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Via CM/ECF
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Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit

RE: No. 21-50469 *Freedom from Religion Foundation v. Abbott*
Supplemental Letter Brief of Appellee

Dear Mr. Cayce:

INTRODUCTION.

Transient rule changes do not moot a pending appeal. In fact, Governor Abbott and the Director of the Texas State Preservation Board (collectively "the State") exacerbate the potential for continuing viewpoint discrimination by repealing regulations that previously applied to Capitol exhibits. The State now claims the right to censor speech subject to no viewpoint neutral standard of exclusion. The same persons who previously engaged in viewpoint discrimination remain gatekeepers without any prophylactic safeguards to prevent future violations of First Amendment rights. The repeal of regulations, therefore, does not affect the pending appeal.

The State has never contested on appeal the district court's holding on June 19, 2018, that it violated the First Amendment rights of the Freedom From Religion Foundation ("Foundation"). Instead, the State argued in its first appeal that the district court granted inappropriate retrospective relief to the Foundation in violation of principles of sovereign immunity. This Court rejected the State's argument on April 3, 2020, while remanding the case with direction to enter appropriate prospective relief. Only then, one month *after* this Court's remand order, did the State first seek to modify its rules governing Capitol displays. One year after that, on May 5, 2021, the district court rejected the State's new mootness argument and issued prospective relief to the Foundation. But that ruling did not end the State's litigation gamesmanship.

The State announced during oral argument before this Court on March 7, 2022, without any prior notice to the Foundation, that it was considering a second round of modifications to its display rules. This time it planned to repeal all written guidelines. One month later, on April 20, 2022, three years and eleven months after the Foundation was first granted relief in this case, and eleven months after the district court issued prospective injunctive relief to the Foundation, the State's rules repeal went into effect,

leaving the State without any discernable standard for the approval of third-party exhibits, despite the State's professed intention to continue displaying such exhibits in the Capitol.

The State's repeal does not moot the final judgment already issued by the district court. The State has not met its burden to demonstrate that the repeal of guidelines for selecting third-party exhibits to display in the Capitol will foreclose the State from engaging in future viewpoint discrimination. Rather, the State has admitted that it intends to continue displaying third-party exhibits, but incorrectly believes that the repeal of its guidelines allows it to circumvent First Amendment protections by merely proclaiming those exhibits to be government speech. The absence of any such guidelines permits the State to proceed exactly as it did with respect to the Foundation's exhibit. Under the voluntary cessation doctrine, therefore, the State has not satisfied its burden to demonstrate that it is "absolutely clear" that viewpoint discrimination cannot reasonably be expected to recur. On the contrary, the State repealed its rule in order to gain carte blanche to engage in viewpoint discrimination.

I. THE STATE HAS NOT MET ITS BURDEN TO DEMONSTRATE THAT CHANGED CIRCUMSTANCES HAVE ENDED THE CHALLENGED CONDUCT.

The State has not foreclosed the potential for engaging in viewpoint discrimination. The controversy at the heart of this case, therefore, has not been eliminated. In this instance, the repeal of the rules governing the selection of third-party exhibits for display in the Capitol does not preclude future viewpoint discrimination by Governor Abbott and the Director of the Texas State Preservation Board. Rather, by eliminating any *guidelines* for selecting third-party exhibits, while admitting that it intends to continue displaying third-party exhibits, the State has exacerbated the risk of future viewpoint discrimination.

On remand, after considering the potential impact of the State's *revised* rule on the Foundation's legal challenge, the district court concluded that the minor alterations contained in the revised rule did not alter the nature of the Capitol's previously existing limited public forum. The challenge was not moot in part because:

> 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**. . . . [T]here 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 (emphasis added).

The State enacted its revised rule under the mistaken belief that it could change the legal status of the Capitol's limited public forum by mere *ipse dixit* declaration that all third-party exhibits would henceforth be government speech. Now, the State has taken its failed legal strategy one step further by repealing all guidelines for the selection of third-party exhibits.

The Preservation Board's rules, however, did not mandate viewpoint discrimination. Instead, it was the implementation of the rules by individual officials thatcaused the censorship at issue. The district court explained this distinction as follows:

> The crux of the First Amendment issues in this case stem not from the rules themselves, but from Governor Abbott's letter demanding that the Board take down the Exhibit. When Sneed ordered the exhibit taken down, he did so to "follow the request of [his] supervisor." The court finds that prospective declaratory and injunctive relief on the Foundation's freedom-of-speech claim will offer redress for the actions of individual state officials. Therefore, the court need not strike down a regulation that admittedly does not usually factor into the Board's approval process.

ROA.2407.

The same logic that undermined the State's mootness argument before still applies to the total repeal of rules, since it was motivated by the same desire: the State seeks an end-run around the First Amendment so that it may continue to display only favored speech at the Capitol. During oral argument, counsel for the State admitted that the State intends to continue displaying third-party exhibits that it has "adopted as government speech." Counsel stated:

> I would like to bring to the Court's attention that since briefing closed in this case, the State Preservation Board has proposed an additional change in the rule that would repeal 1111.13 entirely as unnecessary. The, that rule is not necessary because, as it is, the government—**the State Preservation Board can put up exhibits that are adopted as government speech**, but

> the Board itself has determined that it is no longer necessary to have that rule.

Oral Arg. (Mar. 7, 2022) at 10:15 (cleaned up). The State echoed this admission when it later enacted the repeal, stating that "the agency does not need the rule in order to serve its intended purpose of providing for the display of government speech on the Capitol grounds that educates, informs, and unites." 46 Tex. Reg. 9146 (Dec. 31, 2021) (Foundation's Apr. 11, 2022 Letter, Doc. 00516275040, at 3).

The State has admitted its intention to continue "providing for the display" of third-party exhibits despite the repeal of all guidelines for selecting displays. But the State provides no evidence, or even explanation, as to how requests by third party exhibitors will be handled going forward. In fact, the State proffers no evidence that decisions will be made differently than before the rule repeal, including the opportunity for viewpoint discrimination. Certainly, the State has not proved otherwise, as necessary to meet its burden to establish mootness.

The State incorrectly claims, by naked assertion alone, that the repeal of rules transforms all third-party exhibits into government speech. The Supreme Court recently rejected a similar transformation-by-adoption argument in *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (May 2,2022). The Court held in *Shurtleff* that the City of Boston engaged in viewpoint discrimination despite the fact that the City had no guidelines governing flag raisings. *Id*. at 1592. Critical to the Court's holding was the fact that the City was not crafting its own message. *Id*. at 1593. Finally, the Court expressly rejected an "expansive understanding of government speech by adoption." *Id*. at 1600,n.3.

The gravamen of the Foundation's claims remains unaltered. The State admitted that it intends to continue or resume displaying third-party exhibits in the Capitol, with no provisions to safeguard against censorship at the whim of the Governor and the Executive Director of the State Preservation Board. Thus, a substantial risk remains that the State will continue or resume to engage in censorship in violation of the Foundation's free speech rights. The same individuals are still responsible to make the same decisions about exhibits, without any applicable or articulated restraint on viewpoint discrimination.

II. THE STATE HAS FAILED TO MAKE IT "ABSOLUTELY CLEAR" THAT THE CHALLENGED CONDUCT WILL NOT RECUR.

As the Foundation previously has explained, when voluntary cessation is at issue, the defendant has the burden to make it "*absolutely* clear that the allegedly wrongful behavior could not be reasonably expected to recur." *See* Found. Br. at 38–39 (quoting *Speech First, Inc. v. Fenves*, 979 F.3d 319, 328 (5th Cir. 2020) (emphasis in original) and

discussing the State's burden). The Supreme Court more recently reaffirmed the heavy burden to establish mootness in *West Virginia v. EPA*, ___ U.S. __,142 S. Ct. 2587, 2607 (2022) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* 528 U.S. 167, 189 (2000). The Court reiterated that the burden to establish that a once-live case has become moot is heavy where "the only conceivable basis for a finding of mootness in the case is the respondent's voluntary conduct." *Id.* Significantly, moreover, *West Virginia v. EPA* involved a government actor's assertion that voluntary cessation mooted the plaintiffs' claims. Nonetheless, despite involving a government actor, the Court did not make any assumption that changes to official government policy were not mere litigation posturing.

Even assuming that voluntary governmental cessation of allegedly wrongful conduct is afforded "some solicitude," the Foundation's case remains justiciable. This Court's analysis in *Fenves* is instructive. *Fenves* analyzed the State's voluntary cessation using three factors: (1) the absence of a controlling statement of future intentions; (2) the suspicious timing of the change; and (3) the defendant's continued defense of the challenged policies. *Fenves,* 979 F.3d at 328. Iteration of these factors demonstrates that the State has not met its burden to prove mootness. It is far from "absolutely certain" that the wrongful conduct in this case will not recur.

Under the first *Fenves* factor, the controlling statement of future intention made by the State is that it intends to preserve its existing practice of displaying speech on the Capitol grounds "that educates, informs, and unites." 46 Tex. Reg. 9146 (Dec. 31, 2021). There is no statement suggesting that the State itself will begin generating the content of those exhibits or otherwise begin creating its own speech in the Capitol's exhibit areas. Instead, it is evident that the State intends to proceed under its mistaken belief that it can close a long-standing forum by simply declaring third-party exhibits to government speech. Thus, while the State has repealed the guidelines for selecting third-party exhibits, the State does not evince an intention to no longer display such exhibits in the future

Under the second *Fenves* factor, the State repealed its rule eleven months after the district court issued prospective injunctive relief to the Foundation, a circumstance analogous to the policy change that the *Fenves* Court described as "suspicious." 979 F.3d at 329. And while the university in *Fenves* first announced its intention to revise its policy "only in the University's appellate brief," *id.*, the State made no such announcement in its brief to this Court. It revealed its intention for the first time during oral argument, and even then, counsel for the State claimed to be uncertain whether the repeal would even be adopted, stating, "It has been proposed. The comment period has closed, but it has not yet been formally adopted and I don't know when or if it will." (Oral Arg. (Mar. 7, 2022) at 10:46).

Under the third *Fenves* factor, nothing has changed since November 8, 2021, when the Foundation briefed this Court on the State's unwillingness to accept responsibility for its wrongdoing. *See* Found. Br. at 42. Despite the Foundation pointing out this flaw to the State in its briefing, and the State having an opportunity to respond in its reply brief and subsequent filings, the State *still* has not made a statement that could be interpreted as an acceptance of its wrongdoing. Instead, the State defends its right to engage in viewpoint discrimination via the gambit of repealing all guidelines relating to the display of third-party exhibits.

The State is not entitled to any presumption that its repeal of rules is not mere litigation posturing. The State's own admission about its future intentions, the suspicious timing of the repeal, and the State's unwillingness to accept responsibility for its past wrongful conduct all expose the repeal as nothing more than the State's latest attempt to moot this case, while continuing or resuming the wrongful conduct that gave rise to it. In short, the State has not proved that the challenged conduct at issue in this case will not recur.

This Court's recent decision in *Tucker v. Gaddis*, 40 F.4th 289 (5th Cir. 2022), provides analogous circumstances. In that case, Tucker challenged a prison ban on the right to congregate. The prison then changed its policy which gave Tucker "nothing more than the right to apply for a congregation—to date TDCJ has never approved the Nation for congregation. And it is the latter that this suit seeks to obtain." *Id* at 292. The Court further explained its rationale:

> To be sure, "a case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. But the government has not even bothered to give Tucker any assurance that it will permanently cease engaging in the very conduct that he challenges. To the contrary, as noted, counsel for TDCJ stated precisely the opposite during oral argument—TDCJ would not guarantee congregation in the future, but instead would reserve the question in light of potential "time, space, and security concerns." If anything, it is far from clear that the government has ceased the challenged conduct at all, let alone with the permanence required under the "stringent" standards that govern the mootness determination when a defendant claims voluntary compliance.

Id. at 293.

Similarly, in the present case, the State has provided no assurance that the Foundation's exhibit will not be the subject of viewpoint discrimination in the future. The State, instead, has made every effort to find a workaround that will perpetuate its prior practice of engaging in viewpoint discrimination. This is the explanation for the State's stratagems to avoid the district court's judgment, but such litigation posturing does not establish mootness.

III. VACATUR IS NOT APPROPRIATE WHEN A PARTY PROCURES MOOTNESS BY ITS OWN ACTIONS.

Mootness does not result in vacatur, in any event, where the losing party procures mootness by its own actions. "[V]acatur is an 'extraordinary' and equitable remedy." *Staley v. Harris Cnty*, 485 F.3d 305, 310 (2007) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25–26 (1994)). The Supreme Court has recognized that "[t]he principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, 513 U.S. at 24. "Vacatur of the lower court's judgment is warranted only where mootness has occurred through happenstance, rather than through *voluntary action of the losing party*." *Houston Chron. Pub. Co. v. League City*, 488 F.3d 613 (5th Cir. 2007) (quoting *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003) (per curiam)) (emphasis in original). Moreover, the burden is on the party seeking relief from an adverse judgment to demonstrate entitlement to the extraordinary remedy of vacatur. *Staley*, 485 F.3d at 310 (emphasis in original).

In *Houston Chronicle* this Court elaborated on the applicable principles that limit vacatur of an adverse judgment:

> As the Supreme Court held in *U.S. Bancorp Mortgage Co.*: if mootness results from the losing party's voluntary actions, **that party has "forfeited his legal remedy by the ordinary process of appeal** . . . , **thereby surrendering his claim to the equitable remedy of vacatur**." To allow a party "to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system." *Id.* at 27.

488 F.3d at 619 (citations cleaned up, emphasis added).

The Supreme Court in *U.S. Bancorp* expressly rejected the claim, made both in that case and in the State's Apr. 7, 2022 Letter to this Court (Doc. 00516271371), that vacatur is warranted by *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Instead, the Court refused

to extend that case to those where the losing party's actions create the mootness issue. *See* 513 U.S. at 22–26 ("The principles that have always been implicit in our treatment of moot cases counsel against extending *Munsingwear* to settlement."). Consistent with the principles applied in *U.S. Bancorp*, this Court distinguishes between "cases mooted by actions that were clearly unattributable to the voluntary actions of the parties," in which case vacatur is appropriate, and "cases mooted by the voluntary actions or inactions of a party," in which this Court has "decided the vacatur question in favor of the party that did not cause the case to become moot." *Staley*, 485 F.3d at 311 n.2 (listing cases).

In the present case, the post-judgment repeal of the rules governing Capitol exhibits is entirely attributable to the Texas State Preservation Board. This case thus maps closely to *Houston Chronicle*, where, after having judgment entered against it, League City repealed a challenged ordinance and argued that the case was then moot. *See* 488 F.3d at 619. This Court rejected the city's vacatur-due-to-mootness contention, holding that "the equitable factors in the instant case weigh against vacating the district court's injunction." *Id.* at 620. The Court found no mitigating factors that would have made vacatur more appropriate: "the mootness-causing action did not result from typical progression of events, such as a student graduating from school, . . . the City has not shown its repealing the Ordinance provisions was not in response to the district court judgment . . . [and] the newspapers obtained full relief in district court before League City repealed most of the Ordinance." *Id.*

Likewise, in this case, the rule repeal by the State was not a "typical progression of events;" the State has not shown any reason for repealing the rule other than as a response to the district court's judgment; and the repeal came only after final judgment was issued, and after six years of litigation, and after an adverse Court of Appeals decision, and after oral argument in this second appeal. In these circumstances, the State's litigation tactics would not warrant vacatur, even in the event of mootness.

CONCLUSION

The State's rule changes do not substitute for the relief ordered by the district court because Governor Abbott and the Director of the Texas State Preservation Board remain final decision makers with respect to displays in the Texas Capitol Building. The State has not satisfied its burden to make absolutely clear that viewpoint discrimination could not reasonably be expected to recur. On the contrary, the State's tactics are intended precisely to sanction continued viewpoint discrimination.

Prospective declaratory and injunctive relief remains necessary and appropriate, to prevent recurrence of viewpoint discrimination by these individual state officials, who previously engaged in viewpoint discrimination and remain positioned to do so again.

The State's repeal of rules ignores the fact that viewpoint discrimination remains as much, or more, a real threat to continue without rules.

The State's repeal of all rules relating to Capitol displays does nothing to moot the pending appeal or otherwise provide grounds for vacatur of the district court's judgment.

Respectfully Submitted,

BOARDMAN & CLARK LLP

/s/ Richard L. Bolton

Richard L. Bolton

xc: All counsel of record (via CM/ECF)

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