No. 18-50610

In the 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 BAORD,
Defendants / Appellants Cross-Appellees.

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

BRIEF FOR APPELLANTS-CROSS-APPELLEES

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General

ANDREW B. DAVIS
Assistant Solicitor General
Andrew.Davis@oag.texas.gov

Counsel for Defendants / Appellants / Cross-Appellees

Certificate of Interested Persons

No. 18-50610

Freedom from Religion Foundation, Inc.,
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.

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 outcome 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/ Andrew Davis
ANDREW B. DAVIS
Counsel of Record for
Defendants / Appellants / Cross-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully submit that this matter is appropriate for oral argument. The district court entered retrospective relief against state officials sued in their official capacities, contrary to settled principles of state sovereign immunity. This holding warrants further scrutiny by this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules

Other Authorities

Introduction

Freedom From Religion Foundation ("FFRF") complains of actions taken in December 2015 by the Office of the Governor and the Executive Director of the State Preservation Board ("defendants"). In response, the district court issued a retrospective judgment declaring that defendants violated FFRF's free-speech rights three years ago. That relief is barred by state sovereign immunity, so this Court should reverse.

Statement of Jurisdiction

To the extent that FFRF has standing and overcame Texas's sovereign immunity, the district court had jurisdiction pursuant to 28 U.S.C. § 1331. On June 19, 2018, the district court entered a final judgment disposing of all parties' claims. ROA.2026–27. On July 13, 2018, defendants filed a timely notice of appeal. ROA.2114. On July 26, 2018, FFRF filed a timely notice of appeal. ROA.2122. This Court has jurisdiction under 28 U.S.C. § 1291.

Issue Presented

Does sovereign immunity prevent a federal court from entering a retrospective declaratory judgment against state officials sued in their official capacities?

Statement of the Case

I. FFRF's Faux Nativity Exhibit Is Initially Approved For Display In The Capitol.

The State Preservation Board is a state agency that preserves and maintains the Texas Capitol and its grounds. Tex. Gov't Code §§ 443.001, .007. The Board consists of five elected officials, including the Governor as its chairman, plus one

representative of the general public. *Id.* §§ 443.003, .004. The Board employs an Executive Director to handle day-to-day operation of the Capitol and its grounds. *Id.* § 443.0051. That day-to-day operation includes curating temporary exhibits displayed within the Capitol building. These displays appear in designated indoor spaces—the Ground Floor Rotunda, the North Central Gallery, and the South Central Gallery, ROA.532—according to rules promulgated by the Board. TEX. GOV'T CODE § 443.007(b); 13 TEX. ADMIN. CODE § 111.13.

For an exhibit to be displayed in the Capitol, it must meet certain criteria. First, it must be sponsored by the Governor, the Lieutenant Governor, the Speaker of the Texas House of Representatives, a Texas Senator, or a member of the Texas House of Representatives. 13 TEX. ADMIN. CODE § 111.13(a)(4), (c)(3)(D). Second, the exhibit must serve a "public purpose," *id.* § 111.13(c)(2), which the Board has defined as the "promotion of the public health, education, safety, morals, general welfare, security, and prosperity of all of the inhabitants or residents within the state," *id.* § 111.13(a)(3). "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." *Id.* Finally, an exhibit will be displayed only if the designated space is available. *Id.* § 111.13(d).

FFRF is a nationwide "atheist/freethought" group. ROA.540. As part of a campaign to promote its mission, FFRF designed what it described as a "most irreverent" cut-out display, ROA.585, depicting three founding fathers and the Statute of Liberty "gathered around the Bill of Rights, which [is] placed in a manger," ROA.513; *see* ROA.560 (mock-up of display). To accompany this faux nativity scene,

FFRF also designed a large banner that reads as follows: "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 & enslaves minds." ROA.561.

Knowing it would need an elected official to sponsor this exhibit for display inside the Capitol, FFRF sent a form letter in late May 2015 asking Texas legislators to help "diversify . . . expression" in the Capitol during the holiday season. ROA.540. The letter did not include a mock-up of the faux nativity exhibit or the language on the banner, but instead described the exhibit as meant only "to celebrate the views of Texans who are part of a religious minority or have no religion at all." ROA.540. Based on FFRF's letter, two state representatives offered to sponsor the exhibit: Representative Elliott Naishtat and Representative Donna Howard. ROA.543, ROA.556. Believing it had sponsors, FFRF on July 7, 2015 submitted its original application to the Board to display the faux nativity exhibit inside the Capitol from December 21 to December 25, 2015. ROA.558–61.

Having told FFRF that they would sponsor an exhibit supporting religious diversity and recognizing nonbelievers, Representatives Naishtat and Howard quickly retreated when they saw FFRF's proposed exhibit. A member of Representative Naishtat's staff advised FFRF that "[she] should have seen your application first, because [she] spoke too soon about Rep. Naishtat being your sponsor." ROA.563 (clarifying that Representative Naishtat "is declining to be a sponsor"). As for Representative Howard, her staff explained to FFRF that while the Representative "believes that the use of [the Capitol] should incorporate a diverse range of viewpoints,"

"she has always stopped short of sponsoring items whose message, she feels, in some way negates the beliefs of others." ROA.567. Unlike Representative Naishtat, however, Representative Howard left the sponsorship door slightly open, telling FFRF that she would be willing to sponsor the exhibit if FFRF altered the banner's text or omitted it altogether. ROA.567.

With no other options, FFRF agreed to revise the proposed banner to make the display "more palatable." ROA.569. It proposed a new banner that stated: "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.579–81. FFRF submitted a revised application with the new proposed banner language and Representative Howard's sponsorship on July 20, 2015. ROA.580. Shortly thereafter, a Board employee told FFRF that its application was approved, such that the faux nativity exhibit could be displayed inside the Capitol from December 18 to December 23, 2015. ROA.578.

II. FFRF's Faux Nativity Exhibit Is Removed From The Capitol.

Despite the banner's revised language, the Office of the Governor recognized that FFRF's faux nativity exhibit was not meant to celebrate diverse views but to denigrate religion. ROA.598. Accordingly, on December 22, 2015—the day before the exhibit's five-day residence in the Capitol was set to expire—the Office of the Governor sent a letter asking the Board's Executive Director to remove the exhibit immediately. ROA.598–600.

The letter justified its request based on the law as it then stood, explaining that Capitol displays are restricted to exhibits that promote a "public purpose." ROA.598 (citing 11 TEX. ADMIN. CODE § 111.13(c)(2)). In the view of the Office of the Governor, the faux nativity exhibit did not serve a public purpose as defined by the Board's rules because it "deliberately mocks Christians and Christianity" and thus "undermines rather than promotes any public purpose a display promoting the bill of rights might otherwise have had." ROA.598–99. As the letter explained, "it is hard to imagine how the general public *ever* could have a direct interest in mocking others' religious beliefs." ROA.600. But for displays that do not have such a mocking tone, the letter took pains to emphasize that the Board "has allowed and should continue to allow diverse viewpoints," including "secular message[s] [that] educate the public about nonreligious viewpoints." ROA.599.

The Executive Director consulted with one other Board member regarding the letter, ROA.361, and then directed that FFRF's faux nativity exhibit be removed from display in the Capitol, ROA.1208–09. FFRF has since submitted one application, in July 2016, to display the same exhibit in the South Central Gallery of the Capitol. ROA.602–03. Although the application was denied because the South Central Gallery was set to be renovated during the holiday season, ROA.606, the Board specifically encouraged "FFRF to submit an application [for other galleries] to celebrate the anniversary of the ratification of the Bill of Rights and the Winter Solstice," ROA.608–09. The Board cautioned FFRF, however, that if it again applied to display an exhibit mocking "sincerely held religious beliefs," the application would be denied for failure to satisfy "the public purpose requirement." ROA.608–09. FFRF

has not submitted another application in the wake of *Matal v. Tam*, 137 S. Ct. 1744 (2017).

III. The District Court Enters A Retrospective Declaratory Judgment.

Unhappy that its faux nativity exhibit was removed from the Capitol in December 2015, FFRF filed this suit against Governor Greg Abbott and Executive Director John Sneed in both their official and individual capacities. ROA.14. FFRF's operative complaint alleges five claims against the defendants: (1) a free-speech claim under the First Amendment; (2) an equal protection claim under the Fourteenth Amendment; (3) a claim under the Establishment Clause of the First Amendment; (4) a claim under the unbridled discretion doctrine; and (5) a due process claim under the Fourteenth Amendment. ROA.121–47 (first amended complaint); *see also* ROA.869 (court order enumerating FFRF's claims).

For relief on FFRF's free-speech, equal protection, Establishment Clause, and due process claims, the complaint requests declarations that "the [2015] actions of each Defendant have violated" FFRF's rights. ROA.140. For relief on FFRF's unbridled discretion claim, the complaint requests a declaration that the regulations governing Capitol display approval decisions are unconstitutional both facially and as-applied. ROA.139 (first amended complaint ¶¶ 132–33); ROA.140; *see also* ROA.884 (court order describing unbridled discretion claim). Unconnected to any specific claim, the complaint also requests an injunction requiring the Board to display FFRF's faux nativity exhibit in the Capitol. ROA.140.

Defendants moved for summary judgment on each of FFRF's claims. ROA.478–500. Relevant to this appeal, the district court addressed FFRF's free-speech claim

and held that the Capitol display areas at issue are a limited public forum where "the government's restrictions on speech need only be reasonable and viewpoint-neutral." ROA.876. It "was reasonable," according to the district court, for defendants "to believe FFRF's display, and its satirical view of the traditional nativity scene," did not serve a public purpose. ROA.879. Moreover, the Board "could have excluded the exhibit on those grounds" upon receiving FFRF's application without engaging in viewpoint discrimination. ROA.881. But the district court found a genuine dispute of fact as to whether the exhibit was actually removed due to its satirical tone (viewpoint-neutral) or due to a desire to "silenc[e] anti-religious speech" (viewpoint discrimination). ROA.883. It therefore denied defendants' motion for summary judgment on FFRF's free-speech claim. ROA.881.

After developing evidence demonstrating that the faux nativity exhibit was removed for disparaging and mocking religion, defendants again moved for summary judgment on FFRF's free-speech claim, and FFRF cross-moved. ROA.1731–49; ROA.1523–43. This time the district court granted summary judgment in FFRF's favor on the free-speech claim. ROA.1986. And it did so for one reason: the Supreme Court's intervening decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017).

According to the district court, *Matal* "held a prohibition on registration of trademarks offensive to any group, institution, or belief constituted viewpoint discrimination as a matter of law," because "'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" ROA.1984 (quoting *Matal*, 137 S. Ct. at 1763). For that reason, the district court held that "it is unnecessary to decide whether Defendants removed the exhibit

for its satiric tone or for its nontheistic point of view, because under [*Matal*], either motive constitutes impermissible viewpoint discrimination." ROA.1984.

The district court dismissed the remainder of FFRF's claims.[1] And it turned its summary-judgment order on FFRF's official-capacity free-speech claim into a final declaratory judgment against defendants in their official capacities. ROA.2026. The declaratory judgment reads in relevant part as follows:

> IT IS ORDERED, ADJUDGED, and DECREED that judgment is granted 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.2026–27 (line break omitted). The district court did not enter an injunction. ROA.2026–27.

Defendants timely appealed, ROA.2114, and FFRF timely cross-appealed, ROA.2122.

[1] All individual-capacity claims against the Executive Director were dismissed on a motion to dismiss. ROA.288. The equal protection, due process, and unbridled discretion claims against defendants in both their individual and official capacities were dismissed on defendants' first motion for summary judgment. ROA.870. The Establishment Clause claim against Governor Abbott in his individual capacity was dismissed on his motion for judgment on the pleadings and his second motion for summary judgment. ROA.1993. The Establishment Clause claim against defendants in their official capacities and the free-speech claim against Governor Abbott in his individual capacity were dismissed on the parties' joint stipulation of voluntary dismissal. ROA.2020, 2025.

Summary of the Argument

The district court has entered a declaratory judgment decreeing that defendants violated FFRF's free-speech rights in December 2015 by removing FFRF's faux nativity exhibit from display in the Capitol. But sovereign immunity prevents private plaintiffs from haling state officials into federal court simply because they want a declaration that those officials acted wrongly in the past. Overcoming sovereign immunity requires *prospective* relief that will prevent an ongoing violation of federal law. Because the judgment below does no more than declare that defendants "violated" the law "under the circumstances of this case," ROA.2027, it is purely retrospective and cannot squeeze through *Ex parte Young*'s narrow exception to sovereign immunity.

Standard of Review

"This court reviews a grant of summary judgment de novo." *McClendon v. United States*, 892 F.3d 775, 780 (5th Cir. 2018). "The question of whether state defendants are entitled to sovereign immunity is likewise reviewed de novo." *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 962 (5th Cir. 2014).

Argument

I. Sovereign Immunity Bars Retrospective Relief Against State Officials In Their Official Capacities.

Sovereign immunity prevents a private party from subjecting a State to suit without its consent. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 712–13 (1999); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267–68 (1997); *Hans v. Louisiana*, 134 U.S. 1, 9–21 (1890). The doctrine protects a State's dignity and its treasury, *e.g.*, *Seminole Tribe*

v. Florida, 517 U.S. 44, 58 (1996)—interests so important to the Founders that the initial failure to recognize state sovereign immunity prompted a constitutional amendment, *see Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999) (describing the Eleventh Amendment's swift passage in response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)). A private party cannot evade the immunity bar simply by suing a State's agencies or its officials: a suit against a state official in his official capacity is deemed equivalent to a suit against the State itself, such that the full immunity protecting the sovereign applies. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–02 (1984); *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 462–64 (1945); *Morris v. Livingston*, 739 F.3d 740, 745–46 (5th Cir. 2014).

The Supreme Court created an exception to this Eleventh Amendment immunity with *Ex parte Young*, 209 U.S. 123 (1908).[2] In *Ex parte Young*, the Court allowed a private party to pursue prospective relief in federal court against a state official to enjoin the enforcement of an unconstitutional state statute. The Court avoided sovereign immunity by treating the suit as if it ran only against the official himself—rather than the State—in a manner that has been characterized as a "fiction," given the traditional view that sovereign immunity extends to an official-capacity suit against a state official. *See, e.g.*, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378 n.14 (2006) (referring to *Ex parte Young* doctrine "as an expedient 'fiction' necessary to

[2] This brief employs the phrase *Eleventh Amendment immunity* as a "convenient shorthand." *Alden*, 527 U.S. at 713. Of course, "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002).

ensure the supremacy of federal law"); *Coeur d'Alene*, 521 U.S. at 270 (referring to "the *Young* exception" as "an obvious fiction"). The Court reasoned that officials cannot invoke the State's immunity when they violate federal law because all unconstitutional statutes are void: without the protection of the (void) state statute, an official is "stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. at 159–60; *see also NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 393–94 (5th Cir. 2015).

The *Ex parte Young* exception is "narrow," *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), and "does not insulate from Eleventh Amendment challenge every suit in which a state official is the named defendant," *Papasan v. Allain*, 478 U.S. 265, 277 (1986). *See also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 928–31 (7th ed. 2015). The Supreme Court constrained the *Ex parte Young* doctrine in *Edelman v. Jordan*, 415 U.S. 651 (1974), recognizing a "distinction between prospective and retroactive relief [that] continues to lie at the center of the Court's Eleventh Amendment jurisprudence," 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 559 (3d ed. 2000). "The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other." *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

These limits on *Ex parte Young* reflect the doctrine's underlying rationale. In restricting relief to prospective remedies, the Supreme Court struck a delicate balance between the need to protect the primacy of federal law (as required by the Supremacy Clause) and the countervailing need to protect sovereign immunity (as required by the underlying constitutional structure). *See Coeur d'Alene*, 521 U.S. at 269; *Pennhurst*, 465 U.S. at 106. These general principles yield a settled standard for evaluating a suit in federal court against a sovereign State and its officials: "In determining whether the doctrine of *Ex parte Young* avoids an 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 Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (alteration in original) (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment)).

II. The District Court's Retrospective Declaratory Judgment Is Barred By Texas's Sovereign Immunity.

The declaratory judgment in this case cannot be squared with this settled precedent because the relief it awards is purely retrospective. *See* ROA.2026–27; *cf. Seals v. McBee*, 907 F.3d 885, 888 n.2 (5th Cir. 2018) (Jones, J., dissenting from denial of rehearing en banc) (discussing "retrospective declaratory relief"); *PeTA v. Rasmussen*, 298 F.3d 1198, 1202 n.2 (10th Cir. 2002) (same). The district court cannot be understood as having entered an injunction that will bind defendants in the future, for "[e]very order granting an injunction . . . must[ ] state its terms specifically[,] and

describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." FED. R. CIV. P. 65(d)(1)(B)–(C). The judgment below omits those specifics and details, and is no injunction. ROA.2026–27.

Instead, the district court merely "DECLARED that Defendants violated FFRF's First Amendment rights . . . when the FFRF's exhibit was removed from the Texas Capitol building under the circumstances of this case." ROA.2027. Using only past tense, *all* this declaratory judgment does is tell FFRF that defendants supposedly misbehaved a few years ago.

In entering this retrospective declaratory judgment, the district court missed that the fiction of *Ex parte Young* applies only to claims for prospective relief. Consider the Supreme Court's decision in *Green v. Mansour*, 474 U.S. 64 (1985). In *Green*, private plaintiffs sued state officials for calculating welfare benefits in violation of federal law. *Id.* at 65. Congress changed the law while the suit was pending, bringing the officials' conduct into compliance and mooting any claim for prospective relief. *Id.* Plaintiffs nevertheless sought "a declaratory judgment that [the officials] violated federal law in the past," among other relief. *Id.* at 67. But the Court held in no uncertain terms that state sovereign immunity prevented federal courts from issuing the backwards-looking declaratory judgment that the plaintiffs sought. *Id.* at 71–73. It explained:

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a

> continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of federal law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.

Id. at 68 (citations omitted).

Green's holding and reasoning control here. Because the district court has not halted any impending free-speech violations and has instead condemned one alleged violation that occurred back in December 2015—long before the Supreme Court's intervening decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017)[3]—its declaration is purely retrospective and barred by Texas's sovereign immunity. This Court should reverse this unjustified erosion of the State's sovereignty.

[3] *Matal* is an intervening case in this area and "provides substantial guidance regarding viewpoint discrimination in the context of speech labeled 'offensive.'" *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 31 (2d Cir. 2018). Prior to *Matal*, the district court held that the Board could exclude an offensive exhibit while remaining viewpoint-neutral. ROA.881. It was only after the Supreme Court handed down *Matal* that the district court reversed course and held that excluding an exhibit based on offensiveness is viewpoint discrimination. ROA.1984.

Conclusion

The judgment of the district court should be reversed.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General

/s/ *Andrew B. Davis*
ANDREW B. DAVIS
Assistant Solicitor General

Counsel for Defendants / Appellants / Cross-Appellees

Certificate of Service

On December 28, 2018, 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/ Andrew B. Davis
Andrew B. Davis

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 3,657 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 Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Andrew B. Davis
Andrew B. Davis