No. 21-50469

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.

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

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CERTIFICATE OF INTERESTED PERSONS

FREEDOM FROM RELIGION
FOUNDATION, INC.,

Plaintiff-Appellee,

v. No. 21-50469

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

Defendants-Appellants.

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

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STATEMENT REGARDING ORAL ARGUMENT

The Appellee, Freedom From Religion Foundation, Inc. ("FFRF"), believes that oral argument may be beneficial to the Court's consideration of issues related to the government speech doctrine.

INTRODUCTION

Governor Abbott and the Executive Director of the State Preservation Board[1] urge the Court to recognize a dangerous precedent by their argument that the State can continue to engage in viewpoint discrimination by merely "adopting" private speech as government speech. The State's broad conception of government speech, where the government has no specific message, allows and invites government entities with disparate perspectives to prefer and to silence private speech based upon the viewpoint of the speaker. For that reason, the Supreme Court has emphasized that Government Speech precedents should be extended only with great caution lest "private speech" could be passed off as "Government Speech" and "silenced by simply affixing a government seal of approval." *Matal v. Tam,* 137 S.Ct. 1744, 1758 (2017). The Supreme Court further emphasized in *Matal* that the Government Speech Doctrine is "susceptible to dangerous misuse." *Id.*; *see also Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 35 (2d Cir. 2018). "At

[1] The Governor of Texas, the State Preservation Board, and their respective agents and representatives are referred to collectively as the "State" herein, with individual actors identified by name as needed.

a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination." *Iancu v. Brunetti*, 139 S.Ct. 2294, 2302–03 (2019) (Alito, J., concurring).

Here, the State claims to have mooted FFRF's action more than five years after this dispute began, after losing in the district court and after this Court remanded the case for the issuance of prospective relief to FFRF. The State, however, does not claim to have ended its adjudicated practice of viewpoint discrimination. Instead, Appellants claim to have transformed a longstanding forum for private speech into a venue in which they can continue to discriminate at will, with no substantive change to the challenged practice.

The supposed transformation of an established public forum constitutes eleventh hour litigation posturing without any evidence of actual substantive changes in usage of the public spaces of the Texas State Capitol building. The Appellants' gambit seeks to vitiate the First Amendment protections of speech in public forums by *ipse dixit* declaration that preferred private speech has become government speech, while they continue to operate the Texas Capitol's public forum exactly as they did previously. Upon reviewing the State Preservation Board's revised rule for exhibit applications, the district court held that the minor alterations contained therein did not alter the nature of the limited public forum *at*

all. Thus, the State continues to run a limited public forum for displaying exhibits in the Texas Capitol. The continued exclusion of FFRF's exhibit from that forum remains a live controversy and an ongoing violation of the Foundation's free speech rights.

STATEMENT OF ISSUES PRESENTED

1. Whether the State of Texas has carried its heavy burden to demonstrate that this case became moot when the State Preservation Board adopted rule modifications that retained its ability to censor displays proposed by private groups in the exhibit areas of the Texas Capitol.

2. Whether the State Preservation Board's amendment to the rule regarding applications to display exhibits in the Texas State Capitol's exhibit spaces is effective to transform private speech ipse dixit into government speech.

3. Whether the State has credibly proved that Governor Abbott and the Executive Director of the State preservation Board will not arbitrarily engage in viewpoint discrimination against FFRF in the future.

4. If this case is not moot, whether sovereign immunity or another jurisdictional requirement nevertheless bars the entry of prospective relief.

STATEMENT OF THE CASE

I. FFRF's Exhibit Application

FFRF is a non-profit membership organization that advocates for the separation of state and church and educates on matters of non-theism. *See* ROA.357 at ¶3. FFRF has more than 30,000 members, with members in every state of the United States, including more than 1,000 members living in the State of Texas. *See id.* at ¶4. In December of 2014, FFRF became aware that a Christian Nativity scene was being displayed in the Texas State Capitol. *See* ROA.358 at ¶6. Media reports about the nativity scene in the Texas State Capitol indicated that this was the first time such a religious display was exhibited in the Capitol, *see id.* at ¶7, and that a private organization sponsored the nativity scene in order to combat the "War on Christmas." *Id.* at ¶10. These reports piqued FFRF's interest in the possibility of placing its own exhibit there. *See id.* at ¶7.

In 2015, FFRF sought a Texas legislator to be the "State Official Sponsor" for its own exhibit of "a temporary display in the Ground Floor Rotunda that celebrates freethought and the United States as the first among nations to formally embrace the separation of state and church." ROA.362 at ¶27. FFRF explained that its proposed exhibit was an effort "to celebrate the views of Texans who are part of a religious minority or have no religion at all," *id.* at ¶28, and was meant to diversify the limited expression of the stand-alone Christian nativity displayed in

2014. *See id.* at ¶29. The record does not support the State's claim that FFRF submitted its exhibit application "in hopes of provoking an Establishment Clause violation." Appellant's Br. at 6 (citing ROA.1862). Rather, FFRF hoped to participate equally in the State's limited public forum, while also recognizing, based upon its experience, that "[q]uite often . . . a government entity claims to have created a public forum for displays, but that when a display that's not from the majority is proposed, suddenly the government is unwilling to follow through with the very idea of a public forum, which is that anyone gets to participate, including those with minority points of view." ROA.1862.

The State Preservation Board—via its Capitol Events and Exhibit Coordinator, Robert Davis—expressly noted that the 2014 Christian nativity scene had included a disclaimer of state involvement and requested FFRF to "post a similarly worded sign accompanying your display, mentioning the sponsor, and that it was privately funded and displayed." ROA.360. FFRF complied with this request and the Board approved FFRF's exhibit application on August 6, 2015, after determining that the Foundation had met all of the requirements for displaying exhibits in the Capitol. *See* ROA.362 at ¶31. The Board, incidentally, also approved a stand-alone display of a Christian nativity scene in 2015, which was displayed without premature removal by State officials. *See* ROA.361 at ¶20.

On December 18, 2015, Texas members of FFRF gathered in the Texas Capitol's Ground Floor Rotunda and put FFRF's display in place. *See* ROA.362 at ¶32. No known disruptions, incidents, controversy, or complaints ensued after FFRF's exhibit went on display in the State Capitol, except for the objection of Governor Abbott. *See* ROA.363 at ¶35.

II. State Removal of FFRF's Display and Further Censorship

On or about December 22, 2015, Governor Abbott, "as Chairman of the State Preservation Board," wrote to then-acting Executive Director of the State Preservation Board, John Sneed, to demand that Sneed "remove [FFRF's] display from the Capitol immediately." ROA.401–03 Governor Abbott claimed that FFRF's display failed to meet the Board's criteria for exhibit approval, because the display "does not educate," does not promote public morals and the general welfare, constitutes "tasteless sarcasm," is "intentionally designed to belittle and offend," and "undermines rather than promotes and public purpose." *Id.* The Foundation's exhibit was then removed at Governor Abbott's request, and he boasted about getting it removed on social media. *See* ROA.1733.

III. Litigation

FFRF sued the State in the Western District of Texas for violating its First Amendment rights. In an October 13, 2017 order, the district court issued summary judgment in FFRF's favor on its free speech claim against the State, *see*

ROA.2030, and ultimately granted FFRF declaratory relief on that claim, stating in part 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.2031.

The State appealed that order. *See* ROA.2118. On appeal the State argued that the declaratory relief issued by the district court violated the State's sovereign immunity for two reasons: (1) the declaratory judgment issued by the district court was solely retrospective, and (2) there was no ongoing violation of federal law because the State would comply with the Supreme Court's 2017 decision in *Matal v. Tam*, 137 S.Ct. 1744 (2017), which the State characterized as having held for the first time that a state discriminates based on viewpoint when it regulates speech based on tone. *FFRF v. Abbott*, 955 F.3d 417, 424–25 (5th Cir. Apr. 3, 2020).

As to the State's first argument, this Court held that because FFRF's complaint sought prospective relief, its free speech claim fell within the *Ex parte Young* exception to sovereign immunity. As to the State's second argument, this Court held that FFRF established an ongoing violation of federal law because: (1) "Even assuming that a sea change in the law would obligate FFRF to re-establish the ongoing nature of the violation, *Matal* did not constitute such a change," *id.* at 425, and (2) "Governor Abbott and Mr. Welsh have only presented arguments through counsel that their behavior will change post-*Matal*. Importantly, they have

not retracted their previous statement to FFRF that future applications for the relevant display will be denied." *Id.* The Court remanded the case to the district court "to enter appropriate prospective relief for FFRF." *Id.* at 426.

IV. Remand and Subsequent Developments

Following this Court's April 2020 decision, in May 2020, the State Preservation Board began considering amendments to the rule regarding exhibit applications in the Texas Capitol. The record does not reveal the Board's motivations for considering any changes to the exhibit rule. *See* ROA.2215–23 (Board records outlining proposed changes).

After the State Preservation Board initiated the process for making an administrative rule change on May 22, 2020, counsel for the Appellants did not disclose that fact to FFRF for over one month, despite conferring with FFRF's counsel on June 10 and receiving three additional communications from FFRF's counsel thereafter. *See* ROA.2252. Counsel for the Appellants "eventually advised FFRFs' counsel on June 25 that administrative rule changes had been initiated back on May 22, 2020, with a public hearing scheduled for the very next day." *Id.*

The Board ultimately adopted proposed amendments to the rule regarding exhibit applications (the "Revised Rule"), which became effective July 20, 2020. *See* 13 Tex. Admin. Code § 111.13. The State admits, "[a]s adopted, the definition of public purpose remains unchanged, except to remove the word 'morals' and to

add the words 'and Capitol Extension' at the end of the sentence. ROA.2218. And under the Revised Rule the Board continues to rely on the public purpose requirement to "clarif[y] what exhibits the Board will consider [displaying] in the three particular exhibit spaces in the Capitol and Capitol Extension." ROA.2218. The Revised Rule also does not preclude Governor Abbott or the Executive Director of the State Preservation Board from continuing to exclude FFRF's display from the Capitol based upon considerations of viewpoint discrimination.

On remand, after considering the potential impact of the Revised Rule on FFRF's legal challenge, the district court first concluded that the challenge was not moot:

> The gravamen of the Foundation's remaining claims is that (1) Defendants engage in First Amendment viewpoint discrimination in applying the Board's rules to exclude its Exhibit and (2) the Board's rules violate the First Amendment by delegating overly broad discretion to government officials. The Revised Rule, like the revised ordinance in *Associated General Contractors*, [508 U.S. 656 (1993)] continues the challenged conduct in the same fundamental way. The Revised Rule attempts to *ipse dixit* change the First Amendment status of the Capitol exhibit area so the state may 'select messages it wishes to associate with' and avoid the constraints of the First Amendment. By attempting to adopt the exhibits as government speech, Defendants hope to remove any protections against viewpoint discrimination and gain unfettered discretion over the types of messages displayed. As in *Associated General Contractors*, there is no 'mere risk' that the state will repeat its allegedly wrongful conduct—it has shown in the Revised Rule that it has done exactly that.

ROA.2401–02. The Court then entered injunctive relief for FFRF, to ensure that the State would not continue to discriminate against FFRF's viewpoint by

excluding the Foundation's exhibit from the Capitol's limited public forum. *See* ROA.2407–08.

SUMMARY OF THE ARGUMENT

The State of Texas engages in viewpoint discrimination when it uses the public purpose requirement in 13 Tex. Admin. Code § 111.13(a)(3) to exclude FFRF's Bill of Rights exhibit from display in the Texas Capitol. It did this for the first time in 2015, while allowing other third parties to place their own exhibits—including the Christian nativity scene to which FFRF's exhibit was meant to contrast—in the Capitol's limited public forum. The State did this again in 2016, when it denied FFRF's second application for an exhibit. And it continues to discriminate today, by operating a limited public forum that is guided by a virtually identical public purpose requirement, with no additional provisions to safeguard against censorship at the whim of the Governor and the Executive Director of the State Preservation Board.

The State argues unpersuasively that FFRF's challenge to future viewpoint discrimination has become moot, due to changed circumstances. Specifically, the State claims to have closed the limited public forum through the adoption of an amendment to the rules regarding the application for placing a temporary exhibit in the Capitol's exhibition areas, which became effective on July 20, 2020 ("Revised Rule"). In reality, the Revised Rule does not end the controversy between the

parties because the State has not closed the forum at all. The State made minor alterations to the original rule and added a declaration that the State would henceforth be adopting all exhibits in the Capitol as "government speech." Because in practice the Revised Rule retains the limited public forum as it previously existed, including the public purpose requirement on which the State continues to censor FFRF's speech, the controversy at the heart of this case remains unchanged. Thus, the case is not moot. *See* Sec. I, *infra*.

The State also has not credibly restricted Governor Abbott's authority and willingness to engage in viewpoint discrimination against FFRF. Under the voluntary cessation standard for mootness, the State bears the burden to make it "*absolutely* clear that the allegedly wrongful behavior could not be reasonably expected to recur." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 328 (5th Cir. 2020) (emphasis in original) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)). The State's mootness claim fails under this test because it has not made a sworn affirmative statement regarding its future intentions, or rescinded its prior statement that it will continue to discriminate; the Revised Rule still permits the Governor and the Executive Director to exclude displays based upon viewpoint; the Revised Rule was adopted purely for litigation purposes, only after this Court ordered that FFRF be awarded prospective relief; and the State continues to defend its censorship of FFRF. *See* Sec. II, *infra*.

The other arguments now raised by the State—regarding sovereign immunity and the lack of an ongoing violation to address through injunctive relief—are merely other ways of stating the same mootness argument. The State argues that sovereign immunity would bar relief to FFRF only because it incorrectly believes that there is no ongoing violation of federal law, due to the Revised Rule. *See* Appellant's Br. at 36. And the State argues that injunctive relief is improper "[f]or similar reasons . . . ." Appellant's Br. at 38. These claims both live or die with the mootness claim and do not represent independent grounds for granting the State relief. *See* Sec. III., *infra*.

ARGUMENT

I. The Revised Rule does not moot this case because it does not eliminate the challenged practice.

The Fifth Circuit has described the mootness doctrine as follows: "*If* the controversy between [parties] has resolved to the point that they no longer qualify as 'adverse parties with sufficient legal interests to maintain the litigation,' [a court is then] without power to entertain the case." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 324 (5th Cir. 2009) (emphasis added). This is the "general rule." *Id.* "This general rule is subject to several important exceptions, however. For example, the voluntary cessation [doctrine] . . . ." *Id.* This case is not moot because the State has not ended the challenged practice or closed the limited public forum for displaying third-party exhibits in the Capitol. Secondarily, even if the State had

closed the forum, the case would not be moot because the State has not met its burden to demonstrate that its practice will not recur. *See* Sec. II., *infra*.

Whether a challenged practice has been discontinued—such that the controversy of the case has been eliminated—is the threshold question on mootness. It is distinct from evaluating whether the cessation is permanent. It is also distinct from considering whether a government defendant has the power to make a statutory change, a question that is not at issue in this case. FFRF does not disagree that the State has the power to amend the rule regarding Capitol exhibits and the power to close the limited public forum if it so chooses. Rather, FFRF—and the district court—simply point out that the State *has not done so*. The State misinterprets the district court's opinion when it claims that the court held that the Board lacked such power. *See* Appellant's Br. at 23–26. The district court's decision did not rest on any such finding. Rather, the district court held that "the Board cannot simply declare the First Amendment status of the Capitol exhibit area," but rather, it is the "substantive changes in the Revised Rule [that] determine the First Amendment status of the Capitol exhibits area." ROA.2398. And those changes did not close the forum. *See* ROA.2399–2401 (applying the three factors from *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), to the Revised Rule and concluding "that the Revised Rule does not impact the

court's previous finding that the Capitol exhibit area constitutes a limited public forum").

A. The Government Speech Doctrine is a narrow exception to viewpoint neutrality with a specific functional purpose.

The State incorrectly treats the government speech doctrine as a matter of form, rather than substance. The government speech doctrine, however, is not intended as an abnegation or repudiation of the First Amendment's bedrock principle of viewpoint neutrality toward private speech. The underlying rationale for the government speech doctrine is that the government could not function if it did not favor or disfavor points of view in enforcing its programs and policies. *See Pleasant Grove City v. Summum*, 55 U.S. 460, 468 (2009) ("Indeed it is not easy to imagine how government could function if it lacked this freedom [to express its own views].").

At the same time, however, speech that is otherwise private does not become speech of the government merely because the government labels it as such. The government speech doctrine does not apply if a government entity has created a limited public forum for speech. *Pleasant Grove*, 555 U.S. at 470, 478–80. Forum analysis is applicable, rather than the government speech doctrine, "in situations in which government-owned property or a government program is capable of

accommodating a large number of public speakers without defeating the essential function of the land or the program." *Id.* at 478.

Viewpoint-based restrictions are not proper when the government does not itself speak, but instead seeks "to encourage a diversity of views from private speakers." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995). Prohibiting discrimination based on the viewpoint of private persons whose speech the government facilitates does not restrict the government's own speech. *Id.*

Viewpoint discrimination is not tolerated in government programs intended to facilitate the speech of private individuals. *Bd. of Regents of the Univ. of Wis. System v. Southworth*, 120 S.Ct. 1346, 1354 (2000). "The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue." *Id*. at 1355. By contrast, viewpoint neutrality is excused only "when the government speaks, for instance to promote its own policies or to advance a particular idea." *Id.* at 1357.

The Supreme Court further discussed the distinction between government speech on the one hand, and programs to facilitate private speech on the other, in *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001). The Court again

recognized that viewpoint-based restrictions are not proper as to programs intended to encourage a diversity of views from private speakers. Viewpoint discrimination is barred by the First Amendment where "there is no programmatic message of the kind recognized in *Rust* [*v. Sullivan*, 500 U.S. 173 (1991)] and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives." *Id*. at 548. A critical distinguishing feature of government speech, therefore, is the requirement that the message "from beginning to end" be established by the government, such as with the delineation of an "overarching message." *Johanns vs. Livestock Marketing Ass'n*, 544 U.S. 550, 560–61 (2005).

The Supreme Court again considered the private speech/government speech dichotomy in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), as the district court in this case recognized. That case considered whether a specialty license plate program was subject to the prohibitions of viewpoint discrimination, or whether the State of Texas could restrict the messages of specialty plates as a matter of government speech. The Court concluded that the program was subject to the government speech doctrine, including because the licensing of automobiles was a function not historically treated as a matter of private speech in a public forum. The licensing of automobiles, instead, was, and is, associated with a government identification purpose, i.e., license plates are required by the government, and associated with the government's mandate to

visibly display plates when driving. Automobiles bear license plates, in the first instance, not as a means to facilitate private speech, but as a required means of identification while on the road.

The Supreme Court later described the *Walker* decision as marking "the outer bounds of the government speech doctrine." *Matal*, 137 S.Ct. at 1760. The Court began its analysis in *Matal* by discussing the practical problem of imposing viewpoint-neutrality when a government entity embarks on a course of action that necessarily takes a particular viewpoint and rejects others. *Id*. at 1757. The Court, nonetheless, emphasized the danger of an overbroad interpretation of the government speech doctrine, concluding with respect to trademarks that "it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently." *Id.* Only when the government seeks to convey its own message may it take steps to ensure that the message is neither garbled nor distorted. *Planned Parenthood of Hidalgo Cty. v. Suehs*, 692 F.3d. 343, 351 (5th Cir. 2012).

A number of guiding principles emerge from the Supreme Court's decisions for assessing a government speech claim. The district court in this case correctly considered three factors informing the analysis of a government speech claim, articulated in *Walker*: (1) has the government historically used the medium of

speech to convey a message on the government's behalf; (2) would a reasonable observer interpret this speech as conveying a message on the government's behalf; and (3) has the government retained control and final authority over the content of the message from beginning to end. *See* ROA.2399–2401. Applying these principles to the case at hand, the district court correctly concluded that the State has not established a transformation of the exhibition areas of the State Capitol building. *Id.* The exhibition areas of the Capitol remain a limited public forum under the State Preservation Board's program, rather than a venue of strictly government speech.

B. The State has not closed the forum.

To moot a case due to changed circumstances, the change must have "*eliminate*[d] the actual controversy" at issue. *Fontenot v. McCraw*, 777 F.3d 741, 747 (5th Cir. 2015). A challenge to the display of a monument, for instance, may become moot if the monument is removed from display. *See Staley v. Harris Cty.*, 485 F.3d 305, 309 (5th Cir. 2007) (*en banc*). Likewise, an agency's practice that exists due to insufficient resources may be deemed to have ceased for mootness purposes if new funding causes the agency to abandon that practice. *See Yarls v. Bunton*, 905 F.3d 905, 907–08 (5th Cir. 2018) (mooting challenge to agency's practice of placing indigent, non-capital defendants on waitlists because, thanks to

an influx of funding, "[c]urrent waitlists in the districts for non-capital defendants are non-existent").

In the case of a statutory change, the change must "*discontinue* a challenged practice" in order to moot a case. *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546, 564 (5th Cir. 2006) (emphasis added). A challenge to a rule may become moot if a defendant replaces that rule "with a new version of the rule that corrects the deficiencies [of which the plaintiff complained]." *Stauffer v. Gearhart*, 741 F.3d 574, 582 (5th Cir. 2014). Conversely, when a defendant has made legislative changes that continue the harmful conduct, the case is not moot. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d. 279, 286 (5th Cir. 2012) ("Instead of imposing special burdens on Opulent Life before it can occupy its leased property, Holly Springs has doubled down and banned Opulent Life from the property altogether. . . . [T]he case is not moot."); *Am. Freedom Defense Initiative v. Wash. Metro Area Transit Auth.*, 901 F.3d. 356, 362 (D.C. Cir. 2018) (ruling that a fundamentally unchanged policy, differing only in minor respects, does not moot case); *Smith v. Executive Dir. of Ind. War Mem'ls Comm'n*, 742 F.3d 282, 287–88 (7th Cir. 2014) (holding a case is not mooted if a substantially similar policy has been instituted with merely superficial exchanges); *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d. 503, 507–08 (6th Cir. 2001) (finding an amendment that does not remove language that gives rise to constitutional

challenge does not moot a case); *Horton v. City of St. Augustine*, 272 F.3d. 1318, 1326 (11th Cir. 2001) (holding that post-judgment legislative alterations do not moot a case if they leave challenged features substantially undisturbed).

As the district court held, in this case the State has failed to demonstrate that the challenged practice has ceased *at all* and thus, the State has failed to demonstrate mootness. The State asserts that the practice challenged in this case has ended because the Revised Rule declares that exhibits in the Capitol are now "government speech." *See* Appellant's Br. at 13 ("[T]he rule now expressly adopts any exhibit approved for display on the Capitol grounds as government speech."). And this, the State argues, is enough to close the forum. *See id.* at 19 ("[N]o limited public forum = no live case of controversy = no jurisdiction."). But "government speech" is a legal classification, and whether a government's existing practice constitutes a limited public forum is a determination to be made by the judiciary, not by a state's executive branch. *See, e.g.*, *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d. 1114, 1124 (10th Cir. 2002) ("The government cannot simply declare the First Amendment status of property regardless of its nature and its public use."). In treating the "government speech" *label* as a cure to censorship, the State has once again failed to internalize the lessons from *Matal v. Tam*, where the Supreme Court warned of this precise abuse of government authority. The Court wrote, "while the government-speech doctrine is important—

indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." 137 S.Ct. at 1758.

Instead of simply accepting the State's declaration that it has adopted all third-party exhibits as "government speech," the district court analyzed the Revised Rule under the *Walker* factors, *see* 576 U.S. at 209–10 (identifying three factors), and found that the State had not actually closed the Capitol's limited public forum. First, the court noted that "[t]he Revised Rule does not affect the first factor in the *Walker* analysis, as the Capitol exhibit area's history has not changed;" "the Texas government ha[s] not historically used the Capitol exhibits area to speak." ROA.2399. The State does not dispute this finding, but laments that "because history can *never* be altered, adopting the district court's view would make it nearly impossible for a government body to close a limited public forum." Appellant's Br. at 33. But that is not so. To close the forum the State could simply stop displaying exhibits in the Capitol; it could stop accepting applications for exhibits; or it could erect permanent monuments in the exhibit areas, which are a medium that is legally distinct from temporary exhibits. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 470–71 (2009) (noting that "a request by a private group . . . to erect a cross for a period of 16 days on public property that had been opened

up for similar temporary displays" was "a very different situation" than the erection of a permanent monument). This would immediately change the nature of the Capitol exhibits area and, over time, would undoubtedly change its relevant history as well.

Under the second *Walker* factor, the district court concluded that "a reasonable person would not find that the Capitol exhibits are the voice of the government" and that this remained true despite the Revised Rule stating that the government expressly adopts the exhibits as government speech. ROA.2399–2400. A reasonable observer cannot be expected to "reference the Texas Administrative Code" when viewing exhibits in the Capitol, ROA.2399, and the requirement under the Revised Rule that an exhibit include a statement "indicating the approval of the office of the State Preservation Board" "merely indicates that the Board has consented to the display of a message that is not its own." ROA.2400. Plus, FFRF previously complied with the State's request that it list its legislative sponsor on its exhibit in 2015, *id.*, and the State nevertheless censored FFRF's display. The fact that that requirement is now codified does not alter the analysis under *Walker*. *Id.*

Under the third *Walker* factor, the State "continues to retain final approval authority over the exhibits in the Capitol exhibit area," as it did in 2015. ROA.2401. This factor thus remains unchanged. The only difference under the Revised Rule appears to be the State's willingness to concede that it will, in fact,

censor speech it finds undesirable. As the district court observed, "The Revised Rule attempts to *ipse dixit* change the First Amendment status of the Capitol exhibit area so the state may 'select messages it wishes to associate with' and avoid the constraints of the First Amendment. By attempting to adopt the exhibits as government speech, Defendants hope to remove any protections against viewpoint discrimination and gain unfettered discretion over the types of messages displayed." ROA.2402.

C. The Revised Rule does not meaningfully change how the State handles exhibit applications.

The practice that FFRF has challenged in this case—the State's practice of displaying third-party exhibits in the Texas Capitol's exhibit space and its use of the "public purpose" requirement to supervise use of that space as a limited public forum—remains in place, including the ultimate opportunity for Governor Abbott and the Executive Director of the Preservation Board to arbitrarily exclude disfavored speech from the Capitol exhibition areas. The record demonstrates that even under the Revised Rule, the State has displayed all manner of third-party exhibits in the Capitol, many of which communicate messages that cannot reasonably be interpreted as government speech. Recent exhibits have included "numerous pro-Marijuana decriminalization exhibits from a coalition called Texans for Responsible Marijuana Policy, which includes both private nonprofits and two political parties." ROA.2306. The State cannot reasonably argue that

exhibits meant to encourage the State to change its laws concerning the legality of marijuana are government speech. Other private nonprofit organizations have also placed exhibits, "including the Texas Criminal Justice Coalition and the Texas Healthcare & Bioscience Institute and the American Foundation for Suicide Prevention," *id.*, and many others. *See* ROA.2315–25. These recent exhibits, approved under the Revised Rule, definitively refute the State's government speech claim. If such exhibits were considered government speech, then the State would be "babbling prodigiously and incoherently." *Matal*, 137 S.Ct. at 1758.

The State continues to display third-party exhibits in the Capitol and nothing in the Revised Rule prevents the State from continuing to censor speech it finds undesirable. Under the Revised Rule the State admits that it will continue to rely on the public purpose requirement to make decisions on what exhibits will be approved. *See* Appellant's Br. at 12 (citing 13 Tex. Admin Code § 111.13(d)(2). And the State admits that the public purpose requirement itself "is very similar to the definition in 2015," on which the State relied when illegally censoring FFRF's speech. *Id.* In short, the Revised Rule appears designed to allow the State to continue operating its exhibits policy exactly as it did in 2015, except with a newly minted justification for allowing speech the State finds desirable while excluding speech with which it disagrees. Or, as the district court put it, "[b]y attempting to adopt the exhibits as government speech, Defendants hope to remove any

protections against viewpoint discrimination and gain unfettered discretion over the types of messages displayed." ROA.2402.

The State's attempt to adopt the speech of private exhibitors as its own, whatever the expression may be, as long as it is "appropriate as government speech," substantively misapprehends the concept of government speech. In particular, the State is completely silent as to the message that it, as the government, seeks to express. Without such communicative intent, there is no government speech. Here, any official government message by the State Preservation Board is missing, and far too attenuated to evade FFRF's First Amendment protections.

The reality remains the same as it was before the State's adoption of the Revised Rule. The State Preservation Board is not engaging in government speech, but continues to facilitate private speech. That was previously the case, and nothing in the Board's Revised Rule changes that reality. There was no government message before, and none is created by the Board's nominal changes to its rule. Hence, the need to engage in viewpoint discrimination is not necessary in order for the Board to function.

The State's inability to identify a government message is not surprising as the exhibition areas of the State Capitol building have historically been used as a public forum for private expression, as the district court correctly recognized. The

Court in this matter, in fact, reached exactly this conclusion, the merits of which the State did not challenge on appeal. That ruling is now conclusively the law of the case. Thus, the State's argument that the first *Walker* consideration does not weigh in favor of either party is incorrect. The exhibition areas of the State Capitol have historically served as a limited public forum for private speech.

The State, in fact, advanced no evidence to meet its burden to show that the Preservation Board has historically used the medium of speech in exhibition areas of the State Capitol building to convey a message on the government's behalf. The hundreds of diverse exhibits that have already been displayed in the State Capitol further support the conclusion that the Preservation Board has not used exhibition areas as a medium for communicating a government message.

Furthermore, the State has not carried its burden to show that exhibits in the State Capitol building are closely identified in the public mind with the state government. By definition, speech in a limited public forum occurs on government property with government approval. A limited forum "exists where the government has reserved a forum for certain groups or for the discussion of certain topics." *Walker*, 135 S.Ct. at 2250 (citing *Rosenberger*, 515 U.S. at 829). Proximity and endorsement in a limited public forum, therefore, are more normative than exceptional. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding that a religious display next to the state house in Columbus, Ohio

constituted private expression despite private parties needing to apply for permission in order to display their messages). Administrative regulations made the state house square available in *Pinette* "for use by the public . . . for free discussion of public questions, or for activities of a broad public purpose" and gave the Capitol Square Review and Advisory Board responsibility for regulating public access. To use the square, a group had to fill out an official application form and meet several criteria, yet the Court concluded that the religious display at issue did not constitute government speech. *Id.* at 757–58, 765-66.

In *Summum*, 555 U.S. 460, the Supreme Court further recognized that temporary displays, such as in *Pinette*, may constitute private speech precisely because of their temporary nature, while permanent monuments pose a completely different problem. The Court explained the distinction as follows:

> Respondent compares the present case to *Capitol Square Advisory Bd. v. Pinette*, 515 U.S. 573 (1995), but that case involved a very different situation—a request by a private group, the Ku Klux Klan, to erect a cross for a period of 16 days on public property that had been opened up for similar temporary displays, including a Christmas tree and a Menorah. See *id*. at 758. Although some public parks can accommodate and be made generally available for temporary private displays, the same is rarely true for permanent monuments.

555 U.S. at 480 (citations truncated). Requiring approval to use government property, in short, is fully consistent with the existence of a public forum. It is not transformative of private discourse into government speech. In *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), for example, the Supreme Court ruled that a

park-permitting ordinance did not convert private speakers into public speakers, and noted that "even content-neutral time, place and manner restrictions can be applied in such a manner as to stifle free expression." *Id*. at 323 (*citing Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992)). In the present case, moreover, nothing in the Preservation Board's amended rules prevents private parties who create exhibits from including signage and explanatory language about the purpose of the exhibit, the creator(s) of the exhibit, etc., which further undermines the State's argument that the public will closely identify exhibits with the State.

The Preservation Board's "adoption" of approved exhibits also does not transform private speech into government speech. The direct control factor in the government speech analysis is intended to correlate with the conception of the expressed message. The control is measured, therefore, "from beginning to end." *Johanns*, 544 U.S. at 560. Here, adoption of private speech, after-the-fact, is not the same as conception.

Direct government control in the government speech context also is not met simply by requiring that an approved government official sponsor or sign-off on an exhibit. *See Higher Soc'y of Ind. v. Tippecanoe Cty.*, 858 F.3d. 1113 (7th Cir. 2017) (applying the *Walker* factors and holding that sponsored events held on courthouse grounds by private parties were still private speech); *Miller v. City of*

Cincinnati, 622 F.3d. 524 (6th Cir. 2010) (applying *Walker* factors and finding that rally or press conference held in city hall by private groups did not constitute government speech).

Sponsorship by an approved official also is not equivalent to direct control over an exhibit's message, nor is a sponsorship requirement enough to transform private speech into government speech. The Preservation Board is not thereby the originator of the many expressions conveyed by the innumerable exhibits displayed in the Capitol. The various and diverse exhibits, such as student art exhibitions, are simply not "from beginning to end" a message established by the State of Texas. The sponsorship requirement, by many elected officials, detracts from the State's own contention that exhibits in the State Capitol building convey a coherent government message. The sponsorship requirement is more aptly described as a constituency service provided by elected officials, and, in any event, it does nothing to define the government's intended message.

The Preservation Board's own final approval of exhibits also does not transform private speech into government speech. A permitting process is fully consistent with a limited public forum without transforming private speech into government speech. Nor is final approval by the Board a new feature. The same

requirement existed under the previous rule, which governed exhibit applications in a limited public forum.

The approval process, moreover, remains flawed in a very significant way. The Revised Rule does not eliminate the possibility that Governor Abbot and the Executive Director of the Preservation Board will continue to engage in viewpoint discrimination. The State does not argue otherwise. On the contrary, the State believes that continued viewpoint discrimination is now permissible with impunity. The State purports to have eliminated the need for viewpoint neutrality. If the First Amendment protections afforded to speech in public forums can be abolished by such fiat "adoption" of preferred speech, then the government speech doctrine will supplant public forum protections. The Supreme Court has not intended this outcome and explicitly warned against it in *Matal*.

II. The State has failed to make it "absolutely clear" that the challenged conduct will not recur.

This is not a case subject to the voluntary cessation rule precisely because viewpoint discrimination remains an omnipresent threat. The voluntary cessation doctrine is an "important exception[ ]" to mootness, *Sossamon*, 560 F.3d at 324, but a court need not analyze changed circumstances under this exception if, as in this case, those changes haven't mooted the case at all. *See, e.g.*, *Linton by Arnold v. Comm'r of Health & Environment, State of Tenn.*, 30 F.3d 55, 57 (6th Cir. 1994) ("[T]his court is not required to determine if the cessation of the alleged unlawful

activity is permanent because the modification . . . does not eliminate the injurious effects which gave rise to the intervenors' standing in the first instance."). If, however, this Court determines that the Revised Rule has ended the viewpoint discrimination at the heart of this case, FFRF's challenge still is not moot because the State has not met its burden to demonstrate that the challenged conduct could not recur.

When a defendant's voluntary conduct results in allegations of mootness, those allegations "require closer examination than allegations that happenstance or official acts of third parties have mooted the case." *Fontenot v. McCraw*, 777 F.3d. 741, 747 (5th Cir. 2015) (quoting *Environmental Conservation Organization v. City of Dallas*, 529 F.3d. 519, 528 n.4 (5th Cir. 2008)). A governmental entity may bear a "lighter burden" to "prov[e] that the challenged conduct will not recur," *Stauffer v. Gearhart*, 741 F.3d 574, 582 (5th Cir. 2014), but even when applying "some solicitude" under this "relaxed standard," the government is still required to make it "*absolutely* clear that the allegedly wrongful behavior could not be reasonably expected to recur." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 328 (5th Cir. 2020) (emphasis in original) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)). This remains the government's burden to demonstrate. *Id.* In scrutinizing a defendant's actions, this Court differentiates between actions

that truly extinguish a controversy and actions that amount to mere "litigation posturing." *Fontenot*, 777 F.3d. at 748.

In *Fenves*, this Court considered whether a free speech challenge to a Texas-run university's policy had become moot due to a policy revision. The Court applied—"*arguendo* for purposes of [that] case"—the same "relaxed standard" for which the State now advocates. 979 F.3d at 328. In ruling that the revised policy did *not* moot the challenge, the *Fenves* court considered three factors persuasive: "(1) the absence of a controlling statement of future intention; (2) the suspicious timing of the change; and (3) the [defendant's] continued defense of the challenged policies." *Id.* (citing *Free Speech Inc. v. Schlissel*, 939 F.3d 756, 769–70 (6th Cir. 2019)). Those three factors decisively cut against the State's mootness claim in this case, even more so than they did in *Fenves*.

First, in *Fenves*, despite revising its policy for the time being, "the University ha[d] not issued a controlling statement of future intention," 979 F.3d at 328, and thus, the Court did not consider the policy to have been irreversibly changed. The Court noted that while the defendant "represents in his brief that '[t]he University has no plans to, and will not, reenact the former policies,'" he had not advanced any "sworn affirmative statement" from the university itself and there was "no evidence here that Fenves controls whether the University will restore the challenged definitions during or after his tenure." *Id.*

In this case, where the public purpose requirement remains materially unaltered in the Revised Rule, the relevant inquiry is whether the State has made a controlling statement of future intention regarding viewpoint discrimination and its intended use of the public purpose requirement. Under *Fenves*, it decidedly has not. The State points only to statements made during the course of litigation—twice in briefs and once orally—to argue that it will not abuse the public purpose requirement in the future. *See* Appellant's Br. at 37. The State has not only failed to advance any sworn statement from someone with actual authority to control the Preservation Board's actions, the Board itself affirmatively stated the opposite: "any application to display the same exhibit which was removed last year will be denied for failure to satisfy the public purpose requirement." ROA.1731. The State has never communicated to FFRF that it has changed its position on this point. *See* 955 F.3d at 425 ("Importantly, [Gov. Abbott and the Board] have not retracted their previous statement to FFRF that future applications for the relevant display will be denied. While we presume that counsel's representations on behalf of Governor Abbott and Mr. Welsh are made in good faith, our precedent requires that we view attempts to obtain a vacatur of relief 'with a jaundiced eye.'").

Second, the *Fenves* Court characterized the timing of the university's policy revisions as "suspicious," because "the University did not commence review, much less change its policies, until after the district court decision. The changes were

first announced only in the University's appellate brief." 979 F.3d at 329 (citing *Knox v. SEIU*, 567 U.S. 298, 307 (2012) ("[M]aneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.")).

The timing of the State's adoption of the Revised Rule in this case is even more self-serving. The State did not revise its Rule when *Matal* was decided in 2017, despite its continued claim—already refuted by this Court—that that case marked a sea change in free speech jurisprudence. *Compare* Appellant's Br. at 10 ("*Matal* may have made 'clear that speech cannot be prohibited on the basis of offensiveness . . . .") *with* 955 F.3d at 425 ("*Matal* clarified the contours of the First Amendment; it did not constitute a sea change in the law."). And unlike the university in *Fenves*, the State *still* did not revise its rule after the district court entered its order declaring the practice unconstitutional. *See* ROA.1990.

It was only after this Court's remand with instruction to award FFRF prospective relief that the State sought to modify the rule for exhibit applications. Even then, after the State Preservation Board initiated the process for making an administrative rule change on May 22, 2020, counsel for the Appellants failed to disclose that fact to FFRF for over one month, despite conferring with FFRF's counsel on June 10 and receiving three additional communications from FFRF's counsel thereafter. *See* ROA.2252. Counsel for the Appellants "eventually advised FFRFs' counsel on June 25 that administrative rule changes had been initiated

back on May 22, 2020, with a public hearing scheduled for the very next day." *Id.* Ultimately, as discussed above, the Board adopted only nominal changes to its existing rule. *See* Sec. I., *supra*.

Third, the *Fenves* Court noted that even after changing its policy, the university was "still defending the legality of its original policies." 979 F.3d at 329. This further undermined the required showing that it was "absolutely clear" that the old policies could not be revived. The State has demonstrated even less willingness to accept responsibility for its wrongdoing in the present case. Despite rulings from both the district court and this Court to the contrary, the State remains unwilling even to concede that it has been operating a limited public forum for private exhibits in the Texas Capitol. *Compare* Appellant's Br. at 21 n.5 ("Defendants reserve the right to argue at an appropriate time that the 2015 Capitol exhibit program and programs like it are *not* limited public fora.") *with* 955 F.3d at 426-29 ("clarif[ying] the appropriate application of the unbridled discretion doctrine in the context of a limited public forum, and [remanding] for the district court to apply that standard" to the Capitol Exhibition Area); *and* ROA.1986 (citing *FFRF v. Abbott*, No. 16-CA-223, 2016 WL 7388401 at *6 ("The Capitol Exhibition Area is a Limited Forum")).

In the final analysis, the State's mootness argument fails first and foremost because the Revised Rule does nothing to prevent viewpoint discrimination by

Governor Abbott and the Executive Director of the Preservation Board. Secondarily, it fails because the State has not credibly proved that the viewpoint discrimination suffered by FFRF will not recur. Instead, the State has merely attempted to justify future viewpoint discrimination, albeit without justification under the government speech doctrine.

III. The State's other arguments fail because this case is not moot: there is an ongoing violation of federal law that can be remedied through prospective relief.

The State argues in the alternative that its sovereign immunity bars relief because "there can no longer be any ongoing violation of federal law." Appellant's Br. at 34. This is simply a reiteration of the mootness argument that fails for all the reasons stated above, but with an added nod toward the requirement in *Ex Parte Young* that any relief against the State be prospective. Because the harm to FFRF is ongoing, for the reasons identified above, FFRF is seeking, and has always sought, prospective relief in this case, as this Court ruled previously. *See* 955 F.3d at 421 ("FFRF sought prospective relief, and there was, and still is, a live controversy between the parties."). FFRF has never abandoned that position and need not periodically renew its demand during the pendency of disputed litigation.

The State has not cited any authority for its claim that FFRF needs to reapply to display its exhibit for a third time in order to reestablish the ongoing nature of the violation. *See* Appellant's Br. at 37–38. The State rejected FFRF's

second exhibit application for failing to meet the public purpose requirement in 13 Tex. Admin. Code § 111.13, in a formal letter that unambiguously established that all future applications would be rejected for the same reason. *See* 955 F.3d at 424–25. It wrote this rejection letter after removing FFRF's original exhibit from display for the same reasons. *See id.* at 423. That same public purpose requirement exists today, albeit with two nominal alterations, *see* ROA.2218 ("As adopted, the definition of public purpose remains unchanged, except to remove the word 'morals' and to add the words 'and Capitol Extension' at the end of the sentence."), and the State has never rescinded its prior statements establishing its intent to reject FFRF's future applications. *See* 955 F.3d at 425 ("Importantly, [the Defendants-Appellants] have not retracted their previous statement to FFRF that future applications for the relevant display will be denied."). The State points only to statements made in litigation and the Supreme Court's decision in *Matal v. Tam* as reasons to reconsider whether this violation is ongoing, *see* Appellant's Br. at 37–38, but this Court previously rejected both of these arguments. *See id.* ("Even assuming that a sea change in the law would obligate FFRF to re-establish the ongoing nature of the violation, *Matal* did not constitute such a change;" "[O]ur precedent requires that we view attempts to obtain a vacatur of relief 'with a jaundiced eye . . . the controversy is ongoing."). This prior holding is the law of

this case. The State cannot make these same arguments anew on its subsequent appeal.

The State further repackages its mootness argument as an argument that the district court lacked jurisdiction to enter the injunctive relief. *See* Appellant's Br. at 38–42. Its analysis, however, only serves to highlight the differences between the present case, where the State has not unambiguously closed its limited public forum, and a situation where the government actually *has* closed a forum. The State relies on *Grossbaum v. Indianapolis-Marion County Building Authority*, 100 F.3d 1287 (7th Cir. 1996), which it characterizes as having "facts remarkably like [the present case]." Appellant's Br. at 41. But the building authority in *Grossbaum* had unambiguously closed its forum: it adopted a new rule that "[n]o displays, signs or other structures shall be erected in the common areas by any non-governmental, private group or individual . . . ," 100 F.3d at 1291, which the Seventh Circuit characterized as, "unequivocally a prospective and generally applicable rule [that] bans all private displays henceforth." *Id.* at 1296. Conversely, the State has continued to display numerous third-party exhibits in the Texas Capitol under the modestly modified Revised Rule. *See* ROA.2315–25. This fact likewise distinguishes the present case from *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1851), and subsequent cases (*see* Appellant's Br. at 40 (citing cases)) applying the principle that changed circumstances can render an

injunction unenforceable. Here the public purpose requirement remains in effect and the State continues to accept third-party applications to place exhibits in the Texas Capitol. Thus, an injunction prohibiting the State from continuing to discriminate against FFRF's display remains quite relevant—and necessary given Governor Abbott's established disposition toward the Foundation.

CONCLUSION

The State does not argue as a basis for mootness that viewpoint discrimination against FFRF will not recur by Governor Abbott or the Executive Director of the State Preservation Board. Instead, the State pursues a strategy intended to "get away with it." The State's last-second effort, however, does not transform private speech into government speech, leaving FFRF's claim for prospective relief a most live controversy.

The precedent that the State seeks in this case, by purporting to simply adopt favored private speech as its own, is dangerous. The States invites this Court to disable the First Amendment as a means of prohibiting viewpoint discrimination against disfavored private speech.

For all the reasons stated herein, therefore, this Court should affirm the district court's order granting injunctive and prospective declaratory relief to FFRF.

Dated this 8th day of November 2021.

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CERTIFICATE OF SERVICE

On November 8, 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.

/s/ Richard L. Bolton
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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 9,828 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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