UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC.	§	
Plaintiff,	§	
	§	
-vs-	§	**CASE NO. 1-16: CV-00233**
	§	
GOVERNOR GREG ABBOTT, in his official and individual capacities, and JOHN SNEED, Executive Director of the Texas State Preservation Board, in his official and individual capacities,	§	
Defendants.	§	

COMPLAINT FOR DECLARATORY,
INJUNCTIVE, AND COMPENSATORY RELIEF

Plaintiff Freedom From Religion Foundation, Inc. ("FFRF") complains of Governor Greg Abbott, in his official and individual capacities, and John Sneed, Executive Director of the Texas State Preservation Board, in his official and individual capacities, as follows:

I. NATURE OF THE CLAIMS

1. The Plaintiff seeks a declaration under 28 U.S.C. §2201 that the Defendants have violated the Plaintiff's Free Speech, Equal Protection and Due Process rights, and that the Defendants have violated the Establishment Clause, by removing and excluding the Plaintiff's protected speech, a display, from a public forum, because of the content of the Plaintiff's speech.

2. The Defendants' actions were not viewpoint neutral or reasonable and they were also motivated by animus toward the content of Plaintiff's protected speech and the identity of the speaker.

3. The Plaintiff also seeks a declaration that the criteria for approval of exhibits in the Texas State Capitol, facially and as applied by the Defendants, violate the constitutional rights of the Plaintiff.

4. Plaintiff further requests the Court to grant injunctive relief under 28 U.S.C. §1343 and Fed. R. Civ. P. 65.

5. Finally, the Plaintiff requests the Court to enter judgment against each Defendant in his individual capacity for nominal damages.

6. The Plaintiff brings this action pursuant to 42 U.S.C. §1983 to redress the deprivation of their constitutional rights, committed under the color of state law by the Defendants, who are government officials.

7. The Defendants are sued in both their official and individual capacities.

II. JURISDICTION AND VENUE

8. This Court has federal question jurisdiction pursuant to 28 U.S.C. §1331.

9. The Court also has the authority to order declaratory relief under 28 U.S.C. §2201.

10. The Court further has the authority to award injunctive relief under 28 U.S.C. §1343.

11. Venue is appropriate in the District Court for the Western District of Texas, pursuant to 28 U.S.C. §1391(e).

III. PARTIES

12. The Plaintiff, Freedom From Religion Foundation, Inc. ("FFRF"), is a non-profit membership organization that advocates for the separation of state and church and educates on matters of nontheism.

13. FFRF has more than 23,000 members, with members in every state of the United States, including nearly 1,000 members living in the State of Texas.

14. The Defendant, Greg Abbott, is the Governor of Texas, and he also is the Chairman of the State Preservation Board.

15. The Texas State Preservation Board, is an agency of the State of Texas established in 1987.

16. The duties of the State Preservation Board include approval and scheduling of Capitol events and exhibits displayed in the public areas of the Capitol.

17. The Defendant, John Sneed, is the Executive Director of the State Preservation Board.

18. Sneed's duties include directing and coordinating the activities of State Preservation Board employees.

IV. PUBLIC FORUM AREAS DESIGNATED IN STATE CAPITOL

19. Areas of the Texas State Capitol are open to the public for expression and civic engagement.

20. The public areas of the State Capitol can be used for events, as well as communicative displays or exhibits, upon approval by the State Preservation Board.

21. The State Preservation Board "has allowed and should continue to allow diverse viewpoints to be expressed in Capitol displays," Governor Abbott has acknowledged.

22. The State Preservation 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.

23. The State Preservation Board employs an Executive Director who serves under the sole direction of the Board.

24. The Executive Director is authorized to employ staff necessary to administer the functions of the office.

25. The policy-making responsibilities of the State Preservation Board are supposed to be clearly separated from the management responsibilities of the Executive Director and the staff of the Board.

26. The management functions of the Executive Director and staff of the State Preservation Board include scheduling and approving exhibits for display within the public areas of the Capitol, upon the recommendation of a state official sponsor, *i.e.*, the Governor, Lieutenant Governor, the Speaker, a State Senator, or a State Representative.

27. The State Preservation Board Executive Director and staff apply criteria for exhibit approval that do not limit use of the public premises to use by discrete identifiable groups or displays dedicated solely to the discussion of specified substantive subjects.

28. The criteria for approval of displays, both facially and as applied, however, do allow for consideration of the acceptability of viewpoints expressed.

29. The formal criteria for exhibit approval require that exhibits must be for a "public purpose," defined as something in which the public generally has a direct interest and in which the community at large is to be benefitted.

30. Displays further are to be limited to the promotion of the public health, education, safety, morals, general welfare, security, and prosperity of all of the inhabitants or residents within the state.

31. The Executive Director and staff of the State Preservation Board have previously applied the approval criteria to allow diverse viewpoints to be expressed.

32. In 2014, the State Preservation Board approved the display of a Christian nativity scene in the Capitol's Ground Floor Rotunda.

33. The display of a Christian nativity scene in the Capitol in 2014 was the first time that an exhibit promoting a specific religion had been displayed in the Texas Capitol.

34. The State Preservation Board also approved display of a Christian nativity scene in 2015, which was displayed without premature removal by the Board.

V. FFRF EXHIBIT APPROVED FOR DISPLAY

35. Consistent with the past practice and application of the criteria for approval of displays, the Executive Director of the State Preservation Board and his staff approved an exhibit for display by FFRF.

36. FFRF submitted an exhibit application to the State Preservation Board on July 7, 2015, which the State Preservation Board approved after revisions on July 20, 2015, and August 4, 2015.

37. FFRF described its proposed display in its application as "Cutout figures celebrating the December 15 nativity of the Bill of Rights. The figures will be self-standing and will be between 4 and 6 feet tall."

38. FFRF's exhibit application included a recommendation by Texas Representative Donna Howard.

39. FFRF also described its proposed exhibit in a letter dated May 29, 2015, to potential sponsors as "a temporary display in the Ground Floor Rotunda that celebrates freethought and the United States as the first among nations to formally embrace the separation of state and church."

40. FFRF further explained its proposed exhibit as an effort "to celebrate the views of Texans who are part of a religious minority or have no religion at all."

41. FFRF sought to diversify the limited expression displayed in 2014, manifested by the stand-alone Christian nativity display in the State Capitol.

42. The diversity that FFRF intended to communicate is reflective of the reality that more than 23% of the American population consists of those who identify as "nonreligious."

43. The stated purpose of FFRF's display was, "To educate the public and celebrate the 224th anniversary of the ratification of the Bill of Rights on December 15, 1791. Also, to celebrate the Winter Solstice on December 22 and to educate the public about the religious and nonreligious diversity within the State."

44. The State Preservation Board, by the Executive Director and his staff, officially approved FFRF's exhibit application on August 6, 2015 after determining that FFRF had met all of the Board's requirements for exhibits.

45. Texas members of FFRF subsequently gathered in the Texas Capitol's Ground Floor Rotunda in December and put FFRF's display in place.

46. FFRF's display featured Benjamin Franklin, Thomas Jefferson, George Washington, and the Statue of Liberty gathered around the Bill of Rights, which was placed in a manger. (A true and correct copy of FFRF's displayed exhibit is attached to this Complaint as Exhibit 1.)

47. Accompanying the display was an approved sign that read: "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."

48. No known disruptions, incidents, controversy, or complaint ensued after FFRF's exhibit went on display in the State Capitol on December 18, 2015, except for the objection of Governor Abbott, described below.

VI. CENSORSHIP OF FFRF'S EXHIBIT

49. Despite the resulting tranquility attending FFRF's exhibit, the staff of the State Preservation Board removed FFRF's exhibit three days later, without notice or opportunity to object by FFRF.

50. FFRF's exhibit was removed upon the authoritative demand of Governor Abbott.

51. Governor Abbott wrote to the Defendant Sneed on December 21, 2015, "as Chairman of the State Preservation Board," demanding that Sneed "remove [FFRF's] display from the Capitol immediately."

52. In his letter, Governor Abbott claimed that FFRF's display failed to meet State Preservation Board criteria for approval, including because the display "does not educate," or promote public morals and the general welfare.

53. Governor Abbott accused FFRF of "tasteless sarcasm," called its message "spiteful" and "intentionally designed to belittle and offend," and claimed that the display "undermines rather than promotes any public purpose."

54. Governor Abbott did not explain, however, how the Christian nativity displayed in the Capitol more readily met his interpretation of the State Preservation Board's criteria.

55. Governor Abbott seemingly missed the point that FFRF's display, in fact, communicated a diverse message from that of the Christian nativity scene. He vehemently complained that "the exhibit does not depict *any* other religion, much less does it promote religious 'diversity.'"

56. Governor Abbott then also claimed that "the exhibit promotes ignorance and falsehood," whereupon the Governor cited 17 lines of a fraudulent quote, falsely attributed to George Washington from a fabricated prayer journal.

57. Scholars and experts who have compared the handwriting of the purported Washington quote have consistently concluded that it is a fake.

58. Governor Abbott in his screed to the Executive Director of the State Preservation Board concluded that "the general public does not have a 'direct interest' in the Freedom From Religion Foundation's purpose. That organization is plainly hostile to religion and desires to mock it."

59. Governor Abbott further claimed that FFRF's exhibit was indecent ("it violates general standards of decency") and he compared it to a crucifix immersed in a jar of urine.

60. Governor Abbott later expounded on his letter to the Defendant Sneed, which letter he released to the public.

61. In a social media message, a December 22 "tweet," the Governor refers to FFRF's display as offensive and the Governor boasts that he has demanded removal of the FFRF exhibit from the Capitol.

62. The Defendant Sneed, after receiving the Governor's demand, consulted with State Preservation Board member Charlie Geren, who advised Sneed that because Governor Abbott wants the FFRF exhibit taken down, "I told John [Sneed] that, if I were him, I'd take it down."

63. The Defendant Sneed then directed that the FFRF exhibit be immediately removed from display in the Capitol, without providing any notice or explanation to FFRF.

VII. GOVERNOR ABBOTT HAS HISTORY OF ANIMUS TOWARD FFRF

64. Governor Abbott has a history of hostility directed against FFRF.

65. In December of 2011, for example, Governor Abbott actually warned FFRF to stay out of Texas altogether, stating: "Our message to the atheists is don't mess with Texas and our Nativity scenes or the Ten Commandments."

66. Governor Abbott made his comments to Fox News and Commentary, when he was the Texas Attorney General.

67. At that time, Governor Abbott further proclaimed: "I want the Freedom From Religion Foundation to know that our office has a history of defending religious displays in this State."

68. Governor Abbott further stated that FFRF should be fully aware that "there is a person, a lawyer and an organization in this state that has their back, that has the law, that has the muscle and firepower to go toe-to-toe with these organizations that come from out of state trying to bully governmental bodies into tearing down things like Nativity scenes."

69. In light of Governor Abbott's more recent demand that FFRF's display at the State Capitol be torn down, the Governor's prior comments about bullying seem ironic, but are consistent with his repeated endorsements of religion over non-belief.

70. Governor Abbott, for example, also attacked FFRF during a press conference in October 2012, during which he stated: "We will not allow atheist groups from outside of the State of Texas to come into the State, to use menacing and misleading intimidation tactics, to try to bully schools to bow down at the altar of secular beliefs."

71. During the press conference in October 2012, Governor Abbott contemptuously described FFRF as "an atheist group from Wisconsin, who came into the State of Texas and tried to silence these students."

72. Governor Abbott further expressed his self-styled respect for freedom of speech, in terms that are curious and telling in the circumstances: "We are not going to either tolerate or accept these atheist groups trying to prevent that freedom of expression here in the State of Texas."

73. More recently, Governor Abbott came to the defense of the Brewster County Sheriff's Office, including the alleged right to display a Latin cross on Department vehicles, following a complaint by FFRF.

74. Governor Abbott, through his spokesman John Wittman, stated in December of 2015 that: "The Constitution demands respect for religious expression rather than hostility towards it and Governor Greg Abbott fully supports Sheriff Dodson's decision to allow his deputies to display a Cross on their patrol vehicles."

75. Governor Abbott subsequently sent a memorandum to the Chair of the Opinion Committee within the Office of the Attorney General, favoring the display of such Latin crosses on sheriff department vehicles.

76. Governor Abbott argued that religious expression by public officials, acting in official roles, should be allowed, including because Americans allegedly are religious people whose institutions presuppose a Supreme Being.

77. Governor Abbott also expressed support for the City of Orange, which removed a nativity scene from City Hall after FFRF simply requested to put a banner up as well.

78. Governor Abbott encouraged the City of Orange to continue to display a nativity scene, without allowing FFRF's banner as well, stating that "the Constitution demands accommodation of religion rather than hostility towards it."

79. Governor Abbott has consistently advocated for displays of religion in the public sphere, while actively opposing any expression of nonreligious principles.

VIII. CENSORSHIP OF FFRF'S DISPLAY VIOLATES THE UNITED STATES CONSTITUTION

80. The Defendants have violated the constitutional rights of the Plaintiff by summarily removing FFRF's exhibition from the Texas State Capitol, after prior approval.

81. The Defendants engaged in unambiguous viewpoint discrimination by removing FFRF's exhibit for reasons that were not viewpoint neutral or reasonable.

82. In expelling FFRF's display, the Defendants also applied standards and procedures not utilized in cases involving other Capitol displays.

83. The Defendants' actions, simply put, were not content neutral, as required under the First Amendment of the United States Constitution, which requires that government regulation of expressive activity be justified independently without reference to the ostensibly regulated speech itself.

84. The Defendants violated the Plaintiff's First Amendment rights by basing their conduct on disagreement with the message that they concluded that FFRF's display conveyed.

85. The Defendants' actions also were content based because they distinguished favored speech from disfavored speech on the basis of the ideas or views expressed.

86. The Defendants also acted irrationally and inconsistently in their application of the criteria for approval of exhibition displays in the Capitol.

87. The Defendants' actions were not reasonable and constituted an effort to suppress expression merely because the Defendants opposed the speaker's viewpoint, in this case the viewpoint of FFRF.

88. The Defendants' actions certainly were not narrowly tailored to serve a compelling state interest.

89. The Defendants' censorship of FFRF's display, therefore, does not withstand strict scrutiny, or any scrutiny for that matter.

90. The Defendants also violated the Plaintiff's First Amendment rights by excluding FFRF's display on the basis of the exhibit's nontheistic premise, which constitutes a violation of the Establishment Clause in the First Amendment to the United States Constitution.

91. The Defendants violated the Establishment Clause by discriminating against FFRF's exhibit on the basis of its nontheistic content.

92. The Defendants further violated the Establishment Clause by preferring and endorsing religion, including by favoring the display of a stand-alone Christian nativity scene in the Texas State Capitol.

93. The Defendants also violated FFRF's constitutional rights by singling out FFRF for disadvantageous treatment because of the content of FFRF's beliefs and expressive communications.

94. The Defendants violated the Plaintiff's Equal Protection rights by selecting FFRF for disfavored treatment due to its status as an organization that advocates for and represents the nonreligious and based further on disapproval of FFRF's secular exhibit.

95. The Defendants' actions violated the Plaintiff's Equal Protection rights by treating FFRF differently than other similarly situated entities, with no rational basis for the disparate treatment.

96. The Defendants' actions further violated the Plaintiff's Equal Protection rights by targeting FFRF for disadvantageous treatment due to the animus of Governor Abbott.

97. The Defendants' actions also violated the Plaintiff's Due Process rights by removing FFRF's display without any pre-deprivation or post-deprivation procedures to protect

against unconstitutional deprivations of Plaintiff's interest in the right to display expressive communications in the Capitol.

98. The Defendants further violated the Plaintiff's First Amendment rights by enforcing and applying criteria that allow for unbridled discretion and arbitrary and capricious approval or removal of exhibits in public areas of the State Capitol.

99. The State Preservation Board criteria for approval of exhibits, facially and as applied, allow for decisions to be based on the perceived acceptability of a speaker's viewpoint, thereby allowing for approval by referendum.

100. Where the State requires a permit for expressive activity in a public forum, the scheme for approval must set objective standards governing the grant or denial of approval in order to ensure that government officials not have the power to discriminate on the content or viewpoint of speech, including by suppressing disfavored speech or disfavored speakers.

101. Here, public areas in the Texas Capitol have been opened for public use as places of expressive activity and they are therefore subject to First Amendment decision-making standards.

102. FFRF's exhibit, moreover, clearly constitutes protected speech under the First Amendment.

103. The Defendants have applied the criteria for approval of exhibits in the State Capitol on the basis of content, which regulation does not withstand strict scrutiny under either the Free Speech or Equal Protection standards of the United States Constitution.

104. The criteria for approval of exhibits in the Texas State Capitol also is impermissibly vague, both facially and as applied, because the criteria allow for arbitrary application without any objective principles.

105. Investing government officials with boundless discretion over access to a public forum, as this case illustrates, violates the most fundamental principles of the First Amendment.

106. The criteria for approval of exhibits in the State Capitol violate the First Amendment, facially and as applied, in this case, precisely because the determination as to whether a display is appropriate for exhibit cannot be answered without examining the substantive content or message conveyed by the display.

107. Finally, the criteria for approval of exhibits in the State Capitol, facially and as applied by the Defendants, is overly broad in violation of the First Amendment because the very existence of the regulation, at least as applied in this case, is substantially likely to cause speakers to refrain from engaging in protected speech or expression.

108. In the end, the Defendants' actions have caused the Plaintiff injury by censoring and excluding its protected expression; by defeating FFRF's investment in the exhibit removed from display in the Texas State Capitol; and by disparaging the Plaintiff on the basis of its non-belief in religion and rendering it literally and figuratively to be political outsiders.

109. The Plaintiff, nonetheless, does intend to make further application to the State Preservation Board in the future to again display the exhibit at issue in the Texas State Capitol, and hence this action which is necessitated by the Defendants' continuing and foreseeable violation of Plaintiff's constitutional rights in the future.

WHEREFORE, the Plaintiff demands judgment against the Defendants as follows:

a) Judgment declaring that the actions of each Defendant have violated the Free Speech Clause of the First Amendment to the United Stated Constitution;

b) Judgment declaring that the actions of each Defendant have violated the Establishment Clause of the First Amendment to the United Stated Constitution;

c) Judgment declaring that the actions of each Defendant have violated the Equal Protection Rights of the Plaintiff;

d) Judgment declaring that the actions of each Defendant have violated the Due Process rights of the Plaintiff;

e) Judgment declaring that the criteria to approve exhibits for display in the State Capitol, facially and/or as applied by the Defendants, violate the Free Speech Rights protected by the First Amendment to the United States Constitution;

f) Judgment against each Defendant enjoining the Defendants from excluding the Plaintiff's exhibit at issue from future display in public areas of the Texas State Capitol;

g) Judgment against each Defendant, in his individual capacity, for nominal damages;

h) Judgment against each Defendant, jointly and severally, awarding the Plaintiff its reasonable costs, disbursements, and attorneys' fees, as allowed by law, including pursuant to 42 U.S.C. §1988; and

i) Judgment awarding or ordering such further relief as the Court deems just and equitable.

Respectfully submitted,

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