No. 21-50469

In the United States Court of Appeals for the Fifth Circuit

FREEDOM FROM RELIGION FOUNDATION, INC.,
Plaintiff-Appellee,

v.

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS, CHAIRMAN OF THE STATE PRESERVATION BOARD; ROD WELSH, EXECUTIVE DIRECTOR OF TEXAS STATE PRESERVATION BOARD,
Defendants-Appellants.

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

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Introduction

The Texas State Preservation Board's ("Board") July 2020 amendments to the Capitol Exhibit Rule close the Texas Capitol grounds to private speech by expressly adopting any exhibit approved for display as government speech. Because the First Amendment does not apply to government speech, this regulatory change renders moot, and barred by sovereign immunity, Freedom From Religion Foundation's ("FFRF") prospective Free Speech Clause challenge concerning FFRF's faux nativity scene—an exhibit that was removed from the Capitol grounds in December 2015 because it denigrated the religious views of Texans and which FFRF freely admits (at 11-12) was devised in order to provoke litigation.

FFRF characterizes this argument as "dangerous" and a license for viewpoint discrimination, but it is in fact a routine application of the three-factor government-speech test most recently articulated by the Supreme Court in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). Under the amended Rule, the Board exercises significant editorial control, from start to finish, over the messages conveyed through the exhibits. Any reasonable observer would understand that those exhibits convey a message on behalf of the government given their location on the Capitol grounds and the required signage indicating the government's approval. And the exhibits fit well within the established governmental tradition of using monuments and other public art to communicate.

FFRF tries to undercut this analysis in several ways, but none has merit. It attempts to cast doubt on whether the Board truly controls the content of the exhibits by pointing to the fact that exhibitors may initially propose the exhibit's design. But

this argument is foreclosed by *Walker* and ignores the Board's significant level of control over the content, location, and length of residence of the exhibit's display once submitted. FFRF questions whether a reasonable observer would attribute the exhibits to the government because exhibitors can submit an exhibit that identifies the exhibitor and its own purposes. Yet this contention presumes that the Board would exercise its discretion to accept such an exhibit without alterations and, in any case, fails to account for the exhibit's location on the Texas Capitol grounds and the effect of the required signage indicating the government's approval. And FFRF claims that, for purposes of the historical inquiry, temporary exhibits are materially distinct from permanent ones. But FFRF never explains why temporary exhibits like the ones at issue here fall outside of the historical practice of governments using public art to deliver messages.

FFRF also tries to escape the government-speech doctrine altogether, by asserting that the amendments to the Capitol Exhibit Rule merely perpetuate a public forum for private speech and by claiming that Appellants were required to put forth evidence to show that the Board would not repeal the amendments to the Capitol Exhibit Rule. Neither assertion is correct. The cases cited for the proposition that the amendments to the Capitol Exhibit Rule merely facilitate private speech all involved situations, unlike here, where the government did *not* purport to be speaking, and each case made clear that the analysis would have been different had the government been the speaker. And the argument that the government was required to supply evidence to show that it would not reinstitute the earlier version of the Capitol Exhibit Rule inverts the traditional rule governing voluntary cessation of government

conduct and relies exclusively on a *sui generis* case, *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020), that is expressly limited to the public university context.

Because the forum to which FFRF seeks access has been closed by the amendments to the Capitol Exhibit Rule, the district court should have dismissed the case as either moot or barred by sovereign immunity given the lack of an ongoing violation of federal law. These two legal infirmities should have also prevented the district court from entering prospective injunctive relief. Because it did not, the injunction should be vacated, and the district court's judgment should be reversed.

Argument

I. FFRF's Free Speech Claim Has Been Mooted by the Amendments to the Capitol Exhibit Rule.

The 2020 amendments to the Capitol Exhibit Rule expressly alter the constitutional status of the Capitol grounds, closing that forum by adopting any exhibit approved for display on those grounds as government speech. Blue Br. 17-23. This is a regulatory "change[] that discontinue[s] a challenged practice," thereby rendering FFRF's lawsuit moot. *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546, 564 (5th Cir. 2006) (quoting *Valero v. Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000)), *abrogated on other grounds by Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696, 703 n.3 (5th Cir. 2020); *cf. N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam); Blue Br. 17-23. "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Yarls v.*

Bunton, 905 F.3d 905, 909 (5th Cir. 2018) (citation omitted). And "[b]ecause there remains no live controversy . . . the injunction [FFRF] seek[s] would be meaningless." *Fontenot v. McCraw*, 777 F.3d 741, 747 (5th Cir. 2015).

The gravamen of FFRF's claim is that Appellants engaged in unconstitutional viewpoint discrimination in December 2015 when they removed FFRF's faux nativity scene from the Capitol grounds. *E.g.,* Red Br. 8, 13-14. But "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says"; rather, "it is the democratic electoral process that first and foremost provides a check on government speech." *Walker*, 576 U.S. at 207. So, because government speech is not subject to the First Amendment, FFRF's claim for prospective relief is moot.

FFRF resists this conclusion in three primary ways. First, it argues that the Board's adoption of any approved exhibits as the State's speech was insufficient under the *Walker* factors to render the exhibits government speech. Second, it claims that the amendments to the Capitol Exhibit Rule merely perpetuate a forum for private speech, rather than close the forum to all but government speech. And third, it contends that the Court should eschew the traditional presumption crediting the government's voluntary cessation of allegedly unconstitutional conduct. None of these arguments has merit.

A. Exhibits adopted by the Board for display on the Capitol grounds constitute government speech.

In *Walker*, the Supreme Court articulated three nonexclusive factors—first developed in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009)—for courts

to consider when assessing whether a particular form of speech constitutes government speech: (1) the level of control exercised by the government over the speech; (2) whether an observer viewing the speech would attribute it to the government; and (3) the "history" of the government's use of the medium for speech. 576 U.S. at 209-10. As Appellants have explained, each one favors a finding that exhibits approved for display on the Capitol grounds constitute government speech. Under the Capitol Exhibit Rule, the exhibitor may propose the topic, but the Board retains ultimate control over the content, manner, and location of the display, along with its length of its residence in the Capitol. Blue Br. 27. The exhibit's location on the Capitol grounds, coupled with required signage indicating the approval of the Board, clues a reasonable observer in to the fact that it is the government—not a private actor—speaking. Blue Br. 27-32. And the analogous tradition of governments using monuments to speak to the public demonstrates that "history," too, supports the conclusion that exhibits approved for display by the Board constitute government speech. Blue Br. 32-34. Each of FFRF's three arguments to the contrary is unavailing.

First, although FFRF appears to concede (at 29) the accuracy of the district court's finding that the Board "retain[s] final approval authority over the exhibits in the Capitol exhibit area," ROA.2401, it attempts to resist the import of this conclusion by arguing (at 35-37) that the Board's "adoption," "approval," or "sponsorship" of displayed exhibits is ineffective to render such exhibits government speech. According to FFRF (at 35), that is because the Board supposedly does not control the speech from "beginning to end"—and therefore does not "direct[ly] control"

the message—since exhibitors may initially propose exhibit designs. But the fact that exhibitors may initially propose an exhibit hardly means that the government only indirectly controls the message. If that were true, *Walker*—which involved vanity license plates first designed by nonprofit entities and then submitted to the State for approval—would have come out the other way. 576 U.S at 205, 217. Instead, in *Walker* the Court held that "[t]he fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider." *Id.* at 217; *see also Mech v. Sch. Bd. of Palm Beach Cnty.*, 806 F.3d 1070, 1078-79 (11th Cir. 2015) (holding that a school district controlled the messages communicated by banners displayed on school property even though the banners were designed by, and advertisements for, private businesses).

FFRF's myopic focus on the fact that an exhibitor may initially propose an exhibit obscures the significant level of control the Board exercises over the content of exhibits once they are submitted. "The Board must approve every [exhibit] design proposal before the design can appear" in the Texas Capitol. *Walker*, 576 U.S. at 213; 13 Tex. Admin. Code § 111.13(d)(1). It "reserves the right to require the exhibitor to make any changes with the exhibit." 13 Tex. Admin. Code § 111.13(d)(5). And it retains ultimate control over the manner, location, and length of residence of the exhibit's display. *Id.* §§ 111.13(d)(6), (d)(7), (e). Thus, as in *Walker*, the State "direct[ly] control[s]" the message. 576 U.S. at 213.

For that reason, exhibits adopted and approved for display on the Capitol grounds are unlike "protests and rallies on government property" where the

government "maintains no editorial control of individual speakers." *Higher Soc'y of Ind. v. Tippecanoe Cnty.*, 858 F.3d 1113, 1118 (7th Cir. 2017); *cf. Miller v. City of Cincinnati*, 622 F.3d 524, 537 (6th Cir. 2010) ("sponsoring city officials need not be involved directly in the activities that take place in city hall" and exercise no "editorial control" over press conferences and rallies taking place therein); *contra* Red Br. 35. And they are not akin to a permitting process for rallies in public spaces, like the one in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), where the government did not even purport to be speaking in the first place. *Contra* Red Br. 34-35. Rather, the exhibits are speech by the government over which the Board exercises significant editorial control.

Second, FFRF argues (at 29, 35) that a reasonable observer would not consider exhibits approved for display on the Capitol grounds to be government speech because (a) an observer "cannot be expected to 'reference the Texas Administrative Code' when viewing exhibits in the Capitol," and (b) exhibitors can include explanatory language on the signage describing the purpose of the exhibit and identifying its creator.

But as Appellants have explained, it is not just the "Texas Administrative Code" that informs an observer that approved exhibits are government speech, but also "the mandated language appearing on an exhibit 'identifying the State Official Sponsor and indicating the approval of the office of the State Preservation Board.'"

Blue Br. 29-30 (quoting 13 Tex. Admin. Code § 111.13(b)).[1] That an exhibitor might initially propose an exhibit identifying the creator or its purposes does not mean that Board would approve such a display, since the Board "reserves the right to require the exhibitor to make any changes to the exhibit." 13 Tex. Admin. Code § 111.13(d)(5). And even if the Board did approve such an exhibit, that does not mean that the public would disassociate the message from the government: "privately-financed and donated monuments that the government accepts and displays to the public on government land" are "routinely—and reasonably—interpret[ed]" by an observer "as conveying some message *on the property owner's behalf.*" *Summum*, 555 U.S. at 470-71 (emphasis added).

What FFRF fails to grapple with is that there are few places in Texas more "closely identified in the public mind with the government" than the State Capitol itself. *Id.* at 472. The Capitol "play[s] an important role in defining the identity that [the State] projects to its own residents and to the outside world." *Id.* So, much like the monuments at issue in *Summum* and even more so than the vanity license plates in *Walker*, the exhibits "that are accepted . . . are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* Several of this Court's sister circuits have held that a reasonable observer would

[1] FFRF notes (at 29) that it "list[ed] its legislative sponsor on its exhibit in 2015" and argues that the fact that this requirement is "now codified" does not change the analysis under *Walker*. But under the amendments to the Capitol Exhibit Rule, the exhibit must not only identify the exhibitor's single legislative sponsor, but *also* the approval of the Board—the State agency tasked by the Legislature with preserving and maintaining the Capitol and its grounds. Tex. Gov't Code §§ 443.001, .007.

associate speech with the government when it occurs in other government-run spaces, such as highway rest stops, public schools, public highways, state parks, and even online websites. *See, e.g.*, *Vista-Graphics, Inc. v. Va. Dep't of Transp.*, 682 F. App'x 231, 236 (4th Cir. 2017) (per curiam); *Mech*, 806 F.3d at 1076; *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1115-16 & n.8 (10th Cir. 2010); *Ill. Dunesland Pres. Soc'y v. Ill. Dep't of Nat. Res.*, 584 F.3d 719, 724-25 (7th Cir. 2009); *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 330-31 (1st Cir. 2009). This Court should do the same here *a fortiori* given the uniquely governmental nature of the Capitol grounds. *See Van Orden v. Perry*, 545 U.S. 677, 681 (2005) ("The 22 acres surrounding the Texas State Capitol contain 17 monuments and 21 historical markers commemorating the 'people, ideals, and events that compose Texan identity.'").

Third, FFRF contends (at 34-35) that the long tradition of governments using monuments to speak to the public, *Summum*, 555 U.S. at 470, is inapposite because that tradition only concerns permanent monuments, not the temporary exhibits at issue here. In support of this proposition, FFRF invokes (at 34) the Supreme Court's observation in *Summum* that *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995) was distinguishable—and did not require the Court to engage in a traditional forum analysis—because "some public parks can . . . be made generally available for temporary private displays, [but] the same is rarely true for permanent monuments." 555 U.S. at 480. Nothing about the Court's observation regarding the applicability of forum analysis in a government-speech case undermines Appellants' argument that the government's practice of using monuments and other art to convey messages to the public is an applicable historical tradition here. Monuments fit

comfortably within the Capitol Exhibit Rule's broad definition of "exhibit." 13 Tex. Admin. Code § 111.13(a)(1). And exhibits approved by the Board here, no less than the monuments at issue in *Summum* and the vanity license plates at issue in *Walker*, achieve the core purpose of "convey[ing] some thought or instill[ing] some feeling in those who see [them]." *Summum*, 555 U.S. at 470.

FFRF responds (at 33) that the Board has not "historically used the medium of speech in exhibition areas of the State Capitol building to convey a message on the government's behalf." But as an initial matter, "a long historical pedigree is not a *prerequisite* for government speech." *Mech*, 806 F.3d at 1076 (emphasis original). "[A] particular medium may be government speech based solely on present-day circumstances." *Id.* (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005)). In any event, as Appellants have previously explained, Blue Br. 33-34, FFRF's argument sets the historical inquiry at the wrong level of generality. In *Summum*, the Court considered whether governments have traditionally used monuments to convey messages to the public—not whether certain types of permanent monuments had been used. 555 U.S. at 470-72. And in *Walker*, the Court examined the nationwide tradition of utilizing license plates to communicate to the public—not whether particular types of vanity license plates had been used in Texas. 576 U.S. at 210-11. So, the question here is not whether certain types of exhibits have traditionally been used by the government, but whether governments have historically used public art—like monuments—to communicate to the public. Because the exhibits here are analogous to those permanent monuments, the third *Walker* factor points toward a finding of government speech.

To the extent that FFRF's invocation of *Summum*'s passage distinguishing *Pinette* is a plea for this Court to discard the government-speech framework outlined in *Walker* and *Summum* and instead apply a forum-based analysis, the Court should reject the invitation. "[F]orum analysis is misplaced here." *Walker*, 576 U.S at 215; *see also Summum*, 555 U.S. at 478 (holding that "public forum principles . . . are out of place in the context of this case"). "Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply." *Walker*, 576 U.S. at 215. Moreover, "where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place." *Summum*, 555 U.S. at 480. Yet closure of the forum is precisely what FFRF suggests (at 28) that Appellants should do here to cure the alleged constitutional violation.

B. The Capitol Exhibit rule does not create a program for the facilitation of private speech.

In an attempt to avoid the government-speech doctrine altogether, FFRF claims (at 22-23) that the amendments to the Capitol Exhibit Rule did not successfully close the Capitol grounds to private speech but instead perpetuate a "government program[] intended to facilitate the speech of private individuals." FFRF cites a trio of cases to support this proposition: *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), and *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001). Each of these cases is legally and factually distinct from this case.

In *Southworth*, for example, the Supreme Court considered "a First Amendment challenge to a mandatory student activity fee" imposed by a university that the challengers contended forced them to fund speech by student organizations that they found objectionable. 529 U.S. at 221. The Court rejected that claim, holding that "[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral." *Id.*

This holding has no application here because the student-activity-fee program at issue in *Southworth* bears no relationship to the Board's approval process for the display of exhibits at the Capitol grounds. Most significantly, the Court in *Southworth* was exceedingly clear to note that "[t]he University . . . disclaimed that the speech [at issue] is its own" and its "whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors." *Id.* at 229. That distinction matters because "[i]f the challenged speech . . . were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." *Id.* And "[w]here the university speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different." *Id.* at 235.

Rosenberger is distinguishable for similar reasons. There, a public university refused to reimburse a student group for the printing costs associated with the publication of a Christian magazine—even though the university routinely did so for other

secular student publications—because it feared that reimbursing those costs for a religious magazine would cause the university to run afoul of the Establishment Clause. 515 U.S. at 825-27. The Supreme Court, however, held that the University's policy amounted to unconstitutional viewpoint discrimination based on the religious views expressed in the student publication and that the university was mistaken to believe that allowing for reimbursement of printing costs would precipitate an Establishment Clause violation. *Id.* at 829-46. In so holding, the Court was careful to note that the case did not concern a situation where "the State is the speaker" because in *that* circumstance, the State "may make content-based choices." *Id.* at 833. It merely held that "viewpoint-based restrictions are [not] proper when the University does not *itself* speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 834 (emphasis added). "[T]he University's own speech . . . is controlled by different principles." *Id.*

Velazquez is even further afield. In that case, the Court considered a statute that forbid lawyers who received money from the Legal Services Corporation ("LSC") to accept or continue with a representation of an indigent client in which the client sought to amend or otherwise challenge existing welfare laws. 531 U.S. at 536-37. The Court held that this restriction violated the First Amendment, in part because it constrained the lawyers' constitutionally protected expression and threatened "severe impairment of the judicial function" by limiting what the lawyers could argue on behalf of their clients. *Id.* at 546-48. As in *Southworth* and *Rosenberger*, however, the Court emphasized that "the LSC program was designed to facilitate private

speech, not to promote a governmental message." *Id.* at 542. While "[t]he attorney defending the decision to deny benefits will deliver the government's message in the litigation[,] . . . [t]he LSC lawyer . . . speaks on the behalf of his or her private, indigent client." *Id.* Accordingly, "[t]he advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept." *Id.* at 542-43.

This case presents the precise situation that *Southworth, Rosenberger*, and *Velazquez* did not. Here the State *does* purport to be speaking through the exhibits approved for display by the Board: the amended rule declares that such exhibits are government speech no less than four times. 13 Tex. Admin. Code § 111.13(b), (d)(3)(D), (d)(8), (e)(1). And far from passively attempting to facilitate private speech like the universities in *Southworth* and *Rosenberger* and the LSC in *Velazquez*, here the Board exercises a significant level of control over the content, manner, location, and length of residence of the exhibit's display on the Capitol grounds. *See supra* at 5-7 (citing 13 Tex. Admin. Code § 111.13(d)(6), (d)(7), (e)). For this reason, the Board's approval process for displaying exhibits on the Capitol grounds is nothing like a university's student-activity-fee or funding program or the federal government's attempt to place conditions on recipients of federal funds.

FFRF quibbles with the notion that State itself speaks through the exhibits, citing *Matal v. Tam*, 137 S. Ct. 1744 (2017), and arguing (at 31-33) that, if the State were speaking, it would be "babbling prodigiously and incoherently" given the "hundreds of diverse exhibits that have already been displayed in the State Capitol," including those advocating for marijuana decriminalization and assisted suicide. Yet the

exhibits that FFRF points to (at 31) were all approved under the previous version of the Capitol Exhibit Rule, so they offer no insight into the operation of the amended rule.

Regardless, neither this Court nor the Supreme Court has ever suggested that "the protection of the government-speech doctrine must be forfeited whenever there is inconsistency in the message." *Johanns*, 544 U.S. at 561 n.5. And as the Eleventh Circuit has recently held in rejecting a similar contention, "there is nothing to th[e] argument" that *Matal* established such a proposition. *Leake v. Drinkard*, 14 F.4th 1242, 1251 (11th Cir. 2021). "*Matal*'s reasoning about contradictory speech followed *other* considerations in the light of which the Court concluded that 'it is far-fetched to suggest that the content of a registered mark is government speech.'" *Id.* (quoting *Matal*, 137 S. Ct. at 1758) (emphasis original). Those other considerations included the lack of editorial discretion government examiners had over the content of trademarks, the "mandatory" approval of marks that meet the Lanham Act's viewpoint-neutral criteria, and the lack of review of by any official higher than the examiner. *Id.*

As in *Leake*, "[t]he opposite facts exist in this case," *id.*: the Board retains editorial control over the content of the exhibits, maintains discretion over whether to approve the exhibits, and considers whether the exhibits are consistent with the definition of "public purpose." *See* Blue Br. 31-32 (citing 13 Tex. Admin. Code § 111.13(d)(2), (5), (6), (7)). In short, "[t]his appeal is not *Matal*." *Leake*, 14 F.4th at 1251.

C. FFRF cannot invoke the voluntary cessation exception to avoid the mootness doctrine.

In a last-ditch effort to avoid the mootness doctrine, FFRF argues (at 37-43) that even if the amendments to the Capitol Exhibit Rule closed the forum by adopting any approved exhibits as government speech, Appellants cannot establish that the case is moot because they have failed to demonstrate that the allegedly unconstitutional viewpoint discrimination will not recur. Consequently, FFRF says, the amendments to the Capitol Exhibit Rule are "litigation posturing."

Yet as an initial matter, FFRF gets the burden of proof backwards. "[C]ourts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity.'" *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd*, 563 U.S. 277 (2011). Thus, "[w]ithout evidence to the contrary," this Court "assume[s] that formally announced changes to official governmental policy are not mere litigation posturing." *Id.* This presumption is routinely applied in this Circuit. *See Yarls*, 905 F.3d at 910-11; *Stauffer v. Gearhart*, 741 F.3d 574, 582 (5th Cir. 2014) (per curiam); *DeMoss v. Crain*, 636 F.3d 145, 150-51 (5th Cir. 2011) (per curiam); *Turner v. TDCJ*, 836 F. App'x 227, 229-30 (5th Cir. 2020) (per curiam). And it resolves this case: because FFRF has offered no evidence to demonstrate that the Board intends to reverse the 2020 amendments to the Capitol Exhibit Rule, it cannot claim that those amendments are mere litigation posturing. *See Brazos Valley Coal. for Life, Inc. v. City of Bryan*, 421 F.3d 314, 322 (5th Cir. 2005) (holding that the voluntary-cessation exception did not allow a plaintiff to avoid mootness because the

record contained "nothing whatever to suggest that the City intend[ed] to repeal" the amendment that eliminated the plaintiff's injury).

The sole case that FFRF relies upon, *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020), does not change this analysis. There, this Court held that a public university's amendments to its speech code, enacted during the pendency of the appeal, did not moot the case by voluntary cessation because the university failed to show that its previous rules would not be reinstituted. *Id.* at 327-29. Though the Court observed that voluntary cessation of government conduct is subject to a "relaxed standard" that presumes the government has ceased the allegedly unconstitutional conduct in good faith, it nonetheless applied three factors to hold that the presumption in favor of the government had been overcome: "(1) the absence of a controlling statement of future intention; (2) the suspicious timing of the change; and (3) the university's continued defense of the challenged policies." *Id.* at 328.

FFRF urges (at 38-43) this Court to apply these three factors here and hold that this case is not moot. But as an initial matter, to the extent that FFRF argues that *Speech First* jettisoned *Sossamon* and the traditional presumption of good faith afforded to the government's voluntary cessation, that is wrong; *Speech First* could not have done so under the rule of orderliness. *See Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) ("Under our rule of orderliness, 'one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by statutory amendment, or the Supreme Court, or our *en banc* court.'").

Nor did it purport to abandon *Sossamon*: *Speech First* announced no generally applicable test and instead made clear that the three factors apply—if at all—only in

a narrow class of cases involving "voluntary cessation by a public university." 979 F.3d at 328. Indeed, the Court expressed skepticism that the relaxed standard for voluntary government cessation applies *at all* when it is a public university claiming mootness. *See id.* ("this relaxed standard has not been applied to voluntary cessation by a public university"). And it applied the three factors, which were derived from a Sixth Circuit decision, "to avoid a circuit split" on the question of mootness in the specific situation where "a public university has had a sudden change of heart, during litigation, about the overbreadth and vagueness of its speech code, and then advocated mootness under a relaxed standard." *Id.* at 328. Because this case does not involve a public university or its speech code, however, *Speech First* is wholly inapplicable. *See Umphress v. Hall*, 500 F. Supp. 3d 553, 560 & n.6 (N.D. Tex. 2020) (holding that *Speech First* did not apply to a First Amendment challenge by a judge to a state judicial commission's regulation of that judge's speech and observing the difference between "state courts" and "universities" for purposes of that analysis).

II. FFRF's Free Speech Claim Is Barred By Sovereign Immunity.

FFRF's request for prospective relief on its First Amendment claim is independently barred by sovereign immunity. Blue Br. 34-38. To come within the *Ex parte Young* exception to sovereign immunity, a plaintiff must show "that the defendant *is violating* federal law, not simply that the defendant has done so." *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 394 (5th Cir. 2015) (emphasis original). That is, "the *Ex Parte Young* exception [is limited] to '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.'" *Corn v. Miss. Dep't of Pub.*

Safety, 954 F.3d 268, 275 (5th Cir. 2020) (quoting *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986)). FFRF cannot make this showing here for at least two reasons. First, the Board's adoption of any approved exhibits as government speech moots FFRF's Free Speech Clause claim and thus undercuts any constitutional basis for a First Amendment challenge in the first place. Blue Br. 36-37. Second, even if the exhibits approved by the Board did not constitute government speech, FFRF still cannot establish an ongoing violation of federal law because the State has consistently represented—twice in writing and once at oral argument in this Court—that, following *Matal*, it would not deny any reapplication by FFRF on the ground of offensiveness. Blue Br. 37-38.

FFRF responds (at 43-44) that it need not "reapply to display its exhibit for a third time in order to reestablish the ongoing nature of the violation" and that this Court has already rejected Appellants' argument that their statements made in litigation demonstrate the lack of an ongoing violation of federal law. But that decision was issued *before* the Board amended the Capitol Exhibit Rule. And though FFRF derides those amendments as "nominal" (at 44), the amendments remove the word "morals" from the Capitol Exhibit Rule's definition of "public purpose," *compare* 13 Tex. Admin. Code § 111.13(a)(3) (2012), *with id.* § 111.13(a)(3) (2020), which was one of the bases upon which FFRF's faux nativity scene was removed from the Capitol grounds, ROA.401. That regulatory change, coupled with Appellants' express invitation for FFRF to resubmit its exhibit for display, Blue Br. 12, leaves little doubt that no ongoing violation of federal law is in view.

Furthermore, FFRF ignores that, since this Court's previous decision in this case, the Court has repeatedly held that "an official's public statement alone" does not "establish[] authority to enforce a law or the likelihood of his doing so" as required to establish a claim under *Ex parte Young*. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020) (quoting *In re Abbott*, 956 F.3d 708, 709 (5th Cir. 2020)); *see also Tex. Democratic Party v. Hughs*, 860 F. App'x 874, 878 (5th Cir. 2021) (per curiam). These cases "foreclose[]" FFRF's continued reliance on Executive Director Welsh's failure to retract his predecessor's letter as a route around sovereign immunity. *Hughs*, 860 F. App'x at 878 (rejecting claim based on failure to retract a press release).

III. The District Court Lacked Authority to Issue Prospective Injunctive Relief.

The district court also erred in issuing a permanent injunction awarding prospective relief to FFRF. Blue Br. 38-42. Because an injunction "is executory, a continuing decree" if the government alters the statutory right underlying the decree "it is quite plain the decree of the court cannot be enforced." *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1855). "*Wheeling Bridge* . . . stands for the proposition that when [the government] changes the law underlying a judgment awarding prospective injunctive relief, the judgment becomes void to the extent that it is inconsistent with the amended law." *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 184 (3d Cir. 1999). Thus, "[t]he parties have no power to require of the court continuing enforcement of rights [a] statute no longer gives." *Sys. Fed'n No. 91, Ry. Emps.' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 652 (1961).

These principles foreclose the grant of prospective injunctive relief here. Since Appellants have closed the forum to private speech by adopting any exhibits approved for display as government speech, *supra* at 4-11, FFRF no longer has any "right"—assuming it ever did, Blue Br. 21 n.5—to display exhibits on the Capitol grounds and, consequently, no future injury requiring prospective injunctive relief is in the offing.

FFRF argues in response (at 45-46) that the Board has not "unambiguously closed [the] forum" because "the State has continued to display numerous third-party exhibits in the Texas Capitol" and "the public purpose requirement [of the Capitol Exhibit Rule] remains in effect." But this statement overlooks the fact that any exhibits approved under the amendments to the Capitol Exhibit Rule constitute government speech and so cannot precipitate a First Amendment violation requiring prospective relief.

Conclusion

The Court should vacate the permanent injunction and the district court's declaratory judgment and remand with instructions to dismiss this case for lack of jurisdiction.

Respectfully submitted.

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Certificate of Service

On December 13, 2021, 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 5,856 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).

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