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Via CM/ECF

Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit

Re: No. 21-50469, *Freedom from Religion Foundation v. Abbott*

Dear Mr. Cayce:

I write in response to the panel's November 17 request for supplemental briefing regarding "whether and how (if at all) the repeal of the regulations that previously supported the Capitol Exhibit Rule affect the pending appeal." The repeal of the Capitol Exhibit Rule ("Repeal") does not prevent the Court from holding that the July 2020 amendment (the "Amendment") mooted FFRF's First Amendment claim and from vacating the district court's injunction for the reasons Appellants have already explained. The Repeal does, however, further underscore the mootness of FFRF's claim alleging unequal access to a now-defunct limited-purpose public forum. Indeed, FFRF has admitted as much. *See* Appellees' Br. 28. As a result, the Repeal provides additional reasons why the district court's order should be vacated and may not be affirmed.

I. The New Exhibit Rule Does Not Preclude the Court from Ruling in Favor of Appellants on the Question Presented.

The effect of the Repeal would ordinarily be assessed before addressing the questions presented in the appeal under the principles announced in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) and its progeny. This order of operations is dictated by the bedrock limitation that a federal court may not "decide the merits of a legal question not posed in an Article III case or controversy. For that purpose, a case must exist at all the stages of appellate review." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994). But those rules apply differently when an appellate court is asked to consider whether "a district court lacked Article III jurisdiction in the first instance." *Id.*

Where the "merits" of an appeal itself address whether the district court lacked jurisdiction, the Court "has discretion to dismiss [the] case" before reaching the question of mootness. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007). After all, the "jurisdiction-before-merits principle does not dictate a sequencing of jurisdictional issues." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 575 (1999). And the Supreme Court has recognized that there are times when resolving jurisdictional questions can raise difficult (even constitutional) questions. *See id.* at 577-78 (holding that "federal district courts have discretion to avoid a difficult question of subject-matter jurisdiction when the absence of personal jurisdiction is the surer ground"). Under those circumstances, prudence and judicial economy militate in favor of resolving an easier jurisdictional inquiry and reserving more difficult questions for a case that turns on the outcome of such questions. *See Sinochem*, 549 U.S. at 436 ("where subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course").

The "merits" of this case raise questions of jurisdiction. As Appellants explained in their opening brief (at 16-23), the Amendment that was the subject of the district court's order became effective on July 20, 2020, and it adopted any exhibit approved for display as government speech and required a statement reflecting that adoption and identifying the exhibit's legislative sponsor. Because the First Amendment does not apply to government speech, this regulatory change effectively closed any limited-purpose public forum that the previous Capitol Exhibit Rule created and rendered moot FFRF's First Amendment claim. Appellants' Opening Br. 16-23, Appellants' Reply Br. 3-4.[1] None of those arguments are—or even could be—affected by the Repeal.

As this Court has explained, "[w]hen a challenged rule is replaced with a new rule, the case is moot so long as the change" cures the alleged legal violation. *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374 (5th Cir. 2022) (citing *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020)). In this case, the alleged legal violation is that FFRF was denied equal access to a public

[1] For the avoidance of doubt, to avoid burdening the Court, Appellants summarize rather than repeat any prior arguments here, and then only as responsive to the Court's current, limited inquiry. Failure to reiterate or reference any particular argument should not be deemed a waiver.

benefit that was provided to other exhibitors due to disagreement with its anti-religious (or, at least, irreligious) content. *E.g.*, ROA.24. Although "[t]he First Amendment is a kind of Equal Protection Clause for ideas," *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2354 (2020) (quoting *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 470 (2015) (Scalia, J., dissenting)), it "does not tell [courts] which way to cure the unequal treatment," *id.* at 2355.

There were two potential remedies for the alleged legal violation: "[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," —*i.e.*, leveling up—"or by nullifying the benefits or burdens for all" —*i.e.*, leveling down. *Id.* at 2354 (citing *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)). When a Court is called upon to decide between "leveling up" and "leveling down," it looks to "what the legislature"—or here the relevant agency—"would have willed had it been apprised of the constitutional infirmity." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017). Even if FFRF does "not *want* a 'leveling-down' injunction," such leveling down may still moot its claim because "it may be the only relief courts are authorized to provide." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 417 n.5 (5th Cir. 2020) (Ho, J., concurring).

Here, FFRF's claim was moot before the district court issued its injunction—and long before the Repeal—because the Amendment "nullif[ied] the benefits or burdens for all" by closing the forum recognized by the district court to private speech. *Barr*, 140 S. Ct. at 2354. Following the Amendment, FFRF was on equal footing with all other would-be exhibitors—"the precise relief" it requested, *Franciscan All.*, 47 F.4th at 374—because *no* private speakers could access the then-defunct forum to display speech of their own. The district court thus lacked jurisdiction to issue a permanent injunction in the first place: because an injunction "is executory, a continuing decree," if the government alters the statutory right underlying the decree, "it is quite plain the decree of the court cannot be enforced." *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1855) ("*Wheeling Bridge*"). In other words, "[t]he parties have no power to require of the court continuing enforcement of rights [a] statute no longer gives." *Sys. Fed'n No. 91, Ry. Emps.' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 652 (1961). None of that changed with the Repeal.

II. The Repeal Does Present New Insuperable Barriers From *Affirming* The Injunction.

Although the Repeal does not prevent the Court from reversing the district court and vacating the injunction for the reasons discussed in Appellants' briefs, it *does* prevent the Court from *affirming* the injunction—and for many of the same reasons. Indeed, although it has since tried to walk back the concession, FFRF itself acknowledged in its brief to this Court (at 28) that Texas could "close the forum" by refraining from "accepting applications for exhibits." For good reason. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (holding "a state is not required to indefinitely retain the open character of [a] facility"); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring) (reiterating that "when property has been designated for a particular expressive use, the government may choose to eliminate that designation"). The Repeal does just that: it eliminates the application process by which a member of the Texas Legislature could request the Texas State Preservation Board to display an exhibit on behalf of a constituent. *See* 47 Tex. Reg. 1993, 1993 (2022). Because closing the forum moots any claim for equal access to the forum, the injunction cannot be affirmed for the same reasons already discussed. Appellants are not aware of any principle that would change that analysis here.

A. As an initial matter, FFRF cannot avoid the conclusion that its claim is moot by pointing to the fact that as the entity overseeing the appearance and use of the Texas Capitol Complex, *see* Tex. Gov't Code §§ 443.006-.007, the Board may still choose to display its *own* exhibits or those of other government actors. The Supreme Court has repeatedly recognized that "[a] government entity has the right to 'speak for itself,'" and "'is entitled to say what it wishes'" on its own property, *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009), without giving citizens a First Amendment right to access that property, *see, e.g. Perry Educ. Ass'n*, 460 U.S. at 46 ("the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated"); *U.S. Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981) (the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."). As long as that government entity does not open the space to private speech, the existence of such an inherent power on behalf of a property owner is not the basis for an unequal-treatment claim of the type asserted by FFRF. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-78 (1998) ("The government can

restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'"(quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)); *see Perry Educ. Ass'n*, 460 U.S. at 48-49 (rejecting claim seeking "equal footing" in terms of access to forum). Thus, eliminating that power is not required to "cure" the alleged injury, *Barr*, 140 S. Ct. at 2354, or moot FFRF's claim, *Franciscan All.*, 47 F.4th at 374-75.

B. FFRF has not avoided that conclusion by suggesting that there remains a live controversy because the Board might "continue to display private exhibits" in the Capitol notwithstanding the repeal of the Capitol Exhibit Rule or that the Board might choose to reinstate the Rule at a later date. Letter from R. Bolton to L. Cayce (Apr. 11, 2022). Taking those positions in reverse, subject to the requirements of the Administrative Procedure Act, agencies are *always* "free to change their existing policies." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016); *accord Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 650 (Tex. 2004) ("The notice requirements of the federal Administrative Procedure Act are similar" to those imposed by state law.). If that were enough to avoid mootness, no administrative-law case would ever become moot. *See DeOtte v. State*, 20 F.4th 1055, 1064 (5th Cir. 2021) (rejecting argument that case was not moot because "the current rules *might* be changed by the executive branch"). Yet this Court regularly applies mootness principles in administrative-law cases—particularly when the relevant agency has gone through a formal process to repeal the allegedly offending rule. *See Franciscan All.*, 47 F.4th at 374-75; *see also, e.g.*, *Stauffer v. Gearhart*, 741 F.3d 574, 582-83 (5th Cir. 2014) (per curiam); *La. Envt'l Action Network v. U.S. E.P.A.*, 382 F.3d 575, 580-81 (5th Cir. 2004); *Sannon v. United States*, 631 F.2d 1247, 1250-51 (5th Cir. 1980).

More fundamentally, FFRF's assertions ask this Court to presume that the Board acted in bad faith when it went through the formal process of first amending and then repealing the Capitol Exhibit Rule. This Court's law requires the opposite inference: for more than a decade, it has recognized that "courts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity.'" *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd*, 563 U.S. 277 (2011). Thus, "[w]ithout evidence to the contrary," this Court "assume[s] that formally announced changes to official governmental policy are not

mere litigation posturing." *Id.* Indeed, "it is well established that" this Court "must presume that state officials act in good faith," and to "rebut[]" this presumption, "the party opposing the State must sponsor specific evidence that the State will not act in accordance with the law." *Barbee v. Collier*, No. 22-70012, 2022 WL 16960914, at *2 (5th Cir. Nov. 16, 2022) (Elrod, J., concurring).[2]

Because FFRF can supply only speculation, not evidence, that the Board intends to reverse, or selectively apply, its repeal of the Capitol Exhibit Rule, it cannot invoke the voluntary-cessation exception to overcome mootness. *See also* Appellants' Opening Br. 17-21; Appellants' Reply Br. 16-18.[3]

C. Finally, FFRF did not prevent this case from becoming moot by (twice) seeking attorneys' fees in the district court following each of the district court's jurisdictionally invalid injunctions. *Compare* ROA.2032-36 (seeking attorneys' fees following original injunction), *with Freedom from Religion Found. v. Abbott*, 955 F.3d 417, 425-26 (5th Cir. 2020) ("*FFRF II*") (holding that injunction to be jurisdictionally invalid); *and* ROA.2456-66 (seeking attorneys' fees after the current injunction), *with* Appellants' Opening Br. 38-42 (explaining why that injunction is jurisdictionally invalid). It is black-letter law that an interest in attorneys' fees does

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[2] This Court has repeatedly applied this governmental-defendant rule to dispatch arguments based upon the voluntary-cessation exception to mootness. *Amawi v. Paxton*, 956 F.3d 816, 821-22 (5th Cir. 2020); *Yarls v. Bunton*, 905 F.3d 905, 910-11 (5th Cir. 2018); *Miraglia v. Bd. of Sups. of La. State Museum*, 901 F.3d 565, 572 (5th Cir. 2018); *Moore v. Brown*, 868 F.3d 398, 406-07 (5th Cir. 2017); *Fontenot v. McCraw*, 777 F.3d 741, 748 (5th Cir. 2015); *Stauffer*, 741 F.3d at 581-83; *DeMoss v. Crain*, 636 F.3d 145, 150-51 (5th Cir. 2011); *accord Turner v. Tex. Dep't of Crim. Justice*, 836 F. App'x 227, 229 (5th Cir. Nov. 10, 2020) (per curiam); *Allied Home Mortg. Corp. v. U.S. Dep't of Housing & Urban Dev.*, 618 F. App'x 781, 785-86 (5th Cir. July 22, 2015).

[3] If anything, what evidence exists in the public record (and thus that can be subject to judicial notice) demonstrates that there may be confusion regarding what the Repeal did as a technical, legal matter, but that it is being applied to all potential applicants. Charlotte Scott, *State Preservation Board quietly bans exhibits*, Spectrum News 1 (Oct. 21, 2022), https://tinyurl.com/ywaaks7t.

not "create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990).[4]

Accordingly, if the Court were to conclude that the Amendment did not moot FFRF's claim in 2020 (and it should not), there can be little doubt that the Repeal independently did so in 2022. Under such circumstances, the Court cannot affirm an "executory, a continuing decree" because (among other reasons) it "cannot be enforced." *Wheeling Bridge*, 59 U.S. (18 How.) at 431-32.

III. If the Court Does Decide to Resolve the Case Based on the Repeal, it Should Nonetheless Vacate the Injunction.

Although the Court never needs to reach the issue, *supra* at 1-3, if the Court does conclude that the Repeal mooted FFRF's claim, it should vacate the district court's order under the principles established in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). There, the Supreme Court announced the general rule that an appellate court should vacate the judgment of a court below when the case becomes moot on appeal. *Id.* at 39. That rule is no longer considered automatic. *Bonner Mall P'ship*, 513 U.S. at 23-25. But both the Supreme Court and this Court have recognized that vacatur is driven by equitable principles and is appropriate when, for example, mootness is "not attributable to the parties," or when the case presents particular "federalism concern[s]." *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-72, 75 (1997); *Hall v. Louisiana*, 884 F.3d 546, 552-53 (5th Cir. 2018). This case warrants such relief.

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[4] Again, for the avoidance of doubt, Appellants do not concede that FFRF is entitled to fees. To be entitled to fees as a prevailing party, the party seeking fees must have "'been awarded . . . at least some relief on the merits,' and there must be [a] 'judicial imprimatur on the change' in the legal relationship between the parties." *Veasey v. Abbott*, 13 F.4th 362, 368 (5th Cir. 2021) (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603, 6005 (2001)). Here, assuming there was a jurisdictionally valid judgment giving the necessary *imprimatur* (and there was not), FFRF has never received relief on the merits because it has never even *tried* to actually display an exhibit in the Capitol since 2015. *See* Appellants' Opening Br. 12.

The defendants in this litigation did not cause this case to become moot. Although the Governor is a member of the Board, neither he nor Executive Director Welsh is the decisionmaker responsible for the Board's repeal of the Capitol Exhibit Rule. *Cf. Hall*, 884 F.3d at 553-54. The Governor only has one vote out of six on the Board, and he cannot control the others—four of which are held by independently elected constitutional officers of Texas. *Compare* Tex. Gov't Code § 443.003(a) ("The board consists of the governor, lieutenant governor, speaker of the house of representatives, one senator appointed by the lieutenant governor, one representative appointed by the speaker of the house of representatives, and one member appointed by the governor."), *with* Tex. Const. art. III, §§ 1-2 (vesting legislative power in and specifying the membership of Texas's bicameral legislature), *id.* art. III, § 9 (creating the officer of the Speaker), *id.* art. IV, § 1 (Lieutenant Governor). The Executive Director has no vote on—or role in—selecting the membership of the Board at all. Indeed, Texas law requires that the Board strictly "separate the policymaking responsibilities of the board and the management responsibility of the executive director" and his staff. Tex. Gov't Code § 443.0043.[5]

Moreover, the Board did not need to repeal the Capitol Exhibit Rule to moot FFRF's claim—as described above, that claim was already mooted by the July 2020 Amendment. The administrative record reflects that the Board repealed the rule based on its conclusion that it "does not need the rule in order to serve its intended purpose of providing for the display of government speech in the Capitol that educates, informs, and unites." 47 Tex. Reg. at 1993.

Finally, as it stands now, this case presents significant federalism concerns. "In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: is this conflict really necessary?" *Arizonans for Official English*, 520 U.S. at 75. Such caution is particularly appropriate here where the district court has issued an injunction against the State's chief executive officer that requires the State to allow a private party to erect a display in

[5] If any party caused the mootness problem in this litigation, it is FFRF who took no action for months despite repeated assurances by Appellants and their counsel that FFRF would never again be excluded from the Capitol on the basis of viewpoint. Oral Argument, *FFRF II*, 955 F.3d 417 (5th Cir. Oct. 10, 2019) ("They won't take yes for an answer, Your Honor.").

the State's very seat of government—a location so closely tied to the State that the ability to occupy it conveys "the support and approval of the government." *County of Allegheny v. ACLU Greater Pittsburgh Ch.*, 492 U.S. 573, 599-600 (1989), *abrogated on other grounds*, *Town of Greece v. Galloway*, 572 U.S. 565, 579-80 (2014). And it issued that order based on an isolated incident that occurred seven years ago this month. The federalism concerns underlying the state-sovereign-immunity doctrine prevented this Court from ordering purely retrospective relief based on this incident in 2020. *FFRF II*, 955 F.3d at 425. The same concerns counsel against allowing even a nominally prospective injunction to stand in 2022 after a formal rule change that would prevent the incident from ever recurring.

* * *

In sum, the Court can vacate the injunction because the Amendment provided FFRF all the relief to which it could have been entitled under the First Amendment—*i.e.*, equal access to the then-defunct Capitol Exhibit program with other similarly situated private parties—without ever addressing the Repeal. Even if it did not, because the Repeal indisputably gives FFRF that relief, there is no ongoing injury to correct. Under those circumstances, an injunction cannot issue, *Wheeling Bridge*, 59 U.S. at 431-32, and the dispute is moot, *Franciscan All.*, 47 F.4th at 374. And under the principles established in *Munsingwear*, the Court should still vacate the district court's order.

Respectfully submitted.

/s/ Lanora C. Pettit

Lanora C. Pettit
Principal Deputy Solicitor General

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

Certificate of Service

On December 9, 2022, this letter was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Lanora C. Pettit
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