, 2122.)

B. DISTRICT COURT EVIDENCE.

1. Background To The Dispute.

FFRF is a non-profit membership organization that advocates for the separation of state and church and educates on matters of non-theism. (ROA 656.) FFRF has more than 23,500 members, with members in every state of the United States, including more than 1,000 members living in the State of Texas. (ROA 656.) The percentage of Americans who do not identify with any religion constitutes about 23% of the U.S. public, according to the Pew Research Center. (ROA 651.)

In December of 2014, FFRF became aware that a Christian Nativity scene was being displayed in the Texas State Capitol. (ROA 657.) Media reports about

the nativity scene in the Texas State Capitol indicated that this was the first time such a religious display was exhibited in the Capitol, which piqued FFRF's interest in the possibility of its own display. (ROA 657.)

The display of a nativity scene in the Texas Capitol, and in other capitols as well, concerned FFRF because of the potential for government endorsement of religion, particularly Christianity. (ROA 657.) Media reports about the nativity scene at the Texas State Capitol, however, emphasized the private sponsorship of the display, including the motivation for the display to celebrate the birth of Christ. (ROA 657.) The Texas Nativity Scene Project, a private organization, reportedly sponsored the nativity scene in the Texas Capitol, looking to combat the "War on Christmas." (ROA 657.) The sponsor of the nativity scene reportedly intended its exhibit to communicate a distinctly Christian message, according to the project's spokesperson. "This is an expression of the Christian community coming together and saying, 'we have a right to be in the public square and express our views as much as anyone else.'" (ROA 658.)

In addition to sponsorship by the Texas Nativity Scene Project, the Thomas More Society, an advocacy law firm specializing in the promotion of nativity scenes in state capitols, claimed responsibility for the Nativity in the Texas State Capitol. (ROA 658.) According to the Thomas More Society, the display of nativity scenes in state capitols, including Texas, represents "constitutionally

protected free speech and expression of religious faith by private citizens in a traditional public forum." (ROA 658.) The fact that such a Christian display in the State Capitol was privately funded and sponsored, ostensibly without government aid or endorsement, was reportedly significant to the State Preservation Board's approval of a nativity display in the Texas State Capitol. (ROA 658.) The Thomas More Society further publically defended nativity displays in state capitals as "constitutionally protected expression by private citizens in traditional or designated public forums, where the sole role of the government must be that of a viewpoint-neutral gatekeeper assuring open access for all citizens to have their 'say.'" (ROA 659.)

In a later communication regarding FFRF's own Bill of Rights exhibit, the Capitol Events and Exhibit Coordinator for the State Preservation Board, Robert Davis, expressly noted that the 2014 Christian nativity scene had included a disclaimer of state involvement and requested that FFRF "post a similarly worded sign accompanying your display, mentioning the sponsor, and that it was privately funded and displayed." (ROA 659.)

2. FFRF Seeks Permit To Exhibit.

FFRF submitted an exhibit application to the State Preservation Board on July 7, 2015, which the Board approved after FFRF's voluntary revisions, without any editorial control or alteration of FFRF's substantive message. (ROA 660.)

FFRF later submitted revisions to its application at the request of Representative Donna Hurd, the State Official Sponsor for FFRF's display. (ROA 660.)

FFRF described its proposed display in its application as "Cutout figures celebrating the December 15 nativity of the Bill of Rights. The figures will be self-standing and will be approximately life-sized." (ROA 660.) FFRF further described its proposed exhibit, in a letter dated May 29, 2015, written to potential "State Official Sponsors," as "a temporary display in the Ground Floor Rotunda that celebrates freethought and the United States as the first among nations to formally embrace the separation of state and church." (ROA 661.) FFRF also explained its proposed exhibit as an effort "to celebrate the views of Texans who are part of a religious minority or have no religion at all." (ROA 661.) FFRF also sought to diversify the limited expression displayed in 2014, manifested by the stand-alone Christian nativity in the State Capitol. (ROA 661.) Finally, the stated purpose of FFRF's display was to "educate the public and celebrate the 224th anniversary of the ratification of the Bill of Rights on December 15, 1791. Also, to celebrate the Winter Solstice on December 22 and to educate the public about the religious and nonreligious diversity within the State." (ROA 661.)

The State Preservation Board, by the Executive Director and his staff, officially approved FFRF's exhibit application on August 6, 2015. (Grover Decl., at ¶31.) Texas members of FFRF then subsequently gathered in the Texas

Capitol's Ground Floor Rotunda on December 18 and put FFRF's display in place. (ROA 661.)

FFRF's display featured Benjamin Franklin, Thomas Jefferson, George Washington, and the Statue of Liberty gathered around the Bill of Rights, which was placed in a manger. (ROA 662.) Accompanying the display was a sign that read: "Happy Winter Solstice/At this Season of the Winter Solstice, we honor reason and the Bill of Rights (adopted December 15, 1791)/Keep State & Church Separate/On behalf of Texas members of the Freedom From Religion Foundation." (ROA 662.)

No known disruptions, incidents, controversy, or complaint ensued after FFRF's exhibit went on display in the State Capitol on December 18, 2015, except for the objection of Governor Abbott, described below. (ROA 662.)

All of FFRF's interactions with the Texas State Preservation Board were mutually cordial, respectful, and cooperative. (ROA 662.) Similarly, all communications with the State Preservation Board regarding the actual placement and setting up of the display were friendly, helpful, and cooperative during the scheduling process. (ROA 662.) In none of FFRF's interactions with the State Preservation Board was any complaint or reservation ever expressed regarding the substance or viewpoint of FFRF's exhibit. (ROA 662.) The Preservation Board

only asked that FFRF include a disclaimer of State sponsorship, similar to a disclaimer displayed with the nativity scene. (ROA 662.)

3. Governor Abbott Orders Removal Of FFRF's Exhibit.

After FFRF's exhibit went on display on December 18, 2015, FFRF learned that the staff of the State Preservation Board removed FFRF's exhibit, without any notice to FFRF, and without opportunity to object by FFRF. ((ROA 662.) FFRF learned that FFRF's exhibit was removed upon the demand of Governor Abbott. (ROA 663.)

On or about December 22, 2015, Governor Abbott wrote to John Sneed, "as Chairman of the State Preservation Board," demanding that Sneed "remove [FFRF's] display from the Capitol immediately." (ROA 663.) (Sneed has since been succeeded as Executive Director of the State Preservation Board by Rod Welsh.) In his letter, Governor Abbott claimed that FFRF's display failed to meet State Preservation Board criteria for approval, including because the display "does not educate," or promote public morals and the general welfare. (ROA 663.) Governor Abbott accused FFRF of "tasteless sarcasm," and he called its message "spiteful" and "intentionally designed to belittle and offend," and he claimed that the display "undermines rather than promotes any public purpose." (ROA 663.) Governor Abbott, in his diatribe to the Executive Director of the State Preservation Board, concluded that "the general public does not have a 'direct interest' in the

Freedom From Religion Foundation's purpose. That organization is plainly hostile to religion and desires to mock it." (ROA 664.) Finally, Governor Abbott claimed that FFRF's exhibit was indecent ("it violates general standards of decency") and he compared it to a crucifix immersed in a jar of urine. (ROA 664.)

Executive Director Sneed, after receiving the Governor's demand, reportedly then consulted with State Preservation Board member Charlie Geren, who advised Sneed that if Governor Abbott wants the FFRF exhibit taken down, then Sneed should do so. (ROA 664.)

4. Governor Abbott Singled Out FFRF For Its Viewpoint.

Significantly, the State Preservation Board apparently has never previously denied any application for approval of a requested display. (ROA 667.) In response to a Request for Production of "all documents relating to the denial by the State Preservation Board of any application to exhibit or display in the State Capitol between January 1, 2013, and the present," the Preservation Board responded "that they have no such documents in their possession, custody or control." (ROA 668.) The Board also stated that it has no documents in its possession, custody or control "relating to any exhibit or display prematurely removed by the State Preservation Board while approved for display or exhibit." (ROA 665.)

Governor Abbott's claim that FFRF's Bill of Rights display does not educate or promote public morals and the general welfare, or represent a matter in which the general public has a "direct interest," is belied by review of other displays approved by the State Preservation Board without objection by Governor Abbott. (ROA 665.) The State Preservation Board, for example, approved a display by the Austin Jewish Academy for the purpose of "community outreach." (ROA 665.) The State Preservation Board also approved a display of student quilts on Catholic Advocacy Day. (ROA 665.) An application by the Young Conservatives of Texas was also approved by the State Preservation Board "to connect college students with established organizations that promote conservative values." (ROA 665-66.)

Other applications approved by the State Preservation Board have a relationship to the "general welfare" and "direct interest" of the public that is far narrower than FFRF's display, which concerns the 23% of adult Americans who are nonreligious, the many others who value religious and nonreligious diversity, and anyone affected by the Bill of Rights. (ROA 666-68.)

FFRF's Bill of Rights display also seemingly had greater educational value and more direct public interest than a whole host of displays approved by the State Preservation Board. (ROA 669.)

The State Preservation Board, nonetheless, remains adamant that it will deny any future application by FFRF to display the same exhibit which was removed in 2015. ("Our position on this matter has not changed since the Governor wrote to me, [Executive Director of the State Preservation Board] last December, calling for the removal of FFRF's pejorative exhibit." (ROA 1727.) The Preservation Board notes, however, that an exhibit by FFRF "would be welcomed" if displayed without the content that Governor Abbott considers offensive. The State Preservation Board wrote as follows:

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

(ROA 1727.)

The FFRF Exhibit is shown as follows:

5. Approval Criteria Are Not Objective.

According to the former Executive Director of the State Preservation Board, some of the rules for approving displays "are fairly broad and subject to interpretation. I have an interpretation. Anyone else can have a different interpretation. In this case, the individual who is elected by the people of the State of Texas [Governor Abbott], who has run statewide for five or six times, maybe seven, who probably has visited every county in the State of Texas, he knows the people of Texas and their beliefs and their sensitivities far more than I do. Far more. And that was a major thought process of mine in reading his letter. This man, he -- he knows Texas." (ROA 1640.) Nonetheless, the Executive Director was not aware of any objection to the FFRF display, other than the Governor's objection, before removal. (ROA 1641.)

The Executive Director also was unaware of any application for display ever being rejected for any reason, other than on the basis of rules against financial or commercial gain and campaign political advertising. (ROA 1645.) The Director oversaw a fairly limited review process by the State Preservation Board in approving display requests. "You know, our -- our role in looking at exhibits was, did we have available space; was it too large, too small for the space they wanted to go into; were they properly filling out paperwork; were -- had they been good actors or bad actors in the past as far as taking care of their exhibits. That's overwhelmingly what we look for." (ROA 1650.)

Governor Abbott's letter to the Preservation Board acted as his motivation to remove FFRF's display. "It was my belief that the governor was in a better position than me to determine what -- in this specific case of this exhibit -- what was or was not appropriate as it related to the viewpoint of Texans." (ROA 1662.) With respect to FFRF's display, according to the Director, Governor Abbott "has a better understanding of what the people of Texas think, what they believe than I do." (ROA 1663.)

The Preservation Board itself did not apply an educational function criteria. "Every exhibit, by its nature, affects people in different ways, just like going to a museum. And one person gets one thing out of an exhibit and, you know, the person standing next to him gets something else out of it." (ROA 1664.) Thus the

Preservation Board Director is not aware of any exhibit rejected for failure to have a sufficiently educational purpose. (ROA 1665.) Until the Director received Governor Abbott's letter requesting removal, he was satisfied with the approval of FFRF's display. (ROA 1671.)

V. SUMMARY OF THE ARGUMENT

Governor Abbott incorrectly argues that declaratory relief in this case is barred by Eleventh Amendment immunity. Declaratory and/or injunctive relief is within the immunity exception recognized in *Ex parte Young*. Governor Abbott misreads *Green v. Mansour*, which did not involve an ongoing violation of federal law. By contrast, the present case undisputedly involves ongoing viewpoint discrimination. The District Court's declaration in this case, therefore, does have prospective effect, even without an injunction, because government officials are presumed to comply with the law as declared. In the case of an unchanged and ongoing violation of the law, the Court's declaration regarding Governor Abbott's prior conduct clearly has prospective significance.

The District Court, moreover, should have granted FFRF's request for injunctive relief. Having found that Governor Abbott violated FFRF's First Amendment free speech rights, an injunction against continued viewpoint discrimination was clearly warranted. In fact, the Supreme Court has opined that "the loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

The District Court did not give reasoned consideration to FFRF's request for injunctive relief. The Court, instead denied FFRF's motion for such relief ostensibly because the parties did not agree on the other issues. The Court's failure to consider appropriate factors, and the Court's actual consideration of inappropriate factors, constitutes clear error.

The District Court also erred by concluding that the "public purpose" standard for permitting displays in the State Capitol is sufficiently definite to prevent unfettered discretion. The public purpose standard lacks any objective and definite standards to guide State officials in their decisionmaking. The District Court erroneously concluded, therefore, without any stated reasoning, that the public purpose definition provides "a reasonable framework" such that the State Preservation Board does not have unbridled discretion. In fact, the public purpose criterion, as defined by the State Preservation Board, can only be applied subjectively, without any objectively discernable measuring stick, which violates the First Amendment as a complement to the prohibition on viewpoint discrimination.

VI. ARGUMENT

A. RESPONSE TO APPEAL ISSUE.

1. The District Court's Declaration That Governor Abbott Engaged In Viewpoint Discrimination Operates Effectively As Prospective Relief Against Ongoing Misconduct, Which Declaration Is Not Barred By Eleventh Amendment Immunity.

a. A Declaration Of Unconstitutional Past Conduct That Is Ongoing Is Consistent With The Ex Parte Young Exception To Eleventh Amendment Immunity.

Governor Abbott does not dispute that declaratory and/or injunctive relief may be ordered against state officials sued in their official capacities. The Eleventh Amendment does not bar suits for such relief where individual state officials are named as defendants in their official capacities. *Raj v. Louisiana State University*, 714 F.3d 322, 328 (5th Cir. 2013), *citing Ex parte Young*, 209 U.S. 123, 155-56 (1908). *See also Okpalobi v. Foster*, 190 F.3d 337, 343 (5th Cir. 1999); *LeClerk v. Webb*, 270 F.Supp.2d 779, 791 (E.D. La. 2003). This doctrine "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *P.R. Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

"In determining whether the doctrine of *Ex parte Young* avoids the Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Public Service*

Commission of Maryland, 535 U.S. 635, 645 (2002). In *Verizon*, the Supreme Court reasoned that a request "that state officials be restrained from enforcing an order in contravention of controlling federal law clearly satisfies our straightforward inquiry."

Governor Abbott does not question that the present case satisfies the *Ex parte Young* exception to immunity, but he argues incorrectly that a court may not issue a declaration based upon past conduct. Governor Abbott purports to rely upon the Supreme Court decision in *Green v. Mansour*, 474 U.S. 64, 73 (1985), which decision he misreads. Governor Abbott, in particular, misconstrues *Green*, which holds that the Eleventh Amendment only bars a retrospective declaration of a violation of federal law where there is "no claimed continuing violation of federal law." *Id.* The doctrine of *Ex parte Young* permits a suit to proceed against a government official in his or her official capacity for an ongoing violation of federal law.

The *Green* Court held that the Eleventh Amendment barred the federal court in that particular case from issuing declaratory relief because the State was no longer violating federal law, *i.e.*, there was no "claimed continuing violation of federal law" or "threat of state officials violating the repealed law in the future." *Id.* Any declaration in that case, therefore, could say no more than that state officials had violated federal law in the past. *See K.P. v. LeBlanc*, 729 F.3d 427,

439 fn. 76 (5th Cir. 2013)("In *Green v. Mansour*, there was not even a 'claimed continuing violation of federal law.'") The allegedly unconstitutional conduct in *Green* had been rendered moot by intervening amendments to the applicable law. But for the mootness of the case, *Ex parte Young* would have controlled the outcome.

The *Ex parte Young* exception to immunity, in short, applies to declaratory relief when there is an ongoing violation of federal law. As the Supreme Court explained in *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986), "*Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as in cases in which the relief against the state official directly ends the violation of federal law, as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation."

The fact of an ongoing violation typifies those cases where the intended relief is prospective in nature, *i.e.*, designed to prevent injury that will occur in the future. The requirement, in other words, is similar to the standing requirement that injury be imminent. Standing to seek a declaratory judgment is subject to the constitutional requirement that injury be actual or imminent. *Broadstar Wind Systems Group Ltd. v. Stephens*, 459 Fed. Appx. 351, 356 (5th Cir. 2012).

The question of imminence, in fact, was the subject of the dissent in *Seals v. McBee*, 907 F.3d 885, 888 (5th Cir. 2018), which is relied upon by Governor Abbott. The dissent that Governor Abbott cites involved a case where the District Attorney had expressly disavowed bringing charges against the Defendant, and in addition, the Defendant indicated no intention whatsoever to engage in future conduct that might be challenged under the statute at issue. The *Seals* dissent thus questioned whether there was a case or controversy in such circumstances, *i.e.*, a reasonable expectation that the same complaining party will be subjected to the same action again. *See Yarls v. Button*, 905 F.3d 905, 911 (5th Cir. 2018). *See also Okpalobi v. Foster*, 190 F.3d at 348 (recognizing federal court jurisdiction in cases where state officers have taken or threatened to take action).

Governor Abbott's mischievously incomplete understanding of the *Green* decision is significant. Here, Governor Abbott does not dispute that this case involves an ongoing violation of the First Amendment, nor does he dispute that FFRF's injury is actual and imminent. Finally, Governor Abbott makes no argument that the constitutionality of ongoing conduct cannot be determined from a consideration of a state official's similar past conduct. That is the essence of an ongoing wrong.

b. District Courts Have Authority To Grant Declaratory Relief As Well As Injunctive Relief.

Governor Abbott complains without merit that the District Court granted incomplete relief to FFRF and thereby exceeded the *Ex parte Young* exception to Eleventh Amendment immunity. Governor Abbott appears to suggest that the District Court could only grant prospective injunctive relief, in order to be consistent with the Eleventh Amendment, but he is wrong. While injunctive relief was warranted in this case, the District Court's subject-matter jurisdiction was not limited to such relief.

A long-standing presumption exists that government officials will adhere to the law as declared by the court. *Committee on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008). As a result, when the government is the defendant, a declaratory judgment is "the practical equivalent of specific relief such as injunction or mandamus." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208, n. 8 (D.C. Cir. 1985). Where a plaintiff is eligible for both declaratory and injunctive relief, therefore, district courts evaluate the likelihood of continued misconduct by government officials, while keeping in mind that a government defendant is presumed to adhere to the law as declared by the court. *Center For The Study Of Services v. U.S. Dept. Health And Human Services*, 874 F.3d 287, 293 (D.C. Cir. 2017). This analytical approach is consistent with "the expressed purpose of a Federal Declaratory Judgment Act to

provide a milder alternative to the injunction remedy." *Steffel v. Thompson*, 415 U.S. 452, 467 (1974). *See also Muckrock, LLC v. Center Intelligence Agency*, 300 F.Supp.3d 108, 136-37 (D.C. Dis. Col. 2018).

Governor Abbott argues incorrectly that only injunctive relief can satisfy the requirement of prospective relief. In fact, Governor Abbott's argument that the District Court's judgment in the present case is only backward-looking is belied by his apparent concern about the future. Governor Abbott presumably knows the expectation that he must comply with the law as declared by the Court. He, nonetheless, seeks to end run around the District Court's declaration, all the while making no appeal of the Court's ruling on the merits. Governor Abbott, by his arguments on appeal, seeks simply to continue violating the First Amendment, which the District Court's judgment otherwise impedes. Governor Abbott wants not to comply with the law as declared by the District Court.

c. The District Court Did Not Contravene The Eleventh Amendment.

The District Court undisputedly had jurisdiction from the outset to proceed against Governor Abbott under the *Ex parte Young* exception to Eleventh Amendment immunity. Governor Abbott wisely does not argue to the contrary. FFRF's suit for declaratory and injunctive relief clearly satisfied the "straightforward inquiry" standard articulated by the Supreme Court in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002).

FFRF brought its action against the Defendants in both their official and individual capacities and sought declaratory and injunctive relief as to continuing and foreseeable violations of FFRF's constitutional rights in the future. FFRF specifically alleged:

> The Plaintiff, nonetheless, does intend to make further application to the State Preservation Board in the future to again display the exhibit at issue in the Texas State Capitol, and hence this action which is necessitated by the Defendants' continuing and foreseeable violation of Plaintiff's constitutional rights in the future. (ROA 140.)

FFRF accordingly requested declaratory and injunctive relief, including "judgment against each Defendant enjoining the Defendants from excluding the Plaintiff's exhibit at issue from future display in public areas of the Texas State Capitol." (ROA 140.)

FFRF at no time abandoned or withdrew its claim for prospective relief against Governor Abbott. In fact, during the pendency of this action, FFRF did make new application to the Texas State Preservation Board to display the same Exhibit previously censored by Governor Abbott, whereupon the State Preservation Board advised that it would deny any future application by FFRF to display the same Exhibit that Governor Abbott had removed in 2015. The Executive Director of the State Preservation Board wrote as follows:

> Thus, in addition to the space availability constraints discussed above, please be aware that any application to display the same exhibit which was removed last year will be denied for failure

to satisfy the public purpose requirement. (ROA 1727.)

The State Preservation Board further noted that a censored exhibit by FFRF 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." (ROA 1727.) The actions about which FFRF complained in its suit clearly, therefore, remain ongoing, amid express assurances that no change of behavior should be expected.

Throughout this litigation, FFRF has continued to seek prospective relief as to its official capacity claims, which was no secret to Governor Abbott. In fact, the parties stipulated to dismissal of the individual capacity claims, but Governor Abbott would not agree to the form of a stipulated final judgment that included a prospective injunction. Governor Abbott, therefore, opposed FFRF's motion for entry of judgment, including FFRF's modest request that Governor Abbott be "enjoined from excluding Plaintiff's Exhibit from the Texas State Capitol in the future." (ROA 2009.)

Governor Abbott opposed entry of an injunction, in the first instance, because he intended to appeal the District Court's holding that he had engaged in viewpoint discrimination. (ROA 2009.) Governor Abbott also objected to the form of FFRF's proposed injunction on the grounds that it did not allow consideration of time and space constraints. (ROA 2010.) FFRF responded to

Governor Abbott's objection by proposing an injunction that would be subject to time and space constraints. (ROA 2015-2017.)

The District Court denied FFRF's motion for entry of judgment, ostensibly because the parties did not agree as to the form of FFRF's proposed injunction. During the hearing on FFRF's motion, counsel for FFRF expressed optimism that the parties could subsequently reach agreement on the form of an injunction. (Dkt. No. 97 at 5.) Governor Abbott's counsel, however, expressed doubt that she would agree to the form of any injunction:

> My concern about agreeing to language, agreeing to an order, even as to form, is because we intend to appeal the finding as to liability, we can't represent on the record that in any way sort of the judgment is agreed. So that would be my concern about that. (Dkt. No. 97 at 5.)

While frustrated that the parties could not reach agreement on all issues, the District Court opined off the cuff as to the scope of an injunction. The Court stated as follows:

> I can't think of a general injunction other than saying, ok, the display was to be for three days. Come December, they get to display it for three days. Maybe I'm just simple-minded, but that's all I think this lawsuit's about. (Dkt. No. 97 at 9.)

Because the parties did not agree as to all issues, the District Court denied FFRF's motion for entry of judgment with leave for the parties to file a stipulation dismissing the remaining unresolved claims. (ROA 2019.) The parties, moreover, still could not agree to the form of an injunction, whereupon they filed a stipulated

motion to at least withdraw the remaining claims. (ROA 2020-2024) The Court then entered an order dismissing those claims, after which the Court also entered final judgment with a declaration of rights, but without injunctive relief. (ROA 2026-2027.) In doing so, the District Court should have entered an injunction as FFRF requested, but the Court did not act contrary to the Eleventh Amendment by issuing a declaratory judgment.

FFRF, for its part, clearly alleged official capacity claims against Governor Abbott and the Executive Director of the State Preservation Board that were within the *Ex parte Young* exception to Eleventh Amendment immunity. The record is also undisputed that FFRF never abandoned its claims for prospective relief against Governor Abbott and the Executive Director. The record is further uncontradicted that the conduct determined by the Court to violate the First Amendment remained continuous and ongoing. (In fact, Governor Abbott is foreclosed from even arguing at this point that the present case does not involve an ongoing violation of the Constitution, as an appellant abandons issues not raised and argued in its initial brief on appeal. *See United Paperworkers Int. Union v. Champion Int. Corp.*, 908 F.2d 1252, 1255 (5th Cir. 1990)). Unlike in *Green*, moreover, there are no issues of mootness in this case, nor case or controversy issues. The District Court, therefore, acted within its jurisdiction in declaring that the ongoing actions of Governor Abbott and the Executive Director of the State Preservation Board

violate the First Amendment.

By attempted sleight of hand, Governor Abbott seeks to achieve a free pass to continue violating the First Amendment, despite conceding the District Court's holding that censorship of FFRF's display violates the Constitution. The Eleventh Amendment does not preclude such a declaration regarding ongoing conduct based upon the evidence of prior conduct. A government official's presumed obligation to comply with the Constitution prospectively does not exceed the *Ex parte Young* exception to the Eleventh Amendment immunity where a court's declaration is based upon the established fact of past misconduct.

Governor Abbott's eleventh hour argument regarding immunity lacks merit precisely because this case involves ongoing violations of the First Amendment. Here, Governor Abbott has not denied, either in the district court, or even in the Court of Appeals, that this case involves ongoing conduct as to which Governor Abbott and the State Preservation Board have effectively advised FFRF to "expect the same in the future." Thus, while injunctive relief may well have been warranted, the District Court certainly did not exceed its constitutional authority by its final judgment. The Court had jurisdiction from the outset, and the Court did not exceed its jurisdiction in the end. A court's declaration regarding ongoing and imminent violations of the law has prospective effect within the scope of the *Ex parte Young* exception to the Eleventh Amendment.

B. CROSS APPEAL ISSUES.

1. FFRF Was Entitled To Injunctive Relief Based Upon The District Court's Holding That Governor Abbott Violated FFRF's First Amendment Free Speech Rights.

The District Court ruled in favor of FFRF on its First Amendment free speech claim. Governor Abbott, on appeal, does not contest the Court's merits decision. Thus, FFRF was entitled to an effective remedy, even without asking for such. Federal Rule of Procedure 54(c) provides that "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." In this case, FFRF not only demanded injunctive relief in its pleadings, but it moved the Court for such relief, to which Governor Abbott presented his arguments. Injunctive relief, accordingly, would not have been a surprise to Governor Abbott, as the Court explained in *Portillo v. Cunningham*, 872 F.3d 728, 735 (5th Cir. 2017). Thus, the District Court should have ordered the injunctive relief to which FFRF was entitled as part of its final judgment.

In the case of First Amendment transgressions, injunctive relief is the norm, rather than the exception. This Court applies a four-part test in determining whether to grant a permanent injunction. The party seeking an injunction must show: (1) success on the merits; (2) that the failure to grant the injunction will result in irreparable injury; (3) that the injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not

disserve the public interest. *See Bode v. Kenner City*, 303 F.Supp.3d 44, 507 (E.D. La. 2018).

FFRF obviously meets the first element necessary to warrant a permanent injunction, *i.e.*, FFRF prevailed on the merits. As for the second element, the Supreme Court has held that the loss of First Amendment rights *per se* constitutes irreparable harm, which the Court also recognized in *Opulent Life Church v. City of Holly Springs, Mississippi*, 697 F.3d 279, 295 (5th Cir. 2012). Thus, the District Court's failure to enjoin Governor Abbott from continuing to obstruct FFRF's First Amendment rights will result in irreparable injury if Governor Abbott refuses to comply with the Court's declaration. This is especially so given that Governor Abbott has made clear that he does not view the Court's entry of declaratory relief as preventing him from censoring FFRF's same display in the future.

As to the third element, in *Opulent Life Church*, 697 F.3d at 297, this Court noted that a defendant "would need to present powerful evidence of harm to meet its interests to prevent the Plaintiff from meeting this requirement." In opposition to FFRF's motion for injunctive relief in this case, Governor Abbott presented no such evidence of a harm to its interests that would outweigh the injury to FFRF.

Finally, as to the fourth permanent injunction element, in *Opulent Life Church*, the Court held that "injunctions protecting First Amendment freedoms are always in the public interest." *Id.* at 298. *See also Ingebretsen v. Jackson Pub.*

Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996)(determining that because the statute challenged in that case was unconstitutional, "the public interest was not disserved by an injunction preventing its implementation").

Under F.R.C.P. 54(c), FFRF was entitled to injunctive relief as a matter of course. Governor Abbott, for his part, did not object to FFRF's entitlement to injunctive relief *per se*; Governor Abbott, instead, objected on the basis of the Court's merits determination, which he does not now challenge on appeal. Governor Abbott also objected to the scope of FFRF's requested injunction, including as to purported time and space constraints. In reply, FFRF agreed that the scope of injunctive relief be limited "to generally applicable scheduling and space considerations." (ROA 2015-2017.) Because the content of FFRF's Exhibit was the only basis for otherwise excluding the Exhibit from display in the Texas State Capitol, the mandate of FFRF's requested injunction was otherwise appropriate, *i.e.,* that Governor Abbott be "enjoined from excluding Plaintiff's Exhibit from the Texas State Capitol in the future." (ROA 2002.)

The District Court all but acknowledged the propriety of FFRF's requested injunction, stating "I can't think of a general injunction other than saying, OK, the display was to be for three days. Come December, they get to display it for three days." (Dkt. No. 97 at 9.) Tellingly, the District Court also acknowledged that "that's all I think this lawsuit's about." (Dkt. No. 97 at 9.)

The District Court, nonetheless, refused to grant FFRF's Motion for Entry of Final Judgment, including injunctive relief, because the parties did not themselves agree upon the scope of an injunction. (Dkt. No. 97 at 5-6.) In so ruling, the District Court erred, including by failing to consider the relief to which FFRF was entitled by virtue of the Court's merits determination that Governor Abbott engaged in viewpoint discrimination. The Court also erred by basing its decision on patently inappropriate factors, including the requirement that the parties stipulate to the form of an injunction.

Governor Abbott curiously now bases his appeal on the absence of injunctive relief in the District Court's Final Judgment. He attempts to use that omission as a means of avoiding compliance with the Constitution. Because the District Court's error is correctable on this appeal, however, Governor Abbott's ruse does not work even on its own terms.

2. The State Preservation Board's Public Purpose Criterion For Exhibit Approval Gives Unfettered And Arbitrary Discretion To Government Officials In Violation Of The First Amendment.

"A corollary of the prohibition on viewpoint discrimination is the principle that administrators may not possess unfettered discretion to burden or ban speech, because 'without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.'" *City of Lakewood v. Plain Dealer Publishing*

Co., 486 U.S. 750, 763-64 (1988). Boundless rules run the risk that the government will use seemingly innocuous standards in pretextual and censorial ways, "hiding the suppression from public scrutiny." *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery Co. Pub. Sch. Dist.*, 457 F.3d 376, 386 (4th 2006). In the present case, the criteria for the approval of exhibits in the Texas State Capitol run afoul of the prohibition against unbridled discretion. In fact, Governor Abbott himself uses the vague criteria precisely to conceal otherwise prohibited viewpoint discrimination.

As a restraint on speech, any permitting scheme must meet certain constitutional requirements. In particular, such a scheme may not delegate overly broad discretion to government officials. "A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view. To curtail that risk, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992). *See also Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 783 (2002)(" Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its

content"); *Niemotko v. Maryland*, 340 U.S. 268, 271-73, 71 S.Ct. 325, 95 L.Ed. 267 (1951)(licensing criteria must have definitive standards or other controlling guides to apply in granting or withholding a permit); and *Staub v. City of Baxley*, 355 U.S. 312, 322 (1958)(permitting standard based upon "the general welfare of the citizens" impermissibly gives government officials uncontrolled discretion in violation of the First Amendment).

In the present case, the formal standards of the State Preservation Board for permitting displays in the Capitol including the requirement that a display "promote a public purpose." (ROA 80-81.) This, in turn, is further defined as meaning that "the public must have a direct interest in the purpose and the community at large must be benefitted." (ROA 80.) The public purpose standard is further defined in Texas Administrative Code, Title 13, Part 7, Chp. 11, § 111.13(a)(3), which states:

> 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. (ROA 75.)

This standard, to the extent construed as an identifiable standard, gives government officials, like Governor Abbott, unfettered discretion to determine whether an exhibit should be allowed.

This present case exemplifies precisely the danger of such unfettered discretion, both facially and as applied. Governor Abbott, "as Chairman of the State Preservation Board," purports to justify his censorship of FFRF on the basis that FFRF's Exhibit does not promote a public purpose; the Exhibit does not promote morals and the general welfare; the Exhibit does not educate; the public supposedly does not have a direct interest in FFRF's purpose; and the community at large allegedly is not benefited. On the other hand, Governor Abbott has cheered the display of Christian nativity displays on government property, including in the State Capitol, despite no greater public purpose in which the public has a direct interest or which benefit the community at large. In fact, representative examples of displays approved by the State Preservation Board clearly show that the Board's criteria have not been applied prohibitively, except in the case of Governor Abbott's objection to FFRF's Exhibit.

As a practical matter, the State Preservation Board's formal standards allow for nearly unlimited discretion in determining what displays will be approved. Other than FFRF's Exhibit, no other known display has been interfered with based upon an alleged failure to satisfy the "public purpose" requirement. (ROA 665.) In fact, the former Director of the State Preservation Board, John Sneed, was unaware of any display application ever being rejected by the Board, though it is common practice for the Board to enforce its more narrow and objective standards,

like the prohibition on using exhibits to sell products or for campaign political advertising. (ROA 1645.) Rather than hinging his decision to remove FFRF's display on an impartial application of the Board's rules, according to Sneed, he removed FFRF's display from the capitol due to his deference to Governor Abbott, who he believed had "a better understanding of what the people of Texas think, what they believe than I do." (ROA 1663.) That the Board's review standards in general, and the "public purpose" requirement in particular, allow for such deference is a strike against them. But what is fatal is Sneed's own admission that the Board's standards are not sufficiently narrow, objective, and definite. In Sneed's own words, some of the rules for approving displays "are fairly broad and subject to interpretation. I have an interpretation. Anyone else can have a different interpretation." (ROA 1640.) "Broad" standards that are open to drastically differing interpretations, thus allowing for unfettered discretion, are precisely what a government may not implement when creating prior restraints on speech.

The District Court, nonetheless, erroneously concluded that the "public purpose" criteria does not delegate unbridled discretion. (ROA 885-886.) The Court concluded that in the context of a limited public forum, the public purpose definition "provides the Board a reasonable framework with which to accept or deny exhibit applications in the limited forum context," such that the State

Preservation Board does not have unfettered discretion. (ROA 886.) The Court's conclusory analysis is contradicted by the lack of any objectively applicable standard, as required by the First Amendment. The fact that public areas of the Texas State Capitol may constitute a limited public forum, moreover, does not avoid the prohibition on unfettered discretion. Governor Abbott's own ostensible "use" of the public purpose standard to censor FFRF's Exhibit provides all the proof that one may need to see the already realized threat to First Amendment free speech rights.

The District Court erred in granting summary judgment dismissing FFRF's unbridled discretion claim. This Court should conclude as a matter of law that the public purpose requirement for exhibit approval violates the First Amendment because the definition of public purpose does not contain narrow, objective, and definite standards to guide the permitting authority.

VII. CONCLUSION

The Plaintiff-Appellee-Cross-Appellant, Freedom From Religion Foundation, Inc., respectfully requests that: (1) this Court affirm the District Court's declaration that the Appellants' violated FFRF's First Amendment free speech rights and engaged in viewpoint discrimination; (2) the Court should also rule on FFRF's cross-appeal that the District Court erred by failing to provide injunctive relief to which FFRF was entitled; and (3) this Court should reverse the District Court's

holding and rule as a matter of law that the public purpose standard for permitting exhibits in the Texas State Capitol violates the First Amendment by authorizing unfettered and arbitrary discretion.

/s/ Richard L. Bolton
Richard L. Bolton
WI State Bar No. 1012552
Boardman & Clark LLP
1 S. Pinckney St., Ste. 410
P.O. Box 927
Madison, WI 53701-0927
(608) 257-9521
Attorneys for Plaintiff-Appellee-Cross-Appellant

CERTIFICATE OF SERVICE

On February 12, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Richard L. Bolton
Richard L. Bolton

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,716 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used to calculate the word count).

/s/ Richard L. Bolton
Richard L. Bolton