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; and
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

REPLY BRIEF FOR APPELLEE-CROSS-APPELLANT

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I. INTRODUCTION

The Appellants/Cross-Appellees, Governor Greg Abbott and the Executive Director of the Texas State Preservation Board (hereinafter collectively "Governor Abbott"), do not dispute on appeal that they engaged in viewpoint discrimination, while arguing disingenuously that no remedy is appropriate in order to finally end their censorship of the Freedom From Religion Foundation ("FFRF"). Governor Abbott removed FFRF's exhibit from the Texas State Capitol for reasons that the district court found to constitute viewpoint discrimination, then stated in no uncertain terms that he would exclude the same display from the Capitol for the same reasons in the future. Governor Abbott, nonetheless, blithely claims that no evidence exists of ongoing censorship. He argues wrongly that this Court should presumptively excuse him from future accountability. No legal or logical reasoning supports the Governor's plea for constitutional nullification where he expressly censored FFRF's chosen speech and subsequently made no indication, prior to his response on cross-appeal, that he would not do so again.

Governor Abbott further argues without substance that the Texas State Preservation Board "public purpose" standard sufficiently constrains his discretion to avoid constitutional infirmity. Governor Abbott admits that discretion must be limited by objective standards, but he does not even try to articulate an objective explanation of the Preservation Board's "public purpose" standard. In reality,

abstract language such as "public purpose" does not set forth narrow, objective, and definite criteria needed to appropriately bridle the delegation of discretion.

II. SUMMARY OF THE ARGUMENT

Governor Abbott vigorously defended his censorship of FFRF's exhibit in the district court, and stated in no uncertain terms, in writing, that FFRF would not be permitted to place its display in the State Capitol in the future. For the first time on appeal, Governor Abbott now asks this Court to presume that he will no longer censor FFRF's display from the Capitol. His argument amounts to a mootness argument, but he provides no evidence to meet his formidable burden of proving that the State Preservation Board's policy has changed and cannot reasonably be revived. Instead of evidence, he relies only on the Supreme Court's 2017 decision in *Matal v. Tam*, despite his previous arguments in multiple briefs to the district court that the *Matal* decision is distinguishable from this case. Governor Abbott ignored the firmly established constitutional prohibition on viewpoint discrimination prior to *Matal*, and he has given this Court no reason to believe that he will not do so in the future if this court dismisses FFRF's action. For this reason, FFRF is entitled to prospective relief, including requested injunctive relief.

In addition to granting FFRF prospective relief to remedy ongoing censorship, this Court should also hold that the State Preservation Board's "public purpose" requirement is unenforceable for lack of narrow, objective, and definite enforcement

criteria. The record demonstrates that the "public purpose" requirement has been interpreted by the State Preservation Board and Governor Abbott as a proxy for excluding unpopular speech. The current practice leads to both of the harms that the prohibition on unbridled discretion is meant to prevent: self-censorship by speakers in order to avoid being denied a license to speak, and the difficult task of effectively detecting, reviewing, and correcting content-based censorship as applied. The "public purpose" requirement is unconstitutional on its face.

III. ARGUMENT

A. Governor Abbott's Censorship Of FFRF's Bill Of Rights Exhibit Is Ongoing.

Governor Abbott argues unpersuasively that FFRF has failed to prove an ongoing violation of its constitutional rights. The record before the Court, however, undeniably does establish an ongoing violation of rights, which Governor Abbott never disputed in the district court. Governor Abbott argues only for the first time on appeal that FFRF is entitled to neither injunctive nor declaratory relief.

Governor Abbott did not previously question the district court's jurisdiction, even during extensive summary judgment briefing. Only now, on appeal, does he suggest that FFRF has failed to meet its burden of proof as to standing. In fact, however, FFRF's evidence submitted to the district court established proof of a continuing violation of constitutional rights, which evidence was undisputed by Governor Abbott. FFRF fully met its burden to prove subject matter jurisdiction in

the district court. *See New Orleans & Gulf Coast Railway Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008).

The party asserting mootness has the burden of establishing that the court is now deprived of jurisdiction previously established. "[W]hile the initial burden of establishing the trial court's jurisdiction rests on the party invoking that jurisdiction, once that burden has been met courts are entitled to presume, absent further information, that jurisdiction continues." *Cardinal Chemical Co. v. Morton Int. Inc.*, 508 U.S. 83, 98 (1993). "If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result." *Id*. Governor Abbott has failed to meet his burden to prove mootness, which he argues that this Court should merely presume. He does not offer any evidence or argument that the State Preservation Board has formally changed the policy on which it relied in censoring FFRF's display.

The test to determine whether the district court had jurisdiction to hear FFRF's complaint pursuant to *Ex parte Young*, in the first instance required only 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 of Md.*, 535 U.S. 635, 645 (2002) (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)). FFRF met both parts of this

inquiry. *See* FFRF's Br. at 25–27; FFRF's Amended Complaint ROA.140 at ¶135 ("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."); *Id.* at ¶f) (requesting "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").

"*Young* also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. 123, 155–56, 159 (1908)). FFRF never abandoned its demand for such relief in this case, which it supported with evidence. Governor Abbott's new found claim that the record does not support a finding of an ongoing constitutional violation is belied by the evidence. The ongoing violation of FFRF's free speech rights is undisputedly established in the record.

When Governor Abbott removed FFRF's display from the Texas Capitol in 2015, he claimed that he did so because the display violated the State Preservation Board's "public purpose" requirement: "The 'Bill of Rights Nativity' violates this legal standard in three ways": "First, . . . the exhibit deliberately mocks Christians

and Christianity," "Second, the exhibit does not educate. . . . it instead denigrates religious views held by others," and "Third, the general public does not have a 'direct interest' in [FFRF's] purpose. That organization is plainly hostile to religion and desires to mock it." ROA.598–99.

When FFRF applied in 2016 to place the same exhibit in the State Capitol, the State Preservation Board rejected FFRF's new application, stating, "any application to display the same exhibit which was removed last year will be denied for the same reasons previously given." ROA.1727. Since then Governor Abbott has never backed down or announced a change of position, and he has resisted any relief that would allow FFRF's exhibit.

Governor Abbott does not dispute this record, but instead he attempts to sidestep the facts by characterizing the Supreme Court's decision in *Matal v. Tam*, 137 S.Ct. 1744 (2017), as an intervening event from which "this Court should presume that defendants will follow the law as declared by *Matal*." Abbott Resp. Br. at 10. *Matal*, however, cannot bear the heavy burden of demonstrating an irrevocable change in policy by Governor Abbott and the State Preservation Board.

B. Governor Abbott Has Not Met The "Formidable" Burden To Demonstrate That He Has Changed The Exhibit Policy In A Manner That Moots This Case.

Governor Abbott advances the unique argument that this Court should assume he will not exclude any future display from the Capitol when the display offends him, now that the district court ruled against him. He urges the Court to reverse the district court's decision based on this unsupported assumption. Abbott Resp. Br. at 10. Although Governor Abbott frames this argument as an assertion of sovereign immunity, *Id*. at 10 n.2, the argument does not fit within the "straightforward inquiry" to determine whether the *Ex parte Young* doctrine avoids Eleventh Amendment immunity. The record, however, establishes that the violation of FFRF's constitutional rights is ongoing and Governor Abbott does not rebut the presumption of continuing jurisdiction. *See Section A.*, above; FFRF Br. at 25–27.

Instead, Governor Abbott's argument is best understood as an argument that, despite the fact that FFRF has clearly established the ongoing nature of its injuries, the case is now moot, based on the government's supposed voluntary cessation of its illegal conduct. Governor Abbott claims that the Supreme Court's decision in *Matal v. Tam* "significantly altered First Amendment jurisprudence and defendants' legal obligations," and thus "this Court should presume" Governor Abbott and the State Preservation Board have now changed their practice so as to no longer censor displays deemed offensive by the Governor. Abbott Resp. Br. at 8, 10. Both parts of

this argument are wrong. First, *Matal* did not effect a sea change in the principles of viewpoint discrimination applicable to this case. *Matal* applied long-recognized principles to the unique circumstances of trademark registration. Second, Governor Abbott and the State Preservation Board have not changed their conduct in response to *Matal* at all, let alone in an absolutely clear manner sufficient to establish that censorship could not reasonably be expected to recur.

Governor Abbott's argument perversely suggests that the district court lost jurisdiction as soon as the court ruled against him, since he obviously did not change position prior thereto. Governor Abbott essentially argues that he should be presumed to comply with the district court's ruling, which he consistently opposed. A plaintiff, by such reasoning, supposedly loses standing immediately upon prevailing.

Governor Abbott's argument emphasizes the prospective effect of the district court's judgment in this case. Governor Abbott absolutely never acknowledged his wrong doing in removing FFRF's Exhibit from the State Capitol, and he pledged to exclude the display for the same reasons in the future. Even after *Matal*, Governor Abbott insisted in the district court that he could exclude FFRF's Exhibit from the State Capitol, and he refused to agree to let FFRF display even after the court ruled against him. His coy suggestion that this Court now presume he will accept the district court's judgment based on *Matal* supports the conclusion that a declaratory

ruling is the functional equivalent of an injunction as to future conduct.

1. *Matal* Did Not Announce New Viewpoint Discrimination Principles Applicable To This Case.

The *Matal* decision was not a supposed wakeup call to Governor Abbott, even when he filed his appeal, because *Matal* did not announce new principles applicable to this case. In a unanimous 8-0 decision,[1] the *Matal* Court reaffirmed but did not alter the state of the law: "We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" 137 S.Ct. at 1763 (citing twelve prior Supreme Court decisions dating back to 1937). The Court described this as "a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Id.* at 1751, 1763 (citing *Texas v. Johnson*, 491 U.S. 397 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable")).[2] Contrary to Governor Abbott's assertion,

[1] Justice Gorsuch took no part in the consideration or decision of the case. The Court was unanimous as to parts I, II, and III–A of its opinion. The Court was split 4–4 as to parts III–B, III–C, and IV, but the concurring justices agreed with the plurality that the challenged law "reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination." 137 S.Ct. at 1766 (Kennedy, J., concurring).

[2] FFRF does not accept Governor Abbott's characterization of FFRF's Bill of Rights Nativity as designed to belittle or offend. *E.g.*, ROA.252 ("FFRF does not agree that its display mocked religion..."); ROA.331 (asserting the same). This Court need not determine whether FFRF's display was offensive in order to decide the limited issues raised on appeal, but the record indicates, nonetheless, that the *only* person offended by FFRF's display was Greg Abbott himself. ROA.1239, lns.15-21.

the law was already firmly established prior to *Matal* that "listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*, 505 U. S. 123, 134 (1992). This has been a well-settled First Amendment principle for decades, within the context of a limited public forum. *See Matal*, 137 U.S. at 1763 (holding that even in the limited public forum context "what we have termed 'viewpoint discrimination' is forbidden") (citing *Rosenberger v. Rector*, 515 U.S. 819, 831 (1995)).

The law was well-established prior to Governor Abbott's censorship of FFRF's display, and prior to *Matal,* that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Carey v. Brown*, 447 U.S. 455, 463 (1980) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). This is not an obscure point of law. Governor Abbott cannot convincingly claim that it was *Matal,* a case that he described to the district court as "distinguishable in numerous respects, including the fact that it arose in the context of trademark registration . . . and wholly outside the context of forum analysis," that established his obligation not to discriminate based on speaker viewpoint. ROA.1964.

The law also clearly established, prior to *Matal*, that the censorship of offensive speech is unconstitutional even when that censorship is achieved through

the filter of a "public purpose" requirement. The government may not censor speech because it finds it is not "clean and healthful and culturally uplifting in content." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563 (1975). Similarly, the government may not justify an otherwise unconstitutional regulation by claiming "that it was adopted for the salutary purpose of protecting children." *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) (invalidating for vagueness a Texas ordinance that classified films as either "suitable for young persons" or "not suitable for young persons"). In short, from the very beginning Governor Abbott has been on notice that he cannot censor speech he considers offensive based on a finding that it lacked a "public purpose."

The law review article cited by Governor Abbott to support his contention that *Matal* changed the state of the law actually contradicts that conclusion thoroughly. *See* Wyatt Kozinski, *Our Proudest Boast*, 53 TULSA L. REV. 523, 523 (2018). The very purpose of Kozinski's article is to describe the evolution of "a major tenet of our free speech jurisprudence – the need to protect the speech we hate" from its origins in Justice Oliver Wendell Holmes's dissenting opinion in *United States v. Schwimmer*, 279 U.S. 644 (1929), through the adoption of that position by the Court in *Girouard v. United States*, 328 U.S. 61 (1946), to ultimately being described in *Matal* as "the proudest boast of our free speech jurisprudence." 137 S.Ct. at 1764. The author's premise is that *Matal* "reaffirmed a core principle of First Amendment

law," not that it established a new one. Kozinski at 523.

It is also not surprising that the district court in this case, and the Second Circuit in *Wandering Dago, Inc. v. Destito,* 879 F.3d 220 (2d Cir. 2018), would emphasize the relevance of *Matal* in writing decisions immediately following its publication. Such citations merely demonstrate that *Matal* was current, not that it was groundbreaking. *Matal,* moreover, was not the only precedent on which those courts relied. In fact, the district court in this case expressly held that *prior to* Matal[3] it was "'beyond debate' the law prohibits viewpoint discrimination in a limited public forum" and that "[t]he public purpose requirement does not obscure the clearly established nature of FFRF's right." Dist. Ct.'s Order at ROA.1991 (citing *Heaney v. Roberts*, 846 F.3d 795, 801 (5th Cir. 2017); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *Rosenberger*, 515 U.S. at 829–31); *see also Id.* at ROA.1982–86 (additionally citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009); *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 758 (5th Cir. 2010) in holding Governor Abbott was obligated to remain viewpoint neutral and *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2230 (2015); *Cornelius v. NAACP*, 473 U.S. 788,

[3] At the time the court was evaluating FFRF's claims against Governor Greg Abbott in his personal capacity. Governor Abbott asserted qualified immunity and because "in determining whether Governor Abbott is entitled to qualified immunity, the Court is restricted to considering law clearly established *at the time of the alleged wrong*," the court therefore "assess[ed] Governor Abbott's conduct in light of First Amendment precedent as it existed in December 2015 and without taking *Matal* into account." Dist. Ct.'s Order at ROA.1988. The court found that the law *was* clearly established prior to *Matal* and thus rejected Governor Abbott's defense.

811 (1985) in holding Governor Abbott engaged in viewpoint discrimination as a matter of law).

The principle that censorship of allegedly offensive speech constitutes viewpoint discrimination did not begin with *Matal*. This Court addressed in great detail the same issue in *Texas Division, Sons Of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (5th Cir. 2014), a decision reversed on other grounds in *Walker v. Texas Division, Sons Of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015). In that case, this Court described the state of the law as applied to supposed offensive speech:

> We understand that some members of the public find the Confederate flag offensive. But that fact does not justify the Board's decision; this is exactly what the First Amendment was designed to protect against. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) ("Government action that stifles speech on account of its message . . . poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."). As the Supreme Court has already recognized, "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *See United States v. Eichman*, 496 U.S. 310, 318, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990). "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

The discussion of viewpoint discrimination principles in *Matal* was not a

departure from precedent, nor an innovation, contrary to Governor Abbott's argument in this case. The Federal Circuit previously reached exactly the same conclusion, which the Supreme Court upheld in *Matal*. *See In re Tam*, 808 F.3d 1321 (Fed. Cir. 2016). FFRF cited the Federal Circuit's decision in the district court, well prior to the Supreme Court's affirmation in *Matal*. *See* ROA.627–28.

Governor Abbott's reliance on *Matal* as a basis for denying FFRF any remedy in this case, including injunctive relief, ultimately is unavailing and disingenuous. *Matal* was a timely reminder of the government's constitutional obligations, but it did not alter the law applicable to this case.

2. Governor Abbott Has Not Met His Burden To Prove Mootness.

Governor Abbott has not met his burden to demonstrate that he is now voluntarily abiding by the law in a manner that cannot reasonably be reversed. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). After all, absent an injunction "[t]he defendant is free to return to his old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). "The test for mootness in cases such as this is a stringent one": a case will become moot only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S.

199, 203 (1968). "And the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam) (quotation and alterations omitted; emphasis in original). This burden is no less than "formidable." *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189–90 (2000) (quoting *Concentrated Phosphate*, 393 U.S. at 203).

Actual demonstrated cessation of prohibited conduct by government officials is insufficient to moot a pending matter when the changed behavior is merely voluntary. Unsubstantiated litigation posturing is even less persuasive. Typically, a formal change to official governmental policy that cannot reasonably be reversed is needed. The heavy burden in establishing mootness becomes even more formidable once a case is on appeal. As the Supreme Court recognized in *Adarand*, "it is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this [Supreme] Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." 528 U.S. at 224.

Here, FFRF remains in need of the protection that it has sought from day one. FFRF's interest in securing an end to Governor Abbott's discriminatory practices is no different today than when it commenced this suit. As a result, FFRF "should not

be expected to make a renewed showing of personal interest" in order to obtain relief warranted by the district court's finding of viewpoint discrimination. *See Taspy v. Estes*, 643 F.2d 1103, 1105 (5th Cir. 1981). Governor Abbott's claim that FFRF had the burden to again affirmatively prove that the he would not comply with the law after the district court ruled against him is not a correct apprehension of the law.

The Supreme Court's recent decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), illustrates the formidable nature of Governor Abbott's burden. Trinity Lutheran sued the Missouri Department of Natural Resources after being denied access to its program that would have funded the resurfacing of the church's playground. But even though the Governor of Missouri, while the case was on appeal, "announced that he had directed the Department to begin allowing religious organizations to compete for and receive Department grants on the same terms as secular organizations," "[t]hat announcement [did] not moot this case" because "[t]he Department has not carried the 'heavy burden' of making 'absolutely clear' that it could not revert to its policy of excluding religious organizations." *Id.* at 2019 n.1 (citing *Friends of the Earth*, 528 U.S. at 189).

In this case, there has been no formal announcement of changed policy, as found insufficient in *Trinity Lutheran*. Far from it. After censoring FFRF's display in 2015, the State Preservation Board wrote in 2016 that it absolutely would continue to censor FFRF's display in the future. ROA.608–09. The record otherwise is devoid

of any public announcement or substantive change in policy to contradict the Board's announced position. Instead, Governor Abbott, who has defended his censorship of FFRF throughout this litigation, now asks this Court to simply "presume that defendants will follow the law as declared by *Matal*." Abbott Resp. Br. at 10. That is not a recognized standard for mooting a case, and Governor Abbott's own arguments demonstrate that he is not convinced *Matal* is controlling.

Prior to his most recent filing, Governor Abbott has consistently argued against the applicability of *Matal*. Over one month after the *Matal* decision was published, on July 27, 2017, Governor Abbott filed Defendants' Second Motion for Summary Judgement, in which he argued "the only open question is whether FFRF has a First Amendment right to put up a display in the Texas State Capitol that mocks, belittles, and disparages simply for the sake of being offensive. No court in the country has ever has [*sic*] recognized such a right." ROA.1732. Later, on August 10, 2017, Governor Abbott filed his Response to Plaintiffs' Second Motion for Summary Judgment, in which he, for the first time, addressed *Matal* directly. He argued that to "the extent that FFRF suggests that government restrictions on disparaging speech are—as a matter of law—viewpoint discrimination, [*Matal*] did not paint with so broad a brush" and "*Matal* in no way suggested that the standard it applied to the Lanham Act's disparagement ban was the same as the standard that applies to restrictions on limited public fora." ROA.1882. Later, on August 18, 2017, Governor

Abbott argued that "*Matal* is distinguishable in numerous respects, including the fact that it arose in the context of trademark registration . . . and wholly outside the context of forum analysis." ROA.1964.

Finally, in August 2018, over one year after the *Matal* decision, counsel for Governor Abbott continued to represent to the district court that they did not accept liability for censoring FFRF's display and could not agree to any remedy that allowed FFRF to display its exhibit in the future. Counsel stated, "we intend to appeal the finding of liability, we can't represent on the record that in any way [ ] the judgment is agreed." ROA.2191:20–22. Governor Abbott's arguments are not those of a defendant who has made it "absolutely clear" that his "wrongful behavior could not be reasonably expected to recur." Governor Abbott's argument that there is no evidence of ongoing violation of FFRF's rights is gamesmanship wrapped in misdirection: He does not meet his own burden to prove mootness.

C. The State Preservation Board's "Public Purpose" Standard Impermissibly Allows For The Exercise Of Unbridled Discretion.

It is a fundamental First Amendment principle that prior restraints on speech bear a heavy presumption against constitutional validity. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990). Thus, a regulation that "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional

censorship or prior restraint." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). To avoid giving officials an unconstitutional amount of discretion, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a permit, must set forth "narrow, objective, and definite standards to guide the licensing authority." *Id.* at 150–51.

The State Preservation Board's "public purpose" standard for approving or denying display applications lacks the requisite objective and definite guidelines necessary to prevent viewpoint discrimination. Standards that include only abstract language, such as requirements that exhibits may not "have a harmful effect upon the health or welfare of the general public" or "be detrimental to the welfare of the general public or to the aesthetic quality of the community" confer unconstitutional discretion. *Epona v. County of Ventura*, 876 F.3d 1214, 1223 (9th Cir. 2017); *see also Shuttlesworth*, 394 U.S. at 151 ("There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power . . . . For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.'") *Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001) (striking down Missouri regulation as providing unfettered discretion when state had authority to restrict personalized license plates bearing messages "contrary to public policy").

This Court has steadfastly recognized the prohibition on prior restraints that lack specific and objective limiting standards, and which otherwise give the state unbridled discretion permitting viewpoint discrimination. In *Texas Division, Sons of Confederate Veterans*, the Court concluded that abstract standards such as offensiveness impermissibly give the state unbridled discretion that permits viewpoint discrimination. 759 F.3d at 398–99 (overruled by the Supreme Court on other grounds). This Court's decision, moreover, was consistent and in lockstep with many other courts holding that standards which lack objective criteria present a "very real and substantial" danger that a defendant will exclude speech solely because of its viewpoint. *See United Food & Commercial Workers Union, Local 1099 v. Southeast Ohio Regional Transit Authority*, 163 F.3d 341, 361–62 (6th Cir. 1998) (holding policy prohibiting "controversial" advertisements presented danger of viewpoint discrimination); *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 248–49 (3rd Cir. 2010) (offensiveness standard impermissibly could be applied to cover any speech that offends someone); *Aubrey v. City of Cincinnati*, 815 F.Supp. 1100, 1104 (S.D. Oh. 1993) (banner policy allowing only banners in "good taste" left too much discretion in decisionmaker without any standards); and *Montenegro v. New Hampshire Division of Motor Vehicles*, 93 A.3d 290, 298 (N.H. 2014) ("offensive to good taste" standard is not susceptible of objective definition, thereby giving officials unbridled discretion to deny a vanity plate because it offends

particular officials' subjective idea of what is "good taste").

The State Preservation Board's "public purpose" standard is precisely the type of unconstrained and indefinite standard that is constitutionally prohibited. Governor Abbott argues that this standard is sufficiently definite and objective so as to be "workable and manageable," but he provides no explanation as to how such a standard is narrow, objective, and definite. Merely saying it is so does not constitute a meaningful rebuttal argument.

In this case, the evidence confirms the subjective nature of the "public purpose" requirement. The definition of a "public purpose" includes that "the public generally must have a direct interest in the purpose and the community at large is to be benefitted." 13 TEX. ADMIN. CODE § 111.13(a)(3). The record demonstrates that the requirement that "the public" have a direct interest in an applicant's speech and that "the community at large" will benefit has been interpreted by the Board and Governor Abbott as a proxy for excluding unpopular opinions. This interpretation of the requirement leads to both of the "two major First Amendment risks associated with unbridled licensing schemes" that necessitate courts "entertain[ing] an immediate facial attack on the law": "self-censorship by speakers" in order to "avoid being denied a license to speak" and "the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied.'" *City of Lakewood v. Plain Dealer Pub Co.*, 486 U.S. 750, 759 (1988).

Governor Abbott demonstrated how he applies the "public purpose" requirement *in general* when he wrote his letter requesting the removal of FFRF's display. He wrote specifically, "it is hard to imagine how the general public *ever* could have a direct interest in mocking others' religious beliefs." ROA.600 (emphasis in original). In other words, in the Governor's view, a display that mocks a religious belief will *always* fail the "public purpose" requirement, not just when the standard is applied to FFRF's display.

Equally concerning is the evidence that Governor Abbott and the State Preservation Board have interpreted the "public purpose" requirement as a catch-all for censoring any speech that they believe would not meet with the approval of the majority of Texans. John Sneed, Director of the State Preservation Board at the time, testified that he removed FFRF's display from the capitol due to his deference to Governor Abbott, who he believed has "a better understanding of what the people of Texas think, what they believe than I do." ROA.1663:15–17. Sneed deferred to Governor Abbott's personal assessment despite the Board having initially approved the display and despite the Board having received zero complaints from the public about FFRF's display. ROA.1239:15–21. Similarly, when asked about another aspect of the "public purpose" requirement, the requirement that displays promote "education," Sneed indicated that this too was a subjective test that takes into consideration how each display "affects people in different ways . . . one person gets

one thing out of an exhibit and, you know, the person standing next to him gets something else out of it." ROA1664:19–ROA.1665:1.

Sneed also testified that the State Preservation Board's approval process involves an evaluation of whether a display involves "sensitive" speech. ROA.1670:10–19. Indeed, Sneed attributed his "success at the preservation board," and his "long tenure," to his development of "a keen sense of what is a sensitive issue." ROA.1670:21–ROA.1671:9.

Robert Davis, the Board's Events and Exhibits Coordinator, who is primarily responsible for coordinating with display applicants, further testified that many applicants have self-censored before formally applying, based on conversations with him about display requirements. *See* ROA.1272:2–12 ("[U]sually . . . the person who is inquiring will receive information from me about [ ] our rules up front . . . [and] the potential applicant will decide at that point if they want to pursue it further. So a lot of times by the time they actually get to completing an application and [ ] obtaining sponsorship, [ ] the writing is on the wall.").

The State Preservation Board's public purpose" requirement serves as a tool for discouraging speakers with unpopular viewpoints from applying, and discouraging any applicant from including "sensitive" speech in their applications. While speech on non-sensitive issues is routinely approved, when a "sensitive" topic is involved, approval hinges on the Board's reaction, and in FFRF's case the

Governor's individual reaction. This scheme encourages the exact type of "self-censorship by speakers" that the unbridled discretion doctrine is designed to avoid. *City of Lakewood*, 486 U.S. at 759.

Only by redressing the "public purpose" infirmity can this Court alleviate the risk that potential applicants, including FFRF, will not self-censor their speech to avoid rejection. Similarly, because the "public purpose" requirement is subjective and indefinite, courts will continue to run up against "the difficulty of effectively detecting, reviewing, and correcting" viewpoint discrimination as applied. *Id.* The "public purpose" standard is unconstitutional and the Governor's intent to continue denying FFRF's exhibit by this empty standard is palpable.

D. FFRF Is Entitled To Prospective Relief By Declaration, As Well As By Injunction.

Governor Abbott argues without merit that the district court "correctly declined to enter an injunction or *any* prospective relief." Abbott Resp. Br. at 8 (emphasis added). On the contrary, FFRF is entitled to prospective relief through the district court's declaration and by injunctive relief.

The fact that Governor Abbott violated FFRF's free speech rights by censoring FFRF's display in 2015 is not in dispute. The record also undisputedly establishes that the censorship of FFRF's display is ongoing. The State Preservation Board expressly has said so. *See* ROA.608–09 ("any application to display the same exhibit which was removed last year will be denied for failure to satisfy the public purpose

requirement"). Nothing more is needed to demonstrate FFRF's need for prospective relief.

By contrast, the record is devoid of any evidence of an action or announcement by Governor Abbott indicating a change in policy, let alone evidence sufficient to meet the "formidable burden" of demonstrating that the change is permanent. FFRF is entitled to a remedy. The only way to cure the ongoing violation of FFRF's constitutional rights is through the granting of prospective relief, and in particular by injunctive relief supplementing the district court's declaratory judgment. To the extent that the district court's declaratory judgment is supposedly not prospective enough for Governor Abbott, this Court should also order such clarification.

FFRF is also entitled to injunctive relief. Governor Abbott does not otherwise dispute, beyond alleged mootness, that FFRF is entitled to a remedy that would end Governor Abbott's censorship of FFRF's Bill of Rights Exhibit. In this case, the district court should have granted injunctive relief based on Governor Abbott's stubborn and intransigent hostility to FFRF's exhibit. This is exactly what the Second Circuit deemed appropriate in a similar case involving allegedly offensive speech. In *Wandering Dago*, the Court concluded that the district court erred by entering summary judgment in defendants' favor despite the denial of an application based on allegedly offensive slurs: "We [Second Circuit] reverse that portion of the District Court's judgment and remand the case with instructions for the District Court to enter

an order declaring that defendants' conduct as to both the 2013 and 2014 applications violated WD's First Amendment rights, and enjoining defendants from denying WD's future applications because of WD's use of ethnic slurs in its branding." 879 F.3d at 39–40 (emphasis added).

Similarly, in the present case, the district court should have granted the injunctive relief requested by FFRF, in addition to the court's declaratory judgment. In considering future applications by FFRF, moreover, the district court also should have enjoined Governor Abbott from applying a standard that allows for unbridled discretion in considering whether FFRF's display satisfies the "public purpose" requirement.

IV. CONCLUSION

In order to remedy the ongoing violation of FFRF's free speech rights, FFRF is entitled to injunctive relief, which the district court erroneously did not order, in addition to declaratory relief. Injunctive relief to vindicate First Amendment rights is always in the public's best interest as a most appropriate remedy to prohibit future censorship.

The "public purpose" standard, moreover, also violates the Constitution, by granting government officials unbridled discretion to exclude disfavored speech. The State Preservation Board's "pubic purpose" standard is the enabling cousin of viewpoint discrimination. The district court erred by not invalidating this abstract

and subjective standard.

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CERTIFICATE OF SERVICE

On April 15, 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.

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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 6,473 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).

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