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

BRIEF FOR DEFENDANTS-APPELLANTS

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Certificate of Interested Persons

No. 21-50469

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.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellants, as governmental parties, need not furnish a certificate of interested persons.

/s/ Lanora C. Pettit
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Statement Regarding Oral Argument

Appellants respectfully submit that this matter is appropriate for oral argument. During the pendency of this protracted litigation, the Texas State Preservation Board has amended the rules of the program from which Appellee claims to have been unlawfully barred. Currently, no exhibit can be displayed in the Texas Capitol unless it includes a placard that announces two things. First, it must disclose the public sponsorship of one of a list of specified state officials. And second, it must reflect the Board's agreement that the exhibit is appropriate for display in the historical context of the Capitol. While displayed, the exhibits are expressly adopted as government speech. Nevertheless, the district court permanently enjoined the Governor of Texas and the Board's Executive Director from engaging in viewpoint discrimination to exclude Appellee from a limited public forum that—if it ever existed—has now been closed. When and how a State may close a limited public forum is an important question of constitutional law about which this Court's precedent is underdeveloped. Appellants respectfully suggest that oral argument will aid in the Court's decisional process.

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INTRODUCTION

In July 2015, Plaintiff-Appellee Freedom From Religion Foundation ("FFRF") sought and received approval from the staff of the Texas State Preservation Board ("Board") to display a faux nativity scene on the grounds of the Texas State Capitol during the 2015 holiday season. Though ostensibly designed to celebrate the views of nonreligious Texans, FFRF's exhibit appeared designed to mock the sincerely held religious beliefs of millions of Texans, denigrate religion, and provoke litigation. ROA.1862. Because such ill-conceived aims did not comport with the "public purpose" requirement of the Capitol exhibit program as it existed in 2015, 13 Tex. Admin. Code § 111.13(d)(2), Governor Greg Abbott instructed the Executive Director of the Board to remove FFRF's exhibit.

FFRF immediately sued the Governor and the Board's Executive Director on a litany of claims including, as relevant here, a claim that removal of the exhibit abridged FFRF's rights under the Free Speech Clause. This is the third time the litigation is before this Court. The first appeal was voluntarily dismissed after FFRF agreed to drop many of its claims.[1] The second ended when this Court vacated and reversed the district court's retrospective declaratory judgment that Governor Abbott violated FFRF's rights in 2015 as jurisdictionally invalid. *Freedom From Religion Found., Inc., v. Abbott*, 955 F.3d 417, 425-26 (5th Cir. 2020) ("*FFRF II*").

[1] Agreed Mot. for Vol'y Dismiss. at 1, *Freedom from Religion Found. v. Abbott, Inc.*, No. 17-50956 (5th Cir. Mar. 14, 2018) ("*FFRF I*").

While this case has been pending, the Board, which administers the Capitol exhibit program, amended its rules in several ways that are material to this appeal. Most significantly, the rule now expressly adopts any exhibit approved for display on the Capitol grounds as government speech. 13 Tex. Admin Code §§ 111.13(b), (d)(3)(D), (d)(8), (e)(1). To make the governmental sponsorship of approved exhibits even more explicit, the amended rule requires the exhibit to "identify[] the State Official Sponsor and indicat[e] the approval of the office of the State Preservation Board." *Id.* § 111.13(b).

Assuming that the Capitol exhibit spaces were ever properly held to be a limited public forum under the three-factor test of *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), the State has now exercised its right to close that forum. Following the 2020 amendments, the Board effectively controls all aspects of the messages conveyed through the exhibits. 13 Tex. Admin. Code § 111.13(d)(5)-(7), (e). Any reasonable observer would understand those exhibits to communicate a message on behalf of the government, given the exhibits' location inside the Capitol and the required sign indicating the government's approval. And the exhibits at issue here fit comfortably within the historical tradition of governments using monuments to communicate messages to the public.

Because the forum to which FFRF seeks equal access has been closed, this case should have been dismissed and relief denied for two independent reasons. One, the amendments mooted FFRF's free-speech claim. And two, sovereign immunity bars any claim that FFRF makes for retrospective relief. *FFRF II*, 955 F.3d at 425-26.

But even if one assumes FFRF can overcome these jurisdictional hurdles, FFRF was still not entitled to an injunction. The district court granted FFRF an injunction based on the false premise that, once opened to private speech, the Capitol grounds could not be restricted only to messages with which the government wishes to associate by regulatory change. That premise is contrary to law. Accordingly, at the very least, the injunction should be vacated, and the trial court's judgment should be reversed.

Statement of Jurisdiction

FFRF invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331 because its claims arose under the U.S. Constitution and are brought pursuant to 42 U.S.C. § 1983. On May 5, 2021, the district court overruled Appellants' jurisdictional objections, entered final judgment for FFRF on its free-speech claim, and awarded prospective relief against Appellants. ROA.2409. On May 27, 2021, Appellants timely filed a notice of appeal. ROA.2423-24. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

Issues Presented

1. Whether the district court had jurisdiction to prospectively order Appellants to provide FFRF equal access to the Capitol exhibit after the Board closed the program to non-government speech.

2. Whether sovereign immunity bars the ordered relief because the amendments to the Capitol exhibit program's rules cured any ongoing violation of federal law.

3. Whether, even if FFRF could overcome the jurisdictional barriers to relief, the district court committed reversible error by enjoining the discriminatory application of rules that no longer exist.

STATEMENT OF THE CASE

I. The State Preservation Board and the Pre-2015 Capitol Exhibit Rule

The State Preservation Board is a state agency tasked with preserving and maintaining the Texas Capitol and its grounds. Tex. Gov't Code §§ 443.001, .007. The Board's membership consists of the Governor who serves as the Chairman, four additional elected officials, and one representative of the general public. *Id.* §§ 443.003, .004. The day-to-day operations are managed by an Executive Director and staff. *Id.* § 443.051.

In 1987, the Board promulgated a rule authorizing the placement of temporary exhibits in "Public areas of the Capitol and Capitol Extension," which is defined to include "[t]he hallways, entrances, vestibules, stairways, light courts, rotundas, and other areas adjacent to or near the rotunda." 13 Tex. Admin. Code § 111.13(a)(2). In practice, the program was limited to only three spaces: the Ground Floor Rotunda, the South Central Gallery, and the North Central Gallery. ROA.177, 2218. To be allocated one of these spaces, an exhibit—defined as "[a]ny display of artwork, including paintings, sculptures, arts and crafts; photographs; public service and general interest presentations; and historical displays," 13 Tex. Admin. Code § 111.13(a)(1)—needed sponsorship from the Governor, the Lieutenant Governor, the Speaker of the Texas House of Representatives, a Texas Senator, or a member

of the Texas House of Representatives. *Id.* § 111.13(a)(4). That sponsor's role was, however, largely limited to filling out an appropriate form on behalf of an exhibitor. ROA.82.

For much (if not all) of the program's thirty-year history, an exhibit also had to serve a "public purpose." 13 Tex. Admin. Code § 111.13(d)(2). At the time this suit was filed in 2016, "public purpose" was defined as "promotion of the public health, education, safety, morals, general welfare, security, and prosperity of all" residents of and visitors to Texas. *Id.* § 111.13(a)(3) (2012). The rules further explained that "[t]he chief test of what constitutes a public purpose is that the public generally must have a direct interest in the purpose and the community at large is to be benefitted." *Id.*; *see also* ROA.65 (reproducing the relevant language).

And for much of that history, the Capitol exhibit program has operated without controversy. Exhibitors were forbidden to use the space for commercial advertising, financial gain, lobbying, or political campaigning. 13 Tex. Admin. Code § 111.13; ROA.186-87. Any violation of these rules could—and did—lead to the removal of an exhibit. ROA.1649 (describing the removal of artwork with posted price tags). As a result, "the vast majority of exhibits" were uncontroversial, including "artwork exhibits from school kids" and "health-related exhibits from associations like the dental association or Texas Medical Association." ROA.1647. Absent unusual circumstances, exhibitors were not required to display any form of signage regarding who created or sponsored the exhibit. ROA.1225-26 (discussing that identifying signage was not required for FFRF's exhibit as well as a nativity sponsored by the Thomas More Society).

II. FFRF's 2015 Faux Nativity Scene

In July 2015, FFRF applied to display a faux nativity scene in the Rotunda during the 2015 Christmas season. ROA.390-97. The proposed exhibit depicted Benjamin Franklin, Thomas Jefferson, George Washington, and the Statue of Liberty gathered around a manger containing the Bill of Rights. ROA.363. It was originally to include a banner stating: "At this season of the winter solstice, LET REASON PREVAIL. There are no gods, no devils, no angels, no heaven or hell. There is only our natural world. Religion is but myth & superstition that hardens hearts and enslaves minds." ROA.485. Its message, however, proved so inflammatory that the state legislator who was to sponsor the exhibit pulled out. ROA. 547, 567.

FFRF was eventually able to find a sponsor, but only if significant changes were made. ROA.571-87. As approved by its sponsor, the display was accompanied by a banner reading, "Happy Winter Solstice / At this Season of the Winter Solstice, we honor reason and the Bill of Rights (adopted December 15, 1791) / Keep State & Church Separate / On Behalf of Texas Members of the Freedom From Religion Foundation." ROA.363. At the time, FFRF claimed that its exhibit was designed "to celebrate the view of Texans who are part of a religious minority or have no religion at all." ROA.398-99. FFRF has since conceded that the exhibit was devised in response to a Christian nativity scene that was displayed at the Capitol the previous year,[2] and it was submitted in the hopes of provoking an Establishment Clause violation. ROA.1862.

[2] A menorah was also displayed alongside the nativity scene. ROA.354.

In August 2015, the exhibit was approved by the Board's staff. ROA.533. From December 18 through December 22, 2015, FFRF's exhibit was displayed in the Ground Floor Rotunda of the Capitol. ROA.362-64. On December 22—one day before the exhibit was to be taken down—the Office of the Governor sent a letter asking the Board's Executive Director to remove the exhibit immediately on the ground that mocking the religious beliefs of others did not meet the definition of a "public purpose" as defined in the program's rules. ROA.401-03. Because of the Governor's role as chair of the Board, the Executive Director instructed that FFRF's faux nativity exhibit be removed from display in the Capitol. ROA.1212-13.

III. Procedural History Leading to *FFRF II*

A. Initial Proceedings Before the District Court

Following the removal of its faux nativity scene from the Capitol grounds, in February 2016, FFRF sued the Governor and the Board's Executive Director in their official and individual capacities. ROA.18-33. The operative complaint asserts five claims, four of which are based on the removal of the exhibit: (1) a free-speech claim under the First Amendment; (2) an equal-protection claim under the Fourteenth Amendment; (3) a claim under the Establishment Clause of the First Amendment; and (4) a due-process claim under the Fourteenth Amendment. ROA.125-51. The fifth claim is a First Amendment challenge to the structure of the exhibit program itself under the unbridled-discretion doctrine. ROA.142.

Most of FFRF's claims have been dismissed over the course of these long proceedings. All individual-capacity claims against the former Executive Director were

dismissed under Rule 12(b)(6). ROA.292-93. The equal-protection, due process, and unbridled discretion claims against Defendants in both their individual and official capacities were dismissed on Defendants' first motion for summary judgment. ROA.891. The Establishment Clause claim against Governor Abbott in his individual capacity was dismissed on his motion for judgment on the pleadings and second motion for summary judgment. ROA.1996-97. And the Establishment Clause claim against Defendants in their official capacities and the free-speech claim against Governor Abbott in his individual capacity were dismissed on the parties' joint stipulation of voluntary dismissal, ROA.2024, 2029, in exchange for dismissal of *FFRF I*, *supra* n.1.

As relevant here, Defendants moved for summary judgment on FFRF's official-capacity free-speech claim. ROA.490-98. Defendants argued that exhibits chosen for display at the Capitol are properly classified as government speech and therefore are not subject to the First Amendment. ROA.490-93. And Defendants argued that even if the exhibits were not government speech, the Capitol was a nonpublic or limited public forum, and that the Board's application of the "public purpose" requirement was a reasonable viewpoint-neutral restriction on speech. ROA.493-98. The district court disagreed. Applying the three-factor test last set out in *Walker*, the district court first held that exhibits displayed at the Capitol did not constitute government speech. ROA.875-78. Next, the court concluded that the Capitol exhibit areas constituted a limited public forum, that reasonable grounds existed for Defendants' exclusion of FFRF's exhibit, but that there was a genuine dispute of material fact as to

whether that exclusion was viewpoint neutral. ROA.878-85. As a result, the district court denied Defendants a summary judgment. ROA.891.

After conducting further discovery related to the free-speech claim, the parties filed cross-motions for summary judgment. ROA.1527-46, 1735-52. This time the district court granted FFRF summary judgment on the ground that under then-recent *Matal v. Tam*, 137 S. Ct. 1744 (2017), the removal of the exhibit was not viewpoint-neutral and violated the Free Speech Clause. ROA.1986-90. The district court then entered final judgment for FFRF and issued an order retrospectively declaring that the 2015 removal of its exhibit was unconstitutional. ROA.2030-31.

B. Proceedings Before this Court in *FFRF II*

Defendants appealed the district court's declaratory judgment, and FFRF cross-appealed the district court's earlier dismissal of its unbridled-discretion claim. ROA.2118, 2126. On appeal, Defendants argued that FFRF's free-speech claim was barred by sovereign immunity and did not fall within the *Ex parte Young* exception for two reasons: (1) the declaratory judgment issued by the district court was retrospective, and (2) there was no ongoing violation of federal law because Defendants would comply with *Matal*, which held for the first time that a State discriminates based on viewpoint when it regulates based on tone. *FFRF II*, 955 F.3d at 424, 425. For its part, FFRF argued that the district court erred by failing to award it injunctive relief on the free-speech claim and by granting Defendants a summary judgment on the unbridled-discretion claim. *Id.* at 424, 426.

This Court held that because FFRF's complaint sought prospective relief, its overall free-speech claim based on the removal of the exhibit fell within *Ex parte*

Young's exception to sovereign immunity *from suit*. *Id.* at 424. It also concluded that FFRF had established an ongoing violation of federal law because, even though *Matal* may have made "clear that speech cannot be prohibited on the basis of offensiveness," statements at oral argument from the Texas Solicitor General that Defendants would comply with *Matal* were not sufficient to establish that Defendants' "behavior will change post-*Matal*." *Id.* at 425.

The Court, however, recognized that the district court's declaratory judgment did not fall within *Ex parte Young's* exception to sovereign immunity *from liability*: it was "backwards-looking," "past-tense," and "tantamount to an award of damages for a past violation of law, even though styled as something else." *Id.* Therefore, the Court vacated and remanded for the district court to enter appropriate prospective declaratory or injunctive relief on the free-speech claim, as "appropriate." *Id.* at 424, 426. The Court also clarified the standards applicable for assessing unbridled-discretion claims "in the context of limited or nonpublic forums," and remanded for the district court to apply that test in the first instance. *Id.* at 429.

IV. Post-Remand Developments

A. The 2020 Amendment to the Capitol Exhibit Rule

FFRF's actions and subsequent lawsuit revealed certain ambiguities regarding the constitutional status of the Capitol exhibit program. ROA.2217-19 (summarizing conflicting views as to the appropriate use for the exhibit space). Moreover, the Supreme Court clarified that "[g]iving offense is a viewpoint," *Matal*, 137 S. Ct. at 1763, as is being "immoral or scandalous," *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297

(2019). As a result of these developments, the Board learned that if the Capitol exhibit program remained open to private speech, the Board could not exclude exhibits even if they are "offensive to a substantial percentage" of those visiting Texas's seat of government. *Matal*, 137 S. Ct. at 1763. To address these developments, the State Preservation Board proposed amendments to the Capitol exhibit rule in May 2020. ROA.2215-23. Those amendments were adopted with certain modifications effective July 20, 2020. 13 Tex. Admin Code § 111.13. The amendments affect FFRF's ability to display exhibits at the Capitol in the future—and to continue to prosecute this case—in several key ways.

Most notably, the Board clarified that "[a]ny exhibit approved and scheduled pursuant to this section by the office of the State Preservation Board is hereby adopted as government speech." *Id.* § 111.13(b). The rule retains the requirement that an exhibit must be sponsored by one of the listed elected officers of Texas's government. *Id.* § 111.13(b), (d)(3)(D). But those officials may only sponsor exhibits by their own constituents. *Id.* § 111.13(a)(4).

Sponsorship is also no longer enough: as they existed in 2015, the rules stated that "[e]xhibitions shall be approved and scheduled" by the Board if they had a sponsor and met the listed criteria. *Id.* § 111.13(c)(1) (2012). Now, the Board has discretion to reject any exhibit: exhibits simply "*may* be approved and scheduled" under those conditions. *Id.* § 111.13(d)(1) (2020) (emphasis added). For an exhibit to even be considered by the Board, it must now include a statement from the exhibit's government sponsor that the exhibit "meets the criteria and is appropriate for adoption as government speech." *Id.* § 111.13(d)(3)(D).

The criteria for whether an exhibit is appropriate for adoption as government speech continue to include a public-purpose requirement. *Id.* § 111.13(d)(2). As adopted in the final amendments, the phrase "public-purpose requirement" is very similar to the definition in 2015, *compare id.* § 111.13(a)(3) (2012), *with id.* § 111.13(a)(3) (2020), but it removed the term "morals," the inclusion of which may be improper following the Supreme Court's recent decision in *Iancu*, 139 S. Ct. at 2297.

Finally, should the exhibit be accepted for display in the designated Capitol exhibit areas, it must now "be accompanied by a statement identifying the State Official Sponsor and indicating the approval of the office of the State Preservation Board." 13 Tex. Admin. Code § 111.13(b). And even after approval, it is the Board, not the exhibitor, who has ultimate control over the exhibit's contents and manner of display. In 2015, the Board had "the right to require the exhibitor to make aesthetic changes to the exhibit." *Id.* § 111.13(c)(5) (2012). The amendments reserve to the Board "the right to require the exhibitor to make *any* changes to the exhibit." *Id.* § 111.13(d)(5) (emphasis added). And they give the Board total discretion over the manner of the exhibit's display, where it is displayed, and how long it is displayed. *Id.* § 111.13(d)(6), (d)(7), (e).

At the time the 2020 amendments were adopted, FFRF had not applied to display in the Capitol in nearly five years, even though nine months earlier, the State's Solicitor General essentially invited FFRF to reapply in open court. Oral Argument, *FFRF II*, 955 F.3d 417 (5th Cir. Oct. 10, 2019) ("They won't take yes for an answer, Your Honor.").

B. Proceedings on Remand Before the District Court

On remand, Defendants argued that the May 2020 amendments to the Capitol Exhibit rule prevented FFRF from obtaining the relief it seeks: an order declaring the Capitol exhibit program as it existed in 2015 to have been a limited public forum and an injunction requiring Defendants to provide equal access to that forum regardless of an exhibit's offensiveness. ROA.2190-91. Specifically, Defendants argued that the amendments to the rule mooted FFRF's free-speech claim, ROA.2192-2204, and that sovereign immunity barred the district court from entering relief because Defendants could no longer be discriminating with regard to who has access to a public forum based on viewpoint because the forum no longer exists, ROA.2205-12. Defendants also explained how principles of equity prevent a court from ordering that an individual be granted access to a program that does not exist. ROA.2238-39.

The district court disagreed. The court held that the amendments to the Capitol exhibit rule did not transform exhibits approved for display into government speech. ROA.2398-2401. Applying *Walker*'s three-factor test, the district court reasoned that (1) exhibits at the Capitol had not been historically used by the government for communicating to the public, and (2) a reasonable observer would not interpret an exhibit as conveying a message on the government's behalf. ROA.2398-2401. The court also suggested that Texas lacked to the power to close the Capitol grounds to private speech in any event. ROA.2397-98. As a result, the court held that FFRF's claim seeking equal access to exhibit program was not moot, ROA.2401, and that

there was still an ongoing violation of federal law within the meaning of *Ex parte Young* and this Court's decision in *FFRF II*.[3] ROA.2402-03.

Accordingly, the district court entered an order awarding declaratory and injunctive relief. ROA.2409. This appeal followed. ROA.2423-24.

SUMMARY OF THE ARGUMENT

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.

I. This case was moot before the district court issued its order. The amendments to the Capitol exhibit rule expressly adopt any exhibit approved for display by the Board as government speech. 13 Tex. Admin. Code § 111.13(d). Because government speech is not restricted by the First Amendment, *Walker*, 576 U.S. at 207, FFRF can no longer maintain a free-speech claim seeking prospective relief. Because the amendments to the Capitol exhibit rule thus discontinued the challenged practice in a manner that complies with the Constitution, FFRF's claim is moot.

To the extent the district court held that a live controversy remained because Texas *could not* alter the open character of the Capitol exhibit program, this was error. The Supreme Court has long held that "a state is not required to indefinitely retain the open character of [a] facility" that is not traditional public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). And because the

[3] The district court again rejected FFRF's unbridled-discretion claim. ROA.2404-07. FFRF has not appealed that decision, and the time to do so has lapsed.

Texas Capitol exhibit areas were only ever (at most) limited public fora, *FFRF II*, 955 F.3d at 428-29; ROA.2404, the State was free to alter the status of those fora at will.

The district court also erred by holding that the amendments to the Capitol exhibit rule *did not* close the forum by adopting any exhibit displayed in the Capitol as government speech. The balance of the three *Walker* factors points decisively towards a finding that any exhibit approved for display by the Board on the State Capitol grounds constitutes government speech. The Board effectively controls the messages conveyed through the exhibits by exercising final approval authority over their selection, content, appearance, and duration. *Walker*, 576 U.S. at 210, 213. Any reasonable observer would consider the exhibits to be communicating a message on behalf of the government, given the exhibits' location inside the Texas State Capitol and the mandated sign indicating the approval of at least two government actors. *Id.* at 210, 212-13. And the exhibits at issue here fit comfortably within the historical tradition of governments using monuments to communicate messages to the public. *Id.* at 209-11; *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470-71 (2009).

II. Defendants' sovereign immunity from suit also bars the issuance of any relief to FFRF on its free-speech claim. This Court has already held that federal courts lack jurisdiction simply to declare that the removal of FFRF's exhibit in 2015 was unlawful. *FFRF II*, 955 F.3d at 424-26. Because the rule that FFRF challenged is no longer in effect, FFRF can no longer demonstrate that there is an "ongoing violation of federal law." *NiGen Biotech, LLC v. Paxton*, 804 F.3d 389, 394 (5th Cir. 2015).

And without establishing that key element, FFRF cannot fit within *Ex parte Young*'s narrow exception to sovereign immunity.

III. Finally, the district court erred by concluding that its analysis in 2016 entitled FFRF to relief in 2021. Principles of equity require courts to order injunctive relief based on the facts and law as they exist now. FFRF has offered evidence of only one putatively unconstitutional act: the removal of its exhibit in 2015. Absent the possibility of a repeat of that act, FFRF is not entitled to prospective relief as a matter of law.

STANDARD OF REVIEW

This Court "review[s] questions of federal jurisdiction de novo." *FFRF II*, 955 F.3d at 423 (quoting *Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 524 (5th Cir. 2008)). That "includes questions of sovereign immunity . . . and mootness." *Id.* (citing *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014), and *Env't Conservation Org.*, 529 F.3d at 524).

ARGUMENT

I. The District Court Lacked Jurisdiction Because FFRF's First Amendment Claim Is Moot.

Under well-established standards, the Board's amendments to the Capitol exhibit program mooted FFRF's free-speech claim while this case was on remand. Under the amendments to the Capitol exhibit rule, any exhibit adopted for display by the Board constitutes government speech, and thus falls outside the scope of the First Amendment. That fact is confirmed by balancing the three factors established in *Summum* and expounded upon in *Walker*. The district court erred in holding

otherwise, and this Court should vacate and remand with instructions to dismiss this case as moot.

A. The Capitol Exhibit Rule amendments are a regulatory change to a challenged practice that forecloses any live dispute.

The Constitution permits federal courts to adjudicate only "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988); U.S. Const., art. III. This live-controversy requirement applies independently to each claim and each form of relief sought. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). And it "subsists through all stages of federal judicial proceedings[.]" *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). Because FFRF challenges a rule that no longer exists, its case no longer presents a live controversy and should have been dismissed.

1. The case-or-controversy requirement forbids federal courts from resolving disputes "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). This rule applies "where, as a result of intervening circumstances, there are no longer adverse parties with sufficient legal interest to maintain the litigation." *In re Cmty. Home Fin. Servs., Inc.*, 990 F.3d 422, 426 (5th Cir. 2021) (quoting *Scruggs v. Lowman (In re Scruggs)*, 392 F.3d 124, 128 (5th Cir. 2004)). This court has long held that "*any* set of circumstances that eliminates the actual controversy after the commencement of a lawsuit" generally "renders that action moot." *Fontenot v. McCraw*, 777 F.3d 741, 747 (5th Cir. 2015) (emphasis added). Thus, "[i]f an intervening circumstance

deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (quoting *Lewis*, 494 U.S. at 477-78).

As relevant here, "statutory changes that discontinue a challenged practice are 'usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.'" *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) (dismissing as moot Second Amendment challenge to New York City rule regarding transport of firearms even when the City amended its ordinance "[a]fter we granted certiorari").

For non-governmental defendants, a defendant's "voluntary cessation" of a challenged practice generally does not moot a case unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd*, 563 U.S. 277 (2011). This is a "heavy burden" for private defendants to bear. *Laidlaw*, 528 U.S. at 189.

But a governmental entity asserting mootness stands on different footing. *See Stauffer v. Gearhart*, 741 F.3d 574, 582 (5th Cir. 2014) (per curiam) (stating that governmental entities "bear" a "lighter burden" to "prov[e] that the challenged conduct will not recur"). "[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." *Sossaman*, 560 F.3d at 325. That is because "government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties." *Id.* And this presumption of good faith means that "[w]ithout evidence to the contrary," this Court "assume[s] that formally announced changes to official governmental policy are not mere litigation posturing." *Id*; *see, e.g.*, *DeMoss v. Crain*, 636 F.3d 145, 150-51 (5th Cir. 2011) (per curiam) (same); *Turner v. TDCJ*, 836 F. App'x 227, 229-30 (5th Cir. 2020) (per curiam).

This principle applies not only in the context of laws and ordinances, but also to state agency policies and administrative rules. *See, e.g.*, *Stauffer*, 741 F.3d at 581-83. For example, in *Yarls v. Bunton* this Court considered a challenge to the Louisiana public defender's practice of placing indigent, non-capital defendants on waitlists because it had insufficient resources to provide them all with counsel. 905 F.3d 905, 907 (5th Cir. 2018). After the State provided an influx of funding to the public defender's office, the Court observed, "[c]urrent waitlists in the districts for non-capital defendants are non-existent." *Id.* at 908. Despite the constitutional significance of the plaintiffs' claim and their argument that "the revenue boost [w]as an insufficient stopgap given public defenders' caseloads," the Court held "the legal upshot" to be "unmistakable: The controversial waitlists are no longer in controversy. And no waitlists = no live case or controversy = no jurisdiction." *Id.* As *Yarls* recognized, in cases like this, there "is another constitutional safeguard" in play: "the mootness

doctrine derived from Article III's 'case or controversy' requirement." *Id.* at 907. Defendants acknowledge (indeed, revere) the First Amendment. But no limited public forum = no live case or controversy = no jurisdiction. *See id.* at 908.[4]

Taken together, cases like *Stauffer* and *Yarls* stand for the proposition that when a government policy eliminates any live dispute, the burden of proof flips: the party seeking to avoid dismissal—here, FFRF—bears the burden to show that a live case remains. Defendants had no burden to show that the case was moot. *See, e.g.*, *Stauffer*, 741 F.3d at 582 (quoting *Sossamon*, 560 F.3d at 325). For example, in *Brazos Valley Coalition for Life, Inc. v. City of Bryan*, this Court held that the voluntary-cessation exception did not save a plaintiff's claim because the record contained "nothing whatever to suggest that the City intend[ed] to repeal" the amendment that eliminated the plaintiff's injury after the "case is over." 421 F.3d 314, 322 (5th Cir. 2005).

2. Because FFRF provided no evidence that the Board intended to reverse the 2020 amendments, application of these well-established jurisdictional principles should have led the district court to dismiss this lawsuit as moot. FFRF's free-speech claim centers on the allegation that Defendants engaged in viewpoint- and content-based discrimination when they removed FFRF's faux nativity display from the Texas Capitol grounds in December 2015. ROA.28, 787-90. Key to this First Amendment challenge, however, is the assumption that the Capitol exhibit areas are

[4] *See also, e.g.*, *Moore v. Brown*, 868 F.3d 398, 407 (5th Cir. 2017) (per curiam); *Staley v. Harris Cnty.*, 485 F.3d 305, 307 (5th Cir. 2007) (en banc); *Ovadal v. City of Madison*, 469 F.3d 625, 628-29 (7th Cir. 2006); *Watters v. Otter*, 981 F. Supp. 2d 912, 935 (D. Idaho 2013).

limited public fora for private speech, the regulation of which is subject to the First Amendment. *See Walker*, 576 U.S. at 215; *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) (contrasting constitutional status of private and government speech).

Assuming that the Capitol exhibit program was properly considered a limited public forum in 2015, it is no longer such a forum now.[5] Under the new rules, "[a]ny exhibit approved and scheduled" for display at the Texas Capitol "is hereby adopted as government speech." 13 Tex. Admin. Code § 111.13(b). Indeed, the amended rule makes this point no fewer than four times. *Id.* § 111.13(b), (d)(3)(D), (d)(8), (e)(1). Proposed exhibits must be certified as appropriate for adoption as government speech by a sponsoring state official before even being considered. *Id.* § 111.13(a)(4), (d)(3)(D). The Board has exclusive authority to control the content of exhibits by (among other things) reviewing "every word" prior to display, *id.* § 111.13(d)(3)(A), retaining discretion as to whether and for how long to display an exhibit, *id.* § 111.13(d)(5)-(6), (e)(2), and reserving the right to require "any changes" to any exhibit, *id.* § 111.13(d)(5). The amended rule further requires that exhibits be accompanied by a statement identifying the sponsoring state official and indicating Board approval. *Id.* § 111.13(b).

[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. But the Court need not address the question because, as discussed below (at 38-42), whether FFRF is entitled to an injunction on the merits is determined under the program as it exists today.

3. The distinction between private speech and government speech is dipositive because "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 576 U.S. at 207. That principle recognizes that "it is the democratic electoral process that first and foremost provides a check on government speech." *Id.* (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)). For that reason, "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Id.*; *Johanns*, 544 U.S. at 559.

The amendments eliminate the constitutional basis for FFRF's First Amendment claim. At its heart, FFRF is asserting that it has been treated unequally in access to a public benefit provided to other exhibitors. *See, e.g.*, ROA.24. But "the First Amendment does not tell us which way to cure the unequal treatment in this case." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2355 (2020). Instead, "[w]hen the constitutional violation is unequal treatment, as it is here, a court," legislature, or executive body, "can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all." *Id.* at 2354 (citing *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)). That is, the government actor can "'level up' (everyone gets [to enjoy the benefit]) or 'level down' (no one gets to)." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 417 (5th Cir. 2020) (Ho, J., concurring); *see also Perry Educ. Ass'n*, 460 U.S. at 46. Here, the State chose to level down by closing the forum.

This is a textbook example of mootness. The amendments to the rule are a regulatory change, adopted through formal notice-and-comment procedures, "that discontinue[s] a challenged practice" in a manner that satisfies the Constitution, *Fantasy Ranch*, 459 F.3d at 564, thereby depriving Plaintiff "of a 'personal stake in the outcome of the lawsuit,'" *Genesis Healthcare*, 569 U.S. at 72. Under these circumstances, FFRF's free-speech claim became moot upon effectiveness of the rule, and the district court lacked jurisdiction to award relief on the First Amendment claim.

B. The district court erred in holding that the amendments to the Capitol Exhibit Rule did not moot this lawsuit.

The district court offered two justifications for declining to hold this case moot. *First*, the district court suggested that Texas lacked the power to alter the First Amendment status of the Capitol. ROA.2398. *Second*, it held that even if the State had such power, the State had not validly exercised it merely by expressly adopting all exhibits in the Capitol as government speech. ROA.2398-2402. Neither ground has merit.

1. States are free to alter the open status of limited public fora like the Texas State Capitol grounds.

Contrary to the district court's assertion, the State *can* change "the First Amendment status of the Capitol exhibit area" through regulatory action. ROA.2398. The Supreme Court has long held that "a state is not required to indefinitely retain the open character of [a] facility." *Perry Educ. Ass'n*, 460 U.S. at 46. This rule applies with equal force where the government changes the "character" of a facility by closing a space to the public but leaving it open for government speech.

See id. The district court did not cite, let alone explain how its decision can be reconciled with, *Perry*, or with the cases from this Court and its sister circuits that establish, in the context of a limited public forum, that the State "may close the fora whenever it wants." *Currier v. Potter*, 379 F.3d 716, 728 (9th Cir. 2004); *see also Yselta Fed'n of Teachers v. Ysleta Indep. Sch. Dist.*, 720 F.2d 1429, 1432 (5th Cir. 1983).

Other courts facing analogous circumstances have held that the government's change to forum rules either mooted or significantly altered the plaintiff's First Amendment claims. For example, the Seventh Circuit considered a city ordinance that forced an individual to remove anti-homosexuality protest signs from highway overpasses on the ground that the signs violated the City's traffic-hazard policy, not because of the signs' anti-homosexuality viewpoint. *Ovadal v. City of Madison*, 469 F.3d 625, 628-29 (7th Cir. 2006). The City later adopted an ordinance prohibiting any signs visible from highways with speed limits over forty miles per hour. *Id.* at 628. The Seventh Circuit held that the plaintiff's "request for declaratory and injunctive relief" against the previous traffic hazard policy "has been rendered moot by the passage of the ordinance" because "the ordinance now replaces the behavior that is the subject of the complaint, making the alleged unconstitutional behavior effectively impossible." *Id.* at 629.

The Fourth Circuit similarly considered changes to a City's rule regarding who could hang flags from City-owned light-posts. *Sons of Confederate Veterans, Va. Div. v. City of Lexington*, 722 F.3d 224, 231 (4th Cir. 2013). Under the City's old rule, private organizations could hang flags with the City's approval, but after the plaintiff

secured approval to hang Confederate flags, the City limited use of the flag standards to specific, City-selected flags. *Id.* at 226-27. In upholding the City's action, the Fourth Circuit noted, "[i]t is important to our resolution of this case that the Supreme Court has recognized that 'a state is not required to indefinitely retain the open character of [a designated public forum].'" *Id.* at 231 (quoting *Perry*, 460 U.S. at 46) (alteration in *Sons*). The Fourth Circuit further noted that the City's motive in changing the rule was irrelevant: "it appears that the City experimented with private speakers displaying flags on the City's standards, and that effort turned out to be troublesome. It was entitled, under the controlling principles, to alter that policy." *Id.* at 232. So too here. Texas has determined that it "would prefer to reserve its" Capitol exhibit spaces for government speech and "was entitled, under the controlling principles, to alter [its] policy" governing Capitol exhibits. *Id.*

The three cases cited by the district court are not to the contrary. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656 (1993) (cited at ROA.2401-02) involved legislative amendments to Jacksonville's ordinance affording preferential treatment to minority contractors. The Supreme Court held that the amendments did not moot the case because they did not cure the Equal Protection Clause violation: they "disadvantage[d] [plaintiffs] to a lesser degree then the old [ordinance]" but still "disadvantage[d] them in the same fundamental way." *Id.* at 662. Here, by contrast, Texas's adoption of any exhibit approved for display by the Board as government speech cures the constitutional injury—namely, disparate access to the same public forum. *Barr*, 140 S. Ct. at 2355.

The remaining two cases—*United States Postal Service v. Council of Greenburg Civic Associations*,453 U.S. 114 (1981), and *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002) (cited at ROA.2398)—stand for the uncontroversial principle that the State may not alter "the 'public forum' status of streets and parks which have historically been public forums." *Council of Greenburg*, 453 U.S. at 133; *First Unitarian Church*, 308 F.3d at 1128, 1133. But that principle has no application here because the Capitol grounds have not "historically been [a] public forum[]" like a street, sidewalk, or park. *Council of Greenburg*, 453 U.S. at 133. Rather, as both this Court and the district court have recognized, the Texas Capitol is a "limited public forum." *FFRF II*, 955 F.3d at 428-29; ROA.2404. And as *Perry* and its progeny teach, the State may close a limited public forum if it so chooses.

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

There can be no dispute that the State chose to close the Capitol grounds as a forum here. *See* ROA.2217. As discussed above, the new rules not only expressly adopt any exhibit approved by the Board as government speech, but they also take a number of steps that inform the public of that adoption—*e.g.*, requiring a sign identifying the speaker. *Supra* at 10-12, 21. The district court's contrary conclusion that the exhibits remain private speech misapplied *Walker*. ROA.2399-2401. There, the Court reiterated that three non-exclusive factors developed in *Summum* can be used to assess whether a particular form of speech counts as 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. Each of these factors individually—and all of the factors collectively—tips decisively in favor of a finding that the exhibits accepted by the Board for display at the Texas Capitol constitute government speech.

a. Even the district court recognized that Defendants "retain final approval authority over the exhibits in the Capitol exhibit area." ROA.2401. For an exhibit to be considered for display by the Board, it must first be accompanied by a statement from a qualified sponsor certifying that the exhibit is appropriate for display as government speech under enumerated statutory criteria. 13 Tex. Admin. Code § 111.13 (d)(3)(D). Even with that sponsorship, "[t]he Board must approve every [exhibit] design proposal before the design can appear" in the Texas Capitol. *Compare Walker*, 576 U.S. at 213, *with* 13 Tex. Admin. Code § 111.13(d)(1). The Board further "reserves the right to require the exhibitor to make any changes to the exhibit." *Compare* 13 Tex. Admin. Code. § 111.13(d)(5), *with Walker*, 576 U.S. at 213 ("the State has sole control over the design, typeface, color, and alphanumeric pattern for all license plates"). And the Board retains complete control over the manner of the exhibit's display, where it is displayed, and how long it is displayed. 13 Tex. Admin. Code § 111.13(d)(6), (d)(7), (e). Under these conditions, the exhibitor may propose the topic, but the Board controls the discussion.

b. The second factor—whether an observer of the exhibits would consider them to be the government's speech—likewise points towards a finding that any exhibit adopted for display by the Board constitutes government speech. These

exhibits are displayed on the grounds of the Texas Capitol, *id.* § 111.13 (a)(2)—the very seat of the State's government. There are few places in Texas more "closely identified in the public mind with the government" than the State Capitol itself. *Summum*, 555 U.S. at 472. Indeed, the State Capitol, "play[s] an important role in defining the identity that [the State] projects to its own residents and to the outside world." *Id.*; *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.'").

For that reason, the Board selects exhibits "that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture," *Summum*, 555 U.S. at 472, through the public-purpose requirement, 13 Tex. Admin Code § 111.13(a)(3). Thus, much like the monuments at issue in *Summum* and more than the vanity license plates at issue 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." *Summum*, 555 U.S. at 472.

To the extent that the public could doubt that the State approved the messages in its statehouse, the Board required a sign to be emblazoned on the exhibit "identifying the State Official Sponsor and indicating the approval of the office of the State Preservation Board." 13 Tex. Admin. Code § 111.13(b). In other words, "[t]he governmental nature of the [exhibits] is clear from their faces." *Walker*, 576 U.S. at 212.

The district court held to the contrary for three reasons: (1) a reasonable observer "would not reference the Texas Administrative Code to note that the Board

'expressly adopts' the exhibits as government speech"; (2) the exhibit creator might also identify itself or its own purposes, thus distancing the exhibit from the government; and (3) the government's mere "approval" is insufficient to confer government-speech status under *Matal*. ROA.2399-2400. None of these justifications has merit.

First, the district court understated the importance of the government's express adoption of these exhibits. Compared to other free-speech doctrines, the government-speech doctrine is "recently minted." *Summum*, 555 U.S. at 481 (Stevens, J., concurring). When applied to circumstances where a private party proposes—but the government promulgates—speech, courts are careful that the doctrine "not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." *Id.* at 473 (majority op.). While not a requirement, one "solution" to this dilemma is for government entities "to go through a formal process" of "embracing 'the message' that [a] monument conveys." *Id.* Texas has established a process of curating and adopting messages proposed by others that is at least as formal as others that have been held as creating government speech. *E.g.*, *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 330-31 (1st Cir. 2009) (collecting cases and concluding that "by choosing only certain hyperlinks to place on [its] website," a municipality "communicated an important message about itself").

Moreover, it is not just the "Texas Administrative Code" that clues a viewer in to the fact that the exhibit is government speech, but it is also the mandated language appearing on the exhibit "identifying the State Official Sponsor and indicating the approval of the office of the State Preservation Board" and its display at the State

Capitol. 13 Tex. Admin. Code § 111.13(b). Signs and other forms of attribution have traditionally been understood to convey to the observer the identity of the speaker. *E.g.*, *Wells v. City & County of Denver*, 257 F.3d 1132, 1140-41 (10th Cir. 2001) (discussing *Knights of Ku Klux Klan v. Curators of Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000)); *cf. Texas v. Knights of Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995) (allowing State to reject a private party's participation in the adopt-a-highway program because of the significance of a highway sign).

Second, that an exhibit creator might initially propose a display that identified the creator and its own purposes does not mean that the Board would approve such a display. After all, the Board "reserves the right to require the exhibitor to make any changes to the exhibit." 13 Tex. Admin. Code § 111.13(d)(5). Nor would a reference to the exhibitor and its own purposes mean that a reasonable observer would disassociate the message from the government. *Wells*, 257 F.3d at 1140-41. If that were true, then *Walker* and *Summum* would have come out the other way. They did not because "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. Here, not only is the property owner the State of Texas, but the property in question is its very seat of government. Other courts have held that a reasonable observer would associate speech with the government where the relationship between the government and the property was far more mundane. *E.g.*, *Vista-Graphics, Inc. v. Va. Dep't of Transp.*, 682 F. App'x 231, 236 (4th

Cir. 2017) (per curiam) (examining "rest areas . . . operated by the Commonwealth [that] are located along public highways").

Third, *Matal*'s discussion of what constitutes government speech is far afield of this case. There, the Supreme Court held that the U.S. Patent and Trademark Office ("PTO") violated the Free Speech Clause when it denied a rock band's trademark application on the ground that the band's name "disparaged" racial minorities. 137 S. Ct. at 1751. In doing so, the Court rejected the government's argument that the PTO's approval of a trademark transformed that trademark into government speech. *Id.* at 1758-59. Several aspects of the federal trademark-licensing scheme are materially distinguishable from Texas's approval apparatus for exhibits displayed at the Capitol.

As an initial matter, a PTO "examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy," and "does not edit marks submitted for registration." *Id.* at 1758. By contrast, the Board here *does* consider whether the proposed exhibit serves a "public purpose" and is appropriate for adoption as government speech, and it "reserves the right to require the exhibitor to make any changes to the exhibit." 13 Tex. Admin. Code § 111.13(d)(2), (d)(5).

Moreover, "registration" of the mark by the PTO "is mandatory" if it "meets the Lanham Act's viewpoint-neutral requirements." *Matal*, 137 S. Ct. at 1758. Before the 2020 amendments, the rules of the Capitol exhibit program did mandate that "[e]xhibitions shall be approved and scheduled" if the regulatory criteria were met. 13 Tex. Admin. Code § 111.13(c)(1) (2012). Now, however, the rule provides that exhibits "*may* be approved and scheduled." 13 Tex. Admin. Code § 111.13(d)(1)

(emphasis added). Under Texas law, use of the phrase "'[m]ay' creates discretionary authority or grants permission or a power." Tex. Gov't Code § 311.016(1); *see generally* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 939-42 (2d ed. 1995) (distinguishing "shall" and "may").

Finally, "once a mark is registered, the PTO is not authorized to remove it from the register" except under specified conditions. *Matal*, 137 S. Ct at 1758. By contrast, the Board retains complete control over the manner of the exhibit's display, where it is displayed, and how long it is displayed, even after it is approved. 13 Tex. Admin Code §§ 111.13(d)(6), (d)(7), (e). *Matal*, therefore, does not support the district court's conclusion that exhibits displayed in the Capitol are private speech notwithstanding the Board's express adoption of those exhibits as government speech.

c. The final factor of the *Walker* test—whether governments have historically used the medium at issue for "communicat[ing] messages" to the public, 576 U.S. at 210-11—also favors the conclusion that exhibits, like other artwork displayed in the Capitol, constitute government speech. As the Supreme Court observed in *Summum*, "monuments displayed on public property typically represent government speech," since "[g]overnments have long used monuments to speak to the public" from "ancient times" through the present. 555 U.S. at 470. The exhibits at issue here are directly analogous to monuments. Indeed, monuments fit within the statutory definition of an exhibit: "[a]ny display of artwork, including paintings, sculptures, arts and crafts; photographs; public service and general interest presentations; and historical displays." 13 Tex. Admin. Code § 111.13(a)(1). For that reason, the historical tradition of governmental use of monuments and other forms of public art

to convey public messages applies equally to exhibits. *Summum*, 555 U.S. at 470-71. Indeed, the purposes of exhibits and monuments are one and the same: "convey[ing] some thought or instill[ing] some feeling in those who see" them. *Id.* at 470.

The district court held to the contrary because "the Capitol exhibit area's history has not changed since the court's 2016 analysis" of the parties' motions for summary judgment. ROA.2399. This analysis addresses the wrong question: this element of the *Walker* test examines whether governments have generally used the medium in question to communicate their messages—not whether this avenue of speech has been utilized by the government. 576 U.S. at 210; *see also Summum*, 555 U.S. at 475-78. Indeed, 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. As discussed above (at 23-26), that is not how the law works.

Even if the relevant focus was limited to the pre-amendment history of Texas's Capitol exhibit program, the district court was wrong to define the question—as it did in 2016—as whether the "record establish[es] the Capitol exhibits displayed in the Ground Floor Rotunda have previously been used by the government as a platform to reach the public." ROA.876. This statement does not consider the broad definition of the phrase "exhibit," or explain how an observer who reads a sign identifying the government speaker could fail to understand the distinction between artwork displayed on the ground floor of the Rotunda as part of the exhibit program and artwork hung elsewhere in the Capitol.

The appropriate level of generality is guided by *Summum*, which considered whether governments have traditionally used monuments to convey messages to the

public—not whether particular types of permanent monuments had been used. 555 U.S. at 470-72. And it is confirmed in *Walker*, where the Supreme Court examined the nationwide tradition of States using license plates to communicate to the public—not whether Texas had a long-standing tradition of utilizing particular types of vanity plates. 576 U.S. at 210-11. Viewed properly, then, the question is whether governments have historically used public art—like monuments—to communicate to the public. Because they have, this *Walker* factor supports the conclusion that exhibits adopted for display at the Capitol by the Board constitute government speech. *See* John Barlow, *Unringing the Bell: Publicly Funded Art and the Government Speech Doctrine*, 34 LOY. L.A. ENT. L. REV. 67, 91-92 (2014) (describing "classic public art" used by the government). Because Texas is no longer opening its Capitol exhibit areas to private speech, FFRF's claim that it has been discriminated against in its effort to access the program is moot.

II. Sovereign Immunity Bars FFRF's Free Speech Claim Because There Can No Longer Be Any Ongoing Violation of Federal Law.

A separate and independent jurisdictional barrier should have prevented the district court from issuing injunctive relief here: sovereign immunity. "In most cases, . . . sovereign immunity bars private suits against nonconsenting states in federal courts." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019), *cert. denied* 141 S. Ct. 1046 (2021). The *Ex parte Young* doctrine—"a legal fiction that allows private parties to bring suits for injunctive or declaratory relief against individual state officials acting in violation of federal law," *id.* (quoting *Raj. v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2012))—represents a "narrow exception" to that rule.

Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996). For the exception to apply, "three criteria must be satisfied": "(1) A plaintiff must name individual state officials as defendants in their official capacities'"; "(2) the plaintiff must 'allege[] an ongoing violation of federal law'"; and "(3) the relief sought must be 'properly characterized as prospective.'" *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 471 (5th Cir. 2020) (en banc) (alteration in original) (internal citations omitted). FFRF's lawsuit fails the second element of the *Ex parte Young* test.

A. Because the rule that FFRF claims was unconstitutional no longer exists, any relief would be retrospective and impermissible.

To satisfy *Ex parte Young*, a plaintiff must show "that the defendant *is violating* federal law, not simply that the defendant has done so." *NiGen*, 804 F.3d at 394. 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)). "This requirement is similar but not identical to the Article III minimum for standing to request an injunction, which requires ongoing harm or a threat of imminent harm." *NiGen*, 804 F.3d at 394 n.5.

The Supreme Court has repeatedly held that sovereign immunity bars retrospective relief (even in cases where the plaintiff sought prospective relief). In *Edelman v. Jordan*, for example, the district court entered a prospective injunction against state officers to stop an ongoing violation of federal law, yet the Supreme Court still held that the lower court's injunction ordering retroactive benefits was

barred by sovereign immunity. 415 U.S. 651, 666-69 (1974). As the Supreme Court later explained in *Quern v. Jordan*, "[t]he distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other." 440 U.S. 332, 337 (1979); *see also Green v. Mansour*, 474 U.S. 64, 68 (1985); *Chiz's Motel & Rest., Inc. v. Miss. State Tax Comm'n*, 750 F.2d 1305, 1308 (5th Cir. 1985).

FFRF cannot show a current, ongoing violation of federal law here. As explained above, after the amendments, all exhibits approved by the Board are government speech outside the purview of the First Amendment. *Supra* at 26-34. Because there is no constitutional basis for a First Amendment claim in a case involving government speech, *Walker*, 576 U.S. at 207, the most that FFRF could hope to establish is that its free-speech rights were "violated at one time or over a period of time in the past," *Corn*, 954 F.3d at 275.[6]

This Court has already held that the 2015 removal of FFRF's exhibit—standing alone—will not support an injunction. *FFRF*, 955 F.3d at 423. It held that a "backwards-looking, past-tense declaratory judgment" that the removal violated FFRF's rights would be "'tantamount to an award of damages for a past violation of law, even though styled as something else.'" *Id.* at 425 (quoting *Papasan*, 478 U.S. at 278). And it further recognized that, in a case brought under the *Ex parte Young*

[6] Any declaratory relief is similarly barred. *FFRF*, 955 F.3d at 425-26; *Green*, 474 U.S. at 68-69.

fiction, "the Eleventh Amendment bar[s] a claim for declaratory relief once [a] claim for injunctive relief [i]s rendered moot." *Id.* at 425-26 (citing *Green*, 474 U.S. at 68-69).

B. FFRF has not shown any ongoing violation of federal law.

Even if the change in law were not dispositive in this case, FFRF has not shown any ongoing violation of federal law; instead, it relies on an over-broad view of the Court's mandate rule. For the reasons discussed below (at 38-42), this argument fails on the merits. It also fails to show an ongoing violation of federal law sufficient to satisfy *Ex parte Young*.

For more than eighteen months before the 2020 amendments, the State has consistently represented that following *Matal*, if FFRF were to re-apply to display an exhibit on the Capitol Grounds, its application would not be denied on the grounds of offensiveness. It did so twice in writing, Br. for Appellants-Cross-Appellees at 14 & n.3, *FFRF II*, 955 F.3d 417 (5th Cir. Dec. 28, 2018); Response and Reply Br. for Appellants-Cross-Appellees at 1, *FFRF II*, 955 F.3d 417 (5th Cir. Mar. 25, 2019); and repeatedly at the podium, Oral Argument, *supra* at 12. This Court recognized that this representation was made "in good faith." *FFRF II*, 955 F.3d at 425. Yet FFRF never applied to display a new exhibit. There is thus no evidence that, post-*Matal*, Defendants disregarded that holding or excluded FFRF from their limited public forum for exhibits in the Capitol. Without an ongoing violation of federal law, FFRF's claim is barred by sovereign immunity.

The last time the case was here, this Court found an ongoing violation of federal law based upon a letter that the Board's previous Executive Director sent—long

before *Matal*—indicating that "any application to display the same exhibit which was removed last year" in the limited public forum of the Capitol exhibit spaces "will be denied for failure to satisfy the public purpose requirement." *Id.* In finding an ongoing violation, the Court considered it "[i]mportant[]" that Defendants "ha[d] not retracted their previous statement to FFRF that future applications for the relevant display will be denied." *Id.*

Since the Court decided *FFRF II*, however, the Court has thrice 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*, No. 20-50667, 2021 WL 2310010, at *3 (5th Cir. June 4, 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*, 2021 WL 2310010, at *3 (rejecting claim based on failure to retract a press release).

III. Even if the District Court Had Jurisdiction, It Could Not Order Relief as a Matter of Law.

For similar reasons, even if the district court had jurisdiction, it erred as a matter of law in ordering equitable relief. "The party seeking a permanent injunction must satisfy a four-part test: it must show (1) success on the merits; (2) the failure to grant the injunction will result in irreparable injury; (3) the injury outweighs any damage that the injunction will cause the opposing party; and (4) the injunction will not disserve the public interest." *United Motorcoach Ass'n v. City of Austin*, 851 F.3d 489,

492-93 (5th Cir. 2017). For the reasons discussed above, following the amendments to the Capitol exhibit rule, FFRF cannot establish a First Amendment violation—let alone the other elements of the permanent-injunction test.

FFRF's primary argument in the district court for why an injunction was appropriate relied on this Court's mandate rule. ROA.2171-75. It is a centuries-old equitable principle, however, that "[a] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). Thus, courts lack authority to issue injunctive relief where the basis for such relief—even if previously extant—is no longer present.

Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 577 (1851) ("*Wheeling Bridge*"), was one early recognition of this principle. There, the Supreme Court ordered removal of a bridge because it illegally obstructed navigation. Congress then enacted a law authorizing the bridge. *Wheeling Bridge*, 59 U.S. (18 How.) at 422. Once the new law was passed, the Court denied the movant's subsequent request for an order to remove the bridge because "[t]here [wa]s no longer any interference with the enjoyment of the public right inconsistent with law." *Id.* at 427, 432. Thus, *Wheeling Bridge* recognized that because an injunction "is executory, a continuing decree . . . [i]f, in the meantime, since the decree, th[e] right has been

modified by the competent authority . . . it is quite plain the decree of the court cannot be enforced." *Id.* at 431-32.[7]

"The principles of the *Wheeling Bridge* case have repeatedly been followed" by the Supreme Court and "by lower federal and state courts." *Sys. Fed'n No. 91, Ry. Emps.' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 650-52 (1961); *see, e.g.*, *Cobell v. Norton*, 392 F.3d 461, 467 (D.C. Cir. 2004) (quoting *Miller v. French*, 530 U.S. 327, 347 (2000)); *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1169-70 (10th Cir. 2004) (injunction arising from settlement agreement "must give way" once inconsistent with new legislation). And these courts agree that "*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); *accord Ruiz v. United States*, 243 F.3d 941, 946 (5th Cir. 2001) (applying *Wheeling Bridge*). It is therefore beyond cavil that the propriety of an injunction depends on the facts and law as they exist now. *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 190 (5th Cir. 2008) (quoting *ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 445 F.3d 841, 850 (5th Cir. 2006)). "The parties have no power to require of the court continuing enforcement of rights the statute no longer gives." *Sys. Fed'n No. 91*, 364 U.S. at 650-52.

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[7] *See also, e.g.*, *ePlus, Inc. v. Lawson Software, Inc.*, 789 F.3d 1349, 1355 (Fed. Cir. 2015) ("Because the [Wheeling] [B]ridge was no longer unlawful, the Court had to set aside the previous order rather than enforce it.") (citing *Wheeling Bridge*, 59 U.S. (18 How.) at 431-32).

That principle precludes relief in this instance for many of the same reasons that the Court lacks jurisdiction. Indeed, the Seventh Circuit examined facts remarkably like these in *Grossbaum v. Indianapolis-Marion County Building Authority*, 100 F.3d 1287 (7th Cir. 1996). In *Grossbaum*, Indianapolis banned private displays in the City-County Building after the Seventh Circuit held that its previous ban on religious displays discriminated against those with a "religious perspective." *Id.* at 1290 (quoting *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 592 (7th Cir. 1995)). The new policy "prohibit[ted] *all* private displays, religious or otherwise." *Id.* Applying *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), the court upheld the new rules on the merits because the City had closed the forum. *Grossbaum*, 100 F.3d at 1299-99. In the process, the court acknowledged the legitimacy of the City's "concern about losing control over the lobby" if it remained a public forum. *Id.* at 1290, 1299. The court expressly stated that the plaintiff's "prior victory against the Building Authority does not" give him "immunity against all subsequent Building Authority actions that, although nondiscriminatory, happen to be disadvantageous" to the plaintiff. *Id.* at 1330.

Here, FFRF is not entitled to an injunction based on viewpoint discrimination, unless it can show that it continues to suffer a constitutional violation. *See Barr*, 140 S. Ct. at 2355. It cannot. As discussed above, the State eliminated the violation by "leveling down" to close the forum. *Supra* at 22. FFRF undoubtedly did "not *want* a 'leveling-down'" remedy, but in light of the State's expressed preference, it is "the only relief courts are authorized to provide." *Tex. Democratic Party*, 961 F.3d at 417 n.5 (Ho, J., concurring) (citing inter alia *Sessions v. Morales-Santana*, 137 S. Ct. 1678,

1701 n.29 (2017) ("That Morales-Santana did not seek this outcome does not restrain the Court's judgment. The issue turns on what the legislature would have willed.")).

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 September 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.

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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 11,262 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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