ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5095

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID PULPHUS and WILLIAM LACY CLAY, Representative, United States House of Representatives,

Appellants,

v.

STEPHEN T. AYERS, in his official capacity as Architect of the Capitol,

Appellee.

On Appeal from the United States District Court for the District of Columbia
Case No. 17-cv-00310-JDB

APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW AND RELATED CASES

Parties

The following parties appeared before the district court:

1. David Pulphus—Plaintiff
2. U.S. Representative William Lacy Clay—Plaintiff
3. Stephen T. Ayers, Architect of the Capitol—Defendant

Rulings Under Review

The ruling under review in this Court is the order (Dkt. #15) issued by Judge John D. Bates of the United States District Court for the District of Columbia on April 14, 2017, in civil action no. 17-310 (JDB). The memorandum opinion (Dkt. #16) is reported at 249 F. Supp. 3d 238 (D.D.C. 2017).

Related Cases

There are no related cases.

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I. INTRODUCTION

The House of Representatives created the Congressional Art Competition ("Competition") to encourage "nationwide artistic creativity by high school students," not to convey a message on behalf of the government. [R.11-1 at 29.] [1] A high school student from Missouri, David Pulphus, successfully submitted a painting to the Competition that was approved under the Competition's guidelines, and displayed as a winning entry at the Capitol and online for seven months. The painting (Untitled #1 or the "Painting") depicted the 2014 protests in Ferguson, Missouri. [R.7-20 at 2.] Only when political opposition to the content of the Painting arose was an "official re-review" conducted and the Painting retroactively removed from the Competition over the objection of its sponsor, U.S. Representative William Lacy Clay. Pulphus and Clay sued under the First Amendment, and the district court acknowledged there was "little doubt" that removal of Untitled #1 by the Architect of the Capitol ("AOC") was viewpoint-based, making removal of the Painting unlawful in a limited or nonpublic forum. The district court nonetheless denied preliminary injunctive relief on the premise that the Competition was "government speech" to which the First Amendment does not apply.

[1] For the Court's reference, the trial court docket is cited herein as R plus the relevant ECF docket number. By agreement, the Parties will file a joint deferred appendix.

This Court should reverse. The district court's decision constitutes a radical expansion of the "government speech" doctrine that contravenes Supreme Court precedent and lacks any limiting principle. As the Supreme Court recently cautioned, "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). This is precisely what happened when the AOC retroactively disqualified Untitled #1 in response to complaints from certain House Members. In removing the art of a high school student in response to political pressure, the AOC did not promote government speech, but enforced a heckler's veto.

The Competition is not government speech. It is a limited or nonpublic forum in which viewpoint discrimination is prohibited by the First Amendment, and the district court was wrong to rule otherwise. Moreover, the viewpoint-based exclusion of Untitled #1 from the Competition continues to irreparably harm Appellants for which preliminary injunctive relief remains appropriate. Accordingly, Appellants respectfully request this Court reverse the district court's improper denial of Appellants' motion and remand for entry of a preliminary injunction pending adjudication of Appellants' First Amendment claims on the merits.

II. JURISDICTIONAL STATEMENT

On April 14, 2017, the district court denied Appellants' motion for a preliminary injunction. Appellants timely filed a notice of appeal on May 5, 2017. This Court has jurisdiction to review this appeal pursuant to 28 U.S.C. § 1292(a)(1). Without an immediate appeal, Appellants continue to suffer injury stemming from the AOC's violation of their First Amendment rights.

III. STATEMENT OF ISSUES

1. Whether the district court erred as a matter of law by ruling that the Congressional Art Competition is government speech and thus outside the protection of the First Amendment?
2. Whether the district court erred as a matter of law by ruling that the Competition's Suitability Guidelines were not unconstitutionally vague because the First Amendment does not apply to the Competition?
3. Whether this Court should deny the AOC's Motion to Dismiss this appeal as moot when the unconstitutional exclusion of Untitled #1 is ongoing, Appellants continue to suffer irreparable harm, and their injuries are redressable by this Court?

IV. STATEMENT OF THE CASE

A. History and Purpose of the Congressional Art Competition

The Congressional Art Competition is an annual tradition created by Members of the House of Representatives in 1982 to "encourage[e] nationwide

artistic creativity by high school students through art exhibits in the tunnels connecting the Capitol to the House Office Buildings." [R.11-1 at 29.] Each participating House Member has the opportunity to select and display a piece of artwork created by a high school student from his or her district for eleven months in the pedestrian walkway between the Capitol and the Cannon House Office Building ("Cannon Tunnel"). Winning entries are also permanently displayed on the website of the Congressional Institute, a non-profit co-sponsor and co-host of the Competition. The Institute "photographs the artwork and provides a digital record of each annual competition to the House of Representatives for posting on its public website" and maintains the digital record on its own website as well. [R.7-16 at A-7.] With the exception of Untitled #1, all winning entries from 2012 to the present are displayed by state and year on the Congressional Institute's website. Suppl. Clay Decl. at ¶ 4.

The Competition's purpose is to "provide[] the opportunity for Members of Congress to encourage and recognize the artistic talents of their young constituents." [R.7-16 at 3.] Though the Competition has taken place annually for over 35 years, it has no budget, no staff and no authorizing legislation. Because the Competition has always been "based in congressional districts," there is no required procedure for how Members may select winning entries. [R.7-5 ¶ 5.] Rather, each House Member solicits entries from within his or her district and is

free to establish a method of judging the submissions. "*Any entry* that conforms to the general specifications stated in [the Competition guidelines] is eligible to represent a congressional district." [R.7-16 at 8 (emphasis added).] Since the Competition's inception, over 650,000 students have participated. [*Id*.]

B. The 2016 Competition

The official announcement for the 2016 Competition described the event as "a nationwide annual art competition that allows high school students ... to showcase their artistic ability." [R.7-5 ¶ 3; R.7-6 at 2.] In addition to detailing requirements for size, framing, medium and originality, the Competition guidelines also addressed "suitability" of the artwork, providing:

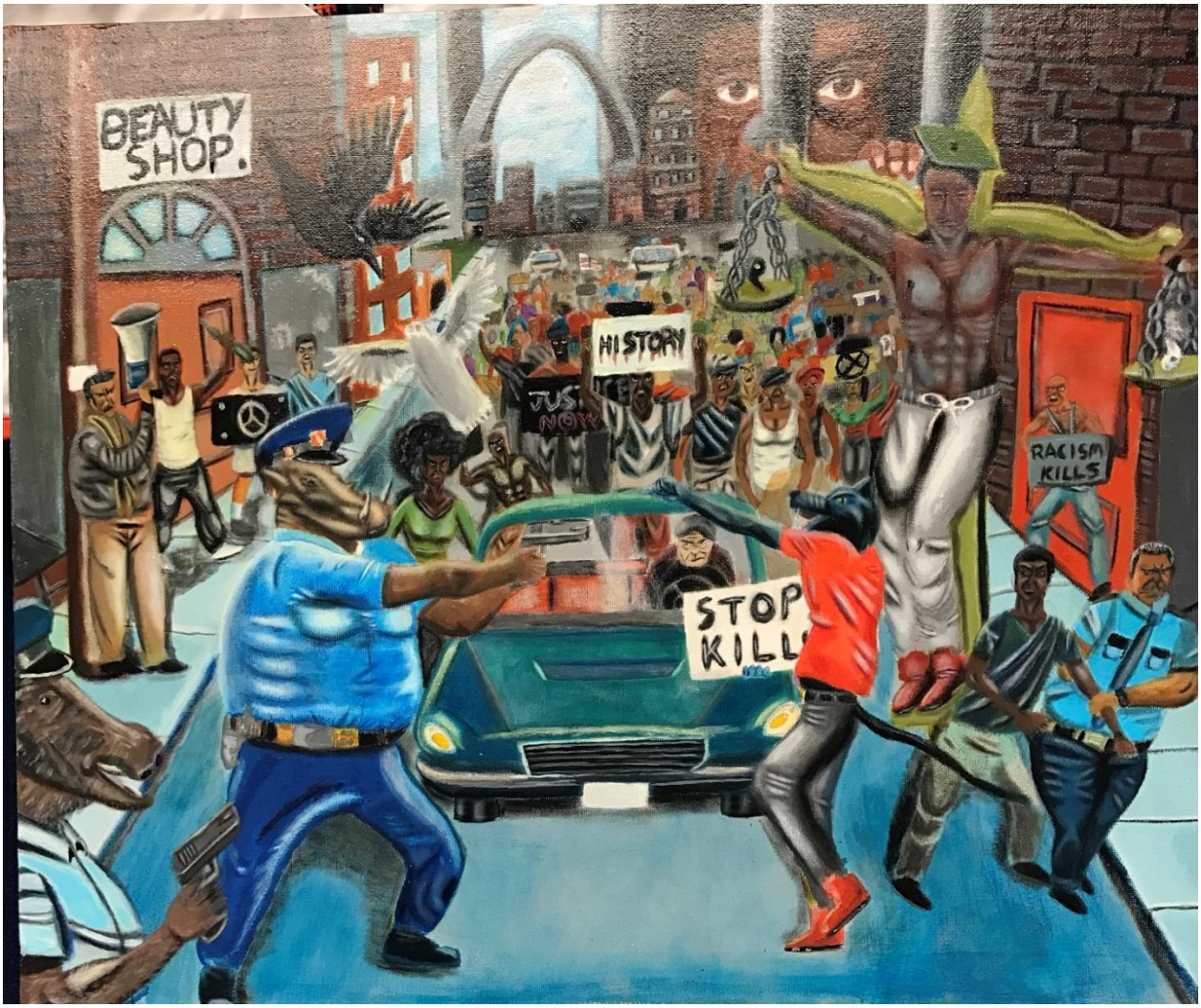
> [T]he final decision regarding the suitability of all artwork for the 2016 Congressional Art Competition exhibition in the Capitol will be made by a panel of qualified persons chaired by the Architect of the Capitol. While it is not the intent to censor any artwork, we do wish to avoid artwork that is potentially inappropriate for display in this highly travelled area leading to the Capitol.
>
> Artwork must adhere to the policy of the House Office Building Commission. In accordance with this policy, exhibits depicting subjects of contemporary political controversy or a sensationalistic or gruesome nature are not allowed. It is necessary that all artwork be reviewed by the panel chaired by the Architect of the Capitol and any portion not in consonance with the Commission's policy will be omitted from the exhibit.

[R.7-7 at B-2–B-3.]

Aside from these rules, the Competition imposed no restrictions on content and stated no desired theme, message, or medium for the art or for the Competition as a whole. [*Id.*; R.7-16 at 21.] The diversity of submissions evidences the lack of restrictions; winning entries range from still life and landscapes to fantasy and modern art. The AOC has a longstanding practice of deferring to the sponsoring Member's determination of suitability and retains only nominal authority over the acceptance of artwork for display. [R.11-2 ¶¶ 11, 14.] In other words, if the AOC and a sponsoring Member disagree about the suitability of a piece of work, the AOC will yield to the Member's preference. [*Id.*] Representative Clay is the only Member ever to have had a sponsored work removed over his objection.

C. Untitled #1 Was Selected and Displayed as a Competition Winner.

In April of 2016, Representative Clay convened a panel of art professionals to select a piece to represent Missouri's First Congressional District in the Competition. [R.7-5 ¶¶ 5-6.] The panel unanimously selected "Untitled #1." [*Id.* at ¶ 7.] As shown below, the Painting depicts a protest. [R.7-4.] In the foreground of the Painting, two police officers and a young man face each other in a standoff. Both the young man and the officers have animalistic features: the officers appear to have the heads of warthogs, while the young man has the head of a wolf and a long tail. In the background, protesters look on, and another officer arrests another young man; none of these figures have animalistic features.



On his entry form, Mr. Pulphus described the Painting as "Deep expressions on difficult times in our community." [R.7-19 at 2.] In adopting the panel's recommendation and choosing to sponsor Untitled #1 in the Competition, Representative Clay avowed that he had "viewed the [] student's artwork and approve[d] of its content," and that he understood that by signing the Member Approval Form, he was "supporting this artwork" and was "responsible for its content." [*Id.*; R.7-16 at 21.]

After Untitled #1 was selected as the winner, the Painting was sent to Washington DC for inclusion in the Competition exhibit. On May 26, 2016, at "art-intake day," the Congressional Institute and AOC staff officially checked the Painting into the Competition. [R.7-42 ¶ 4.] Consistent with its past practice, the AOC's appointed panel reviewed and catalogued all Competition submissions on June 2, 2016. [R.11-2 ¶ 5.] AOC Panel Chair and Competition Curator Michele Cohen attested that Untitled #1 was flagged for being oversized along with 24 other paintings presenting framing or other special issues requiring attention from the sponsoring Member's office. [R.11-2 at 8–9.] The panel never flagged Untitled #1 for any other issues, including content or suitability.

Rather, the AOC's panel flagged only two pieces as depicting "potentially problematic subjects" under the Suitability Guidelines. [*Id*. at 9.] Specifically, the panel flagged a work sponsored by Representative Justin Amash entitled "Remembrance", which was a triptych photograph depicting "open wounds reminiscent of bullet holes" in a young African American boy's back. The panel also flagged Representative José Serrano's sponsored work —a painting of Bob Marley smoking marijuana—for depicting "drug use." [*Id.*] After flagging the potentially unsuitable paintings, Ms. Cohen emailed staff for Representatives Amash and Serrano "to make sure their Member has seen the picture and wants it to represent the district." [*Id.* at 9, 13–14, 16.] Both Members confirmed their

desire to display the flagged works in the Competition, regardless of the AOC's suitability objections. [*Id*. at 13, 16.] Consistent with its usual practice, the AOC deferred to the Members' preferences and allowed the works to be hung.

Following the correction of its oversized frame, Untitled #1 was delivered to AOC staff in the Cannon Tunnel on June 9. [R.11-2 ¶ 12.] AOC Panel member and Museum Curator Jennifer Blancato and the AOC's curatorial assistant, Victoria Villano, hung Untitled #1 in the Cannon Tunnel with the other winners. [*Id.*] Though Ms. Cohen attested that no AOC staff "made any assessment of the content of 'Untitled #1'" at the time it was hung, she did not explain why this was so, nor claim that the AOC Panel Members hanging the Painting were not empowered to conduct such a review. [*Id.*]

Later in June of 2016, the Congressional Institute invited Mr. Pulphus to a reception honoring all the Competition winners, as it had in years past. [R.7-21 at 2.] Mr. Pulphus and his mother traveled from Missouri to Washington, DC to attend. [R.7-3 ¶ 5; R.7-5 ¶ 12.] Along with other Competition winners, Untitled #1 was displayed and honored during the reception, which was attended by approximately 450 people, including winners, guests, Members of Congress and their staff. [R.1 ¶ 39; R.7-3 ¶¶ 5–6; R.7-5 ¶ 12.] Mr. Pulphus, his mother and Representative Clay were photographed in front of "Untitled #1." [R.7-3 ¶ 5; R.7-5 ¶¶ 5, 12.]

From May of 2016 until January 17, 2017, Untitled #1 hung in the Cannon Tunnel, as placed by the AOC, in a space designated for Missouri's First Congressional District. [R.7-5 ¶ 13.] The label beneath the Painting prepared by the AOC read:

> *David Pulphus*
> *Untitled #1*
> *Acrylic*
> *Hon. William Lacy Clay*

[R.1 ¶ 41.] During the period in which Untitled #1 hung without controversy in the Cannon Tunnel, the Painting was also displayed on the Congressional Institute's website along with the other winning artworks from the past five years. [R.7-5 ¶ 13.]

D. The Repeated Unauthorized Removal of Untitled #1

After nearly seven months of display, on December 29, 2016, a conservative news and opinion website criticized Untitled #1 as "depicting police officers as pigs with guns terrorizing a black neighborhood." [R.7-27 at 2.] In the weeks that followed, numerous public figures, including Speaker of the House Paul Ryan, publically disparaged the Painting and called for its disqualification from the Competition. [R.7-5 ¶¶ 14-17, 25, 27.] The presidents of police unions in New York, Los Angeles, San Francisco, San Jose, and Oakland wrote to Speaker Ryan asking him to "immediately remove the reprehensible and repugnant 'art.'" [R.1 ¶ 47.]

During this period, multiple Congressmen allegedly offended by the Painting's viewpoint repeatedly removed the Painting from the Cannon Tunnel. On more than one occasion, Representatives Duncan Hunter and Dave Reichert took the Painting from its designated space and delivered it to Representative Clay's office. [R.7-5 ¶¶ 16-17, 19-21.] Assisted by the AOC and his staff, Representative Clay re-hung the Painting after each removal. [*Id.* ¶¶ 20-21.] AOC staff assured Representative Clay that the removals were unauthorized and provided necessary materials to repeatedly rehang the Painting. [*Id.* ¶ 19.] This back and forth and further criticism of the Painting were widely covered in the national press. [R.7-26; R. 7-27.]

After multiple instances of publicly disparaging (and personally removing) the Painting, on January 11, 2017, Representative Reichert complained that Untitled #1 violated the Suitability Guidelines and requested an "official re-review" of Untitled #1 by the AOC. [R.7-31; R.7-5 ¶ 22.] The next day Speaker Ryan stated during a radio interview that Untitled #1 was "disgusting and . . . not befitting the Capitol," and disputed that the removals of the Painting implicated the First Amendment. [R.7-5 ¶ 25; R.7-36.] On the same day, a paper "Blue Lives Matter" flag was taped above "Untitled #1." [R.7-5 ¶ 26.] This addition to the Cannon Tunnel exhibition was unauthorized. [*Id.*]

On January 13, 2017, Representative Reichert's office released a statement announcing that the AOC had re-reviewed Untitled #1 and rescinded its previous determination that the Painting complied with the Competition guidelines. [*Id.* ¶ 27.] In his statement, Representative Reichert characterized the Painting as a "slap in the face" to law enforcement. [*Id.*] On January 14, 2017, the Congressional Institute removed the Painting from the virtual exhibition on its website of all the other Competition winners. [*Id.* ¶ 28.] On January 17, 2017, the AOC sent a letter to Representative Clay, confirming that Untitled #1 had been retroactively disqualified from the Competition after seven months of display in the Cannon Tunnel. The letter stated that, based on consultation with "industry experts" and his review, he had determined that the Painting did not comply with the HOBC artwork prohibition of artwork depicting subjects of contemporary political controversy or a sensationalistic or gruesome nature. [R.7-13.] The AOC neither explained how Untitled #1 depicted such subjects nor disclosed any input that may have been received by "industry experts." [*Id.*] Nor did he acknowledge his previous determination that Untitled #1 complied with the Suitability Guidelines and all other requirements when the Painting was accepted on May 26, evaluated on June 2, hung on June 9, 2016 and repeatedly re-hung in early January 2017. The AOC returned the Painting to Representative Clay's office. [*Id.* ¶ 29.]

Following the AOC's retroactive disqualification and removal of Untitled #1 from the Competition, Representative Clay asked the HOBC to reverse the AOC's decision. [R.7-5 ¶ 31.] On February 3, 2017, the HOBC upheld the AOC's decision to remove and retroactively disqualify "Untitled #1." [*Id.*] As a result, over the course of 35 years, Untitled #1 is the only painting known to have been removed from the Competition over a sponsoring Member's objection.[2]

E. The District Court's Order

On February 19, 2017, Mr. Pulphus and Representative Clay filed suit in the district court seeking a declaratory judgment that the Painting's retroactive disqualification violated their First Amendment rights and an injunction reversing the disqualification determination. [R.7-1.] Appellants argued that the Competition was a limited or nonpublic forum and the retroactive disqualification

[2] The only other time an entry has been retroactively removed from the Competition occurred in 1989 and was not for its viewpoint but for a copyright violation; no evidence shows the sponsoring Member objected to the removal. [R.11-1 ¶ 16.] In the district court, AOC Curator Michelle Cohen submitted three letters from 1998 in which the AOC raised suitability concerns relating to violent and erotic submissions and asked Members to "consider carefully the suitability of this artwork." [R.11-2 at 21–22, 24, 26.] With respect to two of the letters, there is no evidence in the record the works at issue were removed or whether the Members concurred with the AOC's suitability determination. With respect to the third, the Member responded that he believed the work to be "in good taste and [that it] should be hung in the corridor with the rest of the art." [*Id.* at 22.] Likewise, retired Curator Barbara Wolanin could recall only two instances since 1985 where she suggested a Member select a different work and they agreed to do so. [R.11-3 ¶¶ 6-8.] It is unclear from the record whether these two incidences are the same referenced in the letters attached to the Cohen declaration.

amounted to unconstitutional viewpoint discrimination. Appellants also challenged the Suitability Guidelines as unconstitutionally vague.

In response to the Motion, the AOC did not dispute that Untitled #1 was removed on the basis of its viewpoint, relegating its argument on the merits to a single footnote. [R.11 at 22 n.2.] Instead, the AOC conceded that the Painting was removed because some Congressmen were offended by the Painting and complained. [*Id.*] The AOC further conceded that the two flagged works depicting violence and drug use were permitted to stay in the Competition because those works received "no complaints." [R.11-1 ¶ 26.] The only defense proffered by the AOC was that the Competition falls outside the ambit of the First Amendment because it is "government speech." [*Id.*]

Expressing "sympath[y]" for Appellants, the district court found "little doubt" that Untitled #1's retroactive disqualification was viewpoint based. [R.16 at 2.] Recounting the history of the Painting's removal, the court noted the presence of many winning paintings in both the 2016 Competition and prior years that "depict[ed] subjects of 'contemporary political controversy,' including racism and racial injustice related to policing." [R.16 at 5 (citing R.7-23 at 2–3, 6–8, 11; R.7-24 at 3, 6, 10–11, 16, 20, 22, 26).] The court further noted "other paintings on display [in 2016], and again, that were displayed in past competitions, that are

arguably 'gruesome,' depict or suggest violence, or are otherwise visually disturbing." [*Id.* (citing R.7-23 at 3, 14, 15; R.7-24 at 8, 14, 18).]

Nonetheless, the court denied Appellants' Motion for a Preliminary Injunction, ruling that Appellants could not assert First Amendment rights vis-à-vis the Competition because the Competition was "government speech." [R.16 at 24.] The district court concluded that even though the 400 works displayed in the 2016 Competition were created by students, depicted a vast variety of subjects, and were each attributed to a sponsoring Member, "the public is likely to assume that the government is the speaker." [*Id.*] Moreover, although the AOC had never before exercised any editorial control over the content of any entry, and the AOC conceded that its usual practice was simply to defer to the choice of a sponsoring Member, the court nonetheless ruled that the AOC's theoretical retention of "editorial control" under the unenforced Suitability Guidelines was sufficient to render every work in the Competition the speech of the government. Representative Clay and Mr. Pulphus appealed.

F. The Government's Motion to Dismiss

On June 5, 2017, the AOC moved to dismiss this appeal, arguing that because the physical exhibition in the Cannon Tunnel had ended on May 1, 2017, this appeal is moot. Though Appellants had moved for a preliminary injunction on February 24, the district court did not rule until April 14, 2017. [R.1; R.16.] With

only two weeks remaining in the Cannon Tunnel exhibition, there was insufficient time to obtain appellate review before the physical exhibit ended. In response to the motion, Appellants argued that the appeal is not moot because Untitled #1 remains unconstitutionally excluded from the ongoing virtual exhibition of the Competition and that other concrete injuries continue to flow from the Painting's disqualification. Opp'n to Mot. to Dismiss at 11-18. Because Appellants continue to suffer the ongoing daily deprivation of their First Amendment rights, the appeal is not moot and preliminary injunctive relief remains appropriate.

On September 13, 2017, a panel of this Court referred the AOC's motion to dismiss to the merits panel in this appeal and established a briefing schedule. Per Curiam Order, No. 17-5095, 1:17-cv-00310-JDB, (Sept. 13, 2017). Consistent with the Court's order, this brief addresses both the merits of the appeal and the motion to dismiss.

V. SUMMARY OF ARGUMENT

The question presented by this appeal is whether the Congressional Art Competition—which annually showcases over 400 hundred pieces of student artwork from all over the country—is government speech. The answer is no. The Competition is not an effort to deliver a "government controlled message", but rather a quintessential limited or nonpublic forum for private speech. Untitled #1's

retroactive disqualification and ongoing exclusion from the Competition is thus unconstitutional viewpoint discrimination.

The district court erred as a matter of law when it denied Appellants' Motion for Preliminary Injunction seeking to reinstate the Painting in the Competition. Despite acknowledging there was "little doubt" that the disqualification was viewpoint-based, the court nonetheless ruled that Appellants had no First Amendment rights vis-à-vis the Competition because it is government speech. For the same reason, the court ruled the Suitability Guidelines were not unconstitutionally vague.

Contrary to recent Supreme Court authority, the district court extended the government speech defense far beyond its logical bounds to include Untitled #1—art which was not created, editorially controlled or selected by the AOC. Unlike government speech, no identifiable government policy or directive is advanced through the Competition that supports Untitled #1's retroactive exclusion. Moreover, the AOC has not traditionally communicated through the Competition and has never before exercised any editorial control over the submissions. To the contrary, Untitled #1 is the only submission ever to have been retroactively disqualified over the objection of a sponsoring Member. Applying the government speech factors to the undisputed record, the district court should have rejected the AOC's government speech defense, found Appellants were likely to prevail on the

merits of their First Amendment claims, and entered a preliminary injunction reinstating Untitled #1 as a Competition winner.

Moreover, contrary to the AOC's Motion to Dismiss, this appeal is not moot. Appellants continue to suffer irreparable harm resulting from the deprivation of their First Amendment rights for which preliminary injunctive relief remains appropriate. Although the Competition's physical exhibition in the Cannon Tunnel has concluded, Appellants remain excluded from the Competition's virtual exhibition. Further, Appellants continue to suffer reputational harm from having been excluded from the Competition. Finally, Representative Clay's injuries are likely to recur, as the unconstitutionally vague Suitability Guidelines—and with them the likelihood of viewpoint discrimination—continue to govern future Competitions.

In sum, the district court should not have denied the preliminary injunction. The Competition is not government speech and Appellants continue to suffer irreparable harm caused by the ongoing loss of their First Amendment rights.

VI. ARGUMENT

A. Standard of Review.

This Court reviews the denial of a preliminary injunction for abuse of discretion, but reviews legal issues *de novo*. *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011). "In cases raising first amendment issues an 'appellate court has

an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 897 (D.C. Cir. 1984) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)). Here, the district court committed legal error in its application of the government speech defense to the Competition, compelling this Court's reversal on *de novo* review.

B. Appellants Were Likely to Prevail on Their Claim That the Retroactive Disqualification of "Untitled #1" Was Unlawful Viewpoint Discrimination.

The Supreme Court has held "time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Matal*, 137 S. Ct. at 1763 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). Here, there is no question that Untitled #1 was disqualified on the basis of its allegedly "offensive" viewpoint. As such, the district court should have found that Appellants were likely to prevail on their First Amendment claims. Instead, the district court refused to apply the forum analysis to the Competition, ruling that the Competition is government speech. That was error.

Under well-established Supreme Court precedent, the Competition is a limited or nonpublic forum for private speech.[3] A limited or nonpublic forum is created when the government opens its property to a limited class of speakers or topics. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Once it has opened a limited forum, the government may not exclude speech where to do so is not "reasonable in light of the purpose served by the forum," nor may it "discriminate against speech on the basis of its viewpoint[.]" *Id.* at 829 (collecting cases). It is undisputed that a forum need not be solely a physical space, but rather can exist in a "metaphysical" form. *Id.* at 830 (forum analysis of funding of student newspapers); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (forum analysis of charitable contribution program); *Perry Educ. Ass'n. v. Perry Educators' Ass'n*, 460 U.S. 37, 46-47 (1983) (forum analysis of a school mail system); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300-04 (1974) (forum analysis of advertising spaces on city buses); *see also Matal*, 137 S. Ct. at 1744 (forum analysis more appropriate for trademark restrictions than government speech analysis); *Bryant v. Gates*, 532 F.3d 888, 899 (D.C. Cir. 2008) (applying forum analysis, not government speech

[3] Restrictions on speech must be reasonable and viewpoint-neutral in both a limited public forum and a nonpublic forum. *Cornelius*, 473 U.S. at 806. As the district court observed, this Circuit and the Supreme Court have at times used the terms interchangeably. Regardless, viewpoint discrimination is prohibited in both. *See Oberwetter v. Hilliard*, 639 F.3d 545, 551 (D.C. Cir. 2011).

analysis, to a military newspaper); *cf. Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (equating social media cites to streets and parks in forum analysis).

In determining the contours of the relevant forum, courts look to "the access sought by the speaker." *Cornelius*, 473 U.S. at 801. Here, Appellants do not seek "general access" to the Capitol grounds for purposes of self-expression, nor do they claim an unfettered right to hang art in the Cannon Tunnel. Rather, Appellants seek access to the Competition, which is designed to "showcase" private "artistic expression" and is open to the class of speakers that includes artists and artwork sponsored by a Member of Congress.

Within a limited or nonpublic forum, the AOC could have imposed reasonable and viewpoint-neutral limitations on the Competition, but it chose not to. Instead, the AOC enforced no restrictions on content and deferred all suitability determinations to individual House Members on what works they wished to sponsor. Thus, although limiting the Competition to a single work sponsored by a Member of Congress is a permissible limitation based on speaker identity and the purpose of the forum, retroactively disqualifying Untitled #1 based on its viewpoint was not. *Rosenberger*, 515 U.S. at 829; *see also Cornelius*, 473 U.S. at 806 ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible

subject."). Indeed, the primary purpose behind requiring neutral policies established in advance to govern speech in a limited or nonpublic forum is to prevent the summary termination of speech in that forum based on disagreement with its viewpoint. *See, e.g.*, *Cornelius*, 473 U.S. at 806.

As the district court noted, Untitled #1 was clearly "includible" in the Competition, i.e. the painting met the Competition's criteria and was in fact selected and displayed as a winning entry for seven months. *Id.* Subjects addressed by Untitled #1—race relations, the treatment of African-Americans by law enforcement, and policing—are also addressed by other works that were allowed to remain in this year's Competition and that have appeared in prior Competition years. [R. 7-23 at 14 (tryptic photograph depicting African-American male with bullet holes in his back); *id.* at 3 (painting of a person of color with a black eye entitled "Huddled Masses Yearning To Be Free"); R. 7-24 at 3 (drawing of an African-American man with a tear running down his face and tape over his mouth entitled "I am Trayvon Martin"); *id.* at 2 (poster "honoring police, fire, and medical first responders").] No established Competition procedure allowed for a retroactive "re-review" of the painting. Nonetheless, the AOC conceded that he disqualified Untitled #1 because a few Congressmen complained that they did not like the Painting's perceived "anti-law enforcement" viewpoint. [R.11-1 ¶ 26.] Untitled #1's disqualification therefore amounted to a classic "heckler's veto," in

which the objections of a small group of dissenters were ratified by the government and used to silence constitutionally protected speech. *See Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be . . . punished or banned, simply because it might offend a hostile mob."); *Texas v. Johnson*, 491 U.S. 397, 408–409 (1989) ("[A] principal function of free speech ... is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.") (citations omitted).

On this record, the district court appropriately ruled that "there is little doubt that the removal of the painting was based on its viewpoint." [R.16 at 2.] This should have ended the inquiry, and the district court should have entered a preliminary injunction reinstating Untitled #1 in the Competition. The court's failure to do so is reversible error. *Sanjour v. EPA*, 56 F.3d 85, 96 (D.C. Cir. 1995) ("It is perhaps the most fundamental principle of First Amendment jurisprudence that the government may not regulate speech on the ground that it expresses a dissenting viewpoint.") (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)); *Texas*, 491 U.S. at 414 (collecting cases holding same) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not

prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

C. The Competition Is Not Government Speech.

Despite acknowledging Untitled #1's retroactive disqualification was obvious viewpoint discrimination, the district court nonetheless concluded that Appellants "have no First Amendment rights at stake" because "this case involves government speech[.]" [R.16 at 2.] The district court should be reversed.

Where, as here, the government acts to "encourage a diversity of views" from private speakers, the government speech doctrine does not apply. *See*, *e.g.*, *Rosenberger*, 515 U.S. at 834. Only when expression is "meant to convey and ha[s] the effect of conveying a government message," is there government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009). Here, the Competition was intentionally designed to promote the expression of a diverse set of private speakers—by its own terms, the purpose of the Competition is "to encourage nationwide artistic creativity" by high school students and "to provide the opportunity for Members of Congress to encourage and recognize the artistic talents of their young constituents" without any functional limitations on content and no government-directed theme. [R.7-16 at 3, 5, 12.] Given the Competition's great diversity and "encouragement" of private views, it is not reasonable to

conclude that the Competition "meant to convey and ha[s] the effect of conveying a government message[.]" *Summum*, 555 U.S. at 472.

As discussed below, the three factors enumerated by the Supreme Court for identifying government speech in *Summum* and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2247-49 (2015)—i.e., whether the government has historically used the Competition to communicate a message to the public, whether the public perceives the government to be speaking through the Competition, and whether the government maintains direct editorial control over the Competition—fully support reversal. Moreover, to the extent the district court buttressed its government speech analysis by characterizing the AOC as an "arts patron," this analogy is contradicted by the undisputed record. Finally, the policy of political accountability on which the government speech doctrine is based does not apply to the Competition.

1. The Competition Is Not a Traditional Medium for Government Communication.

In the district court, the government argued both that the Competition had been traditionally used to communicate a message of "support for young artists" and that the government "traditionally speaks to the public through the monumental buildings and grounds of the Capitol campus." [R.11 at 14.] The district court properly rejected these arguments, finding "little evidence" to support them, and therefore determined that the first of the *Summum/Walker* factors was

"inconclusive." [R.16 at 16.] While the district court was right to note the absence of support for the AOC's claims, it should have ruled this factor does not support a finding of government speech.

In *Summum*, the Supreme Court upheld a city's decision to exclude from a small city park a permanent monument offered by a private religious group, holding that the city's choice of permanent monuments constitutes government speech. *Summum*, 555 U.S. at 464. The *Summum* Court's fractured opinion focused most heavily on the *permanent* nature of park monuments and the fact that "[g]overnments have used monuments to speak to the public since ancient times." *Matal*, 137 S. Ct. at 1759–60 (citing *Summum*, 555 U.S. at 472). The Court further relied on the government's longstanding practice of "selective receptivity" of privately donated works, and the practical space limitations in parks that prevent acceptance of all offered permanent monuments. In rejecting the application of a traditional forum analysis, the Court acknowledged that the "forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." *Summum*, 555 U.S. at 478. The Court explained:

> For example, a park can accommodate many speakers and, over time, many parades and demonstrations. The Combined Federal Campaign permits hundreds of groups to solicit donations from federal employees. A public university's student activity fund can provide

> money for many campus activities. A public university's buildings may offer meeting space for hundreds of student groups. A school system's internal mail facilities can support the transmission of many messages to and from teachers and school administrators.

Id. (citations omitted). In contrast with these large, elastic or metaphysical forum examples, the Court observed that if a city park were required to accept all monuments, it would quickly run out of space and be forced to accept none. *Id.* at 480.

Here, the Competition raises no similar space or permanence considerations. Instead, by its terms, the Competition is limited to one Member-sponsored work each year. Like the Combined Federal Campaign in *Cornelius* or the student activity fund in *Rosenberger*, the Competition is *designed* to accommodate a large number of different speakers over time, and in fact, has displayed thousands of works in its history. [R.7-16 at 8]. The yearly rotation of the physical exhibition in the Cannon Tunnel thus distinguishes the Competition from the permanent monuments in *Summum* both in terms of historical intent to communicate a government message and practical effect of doing so. *See Arkansas Soc. of Freethinkers v. Daniels*, No. 4:09CV00925SWW, 2009 WL 4884150, at *5 (E.D. Ark. Dec. 16, 2009) (rotating displays on Capitol grounds not government speech).

Similarly, in *Walker*, the Supreme Court held that specialty license plates are government speech, such that the State of Texas could permissibly exclude a license plate featuring the confederate flag. Starting with the proposition that

license plates are a form of official state identification, the Court relied on the long history of license plates being used to communicate messages from the states, and the public's reasonable perception that license plates stamped with official vehicle identification numbers carried the imprimatur of the state of Texas.[4] *Walker*, 135 S. Ct. at 2248. Here, the Competition has no equivalent history of government communication. The AOC conceded that the Competition prescribes no mission beyond "encouraging artistic expression" of private speakers, and has no budget, no authorizing legislation, and no dedicated staff. Neither the AOC nor the district court cited any case finding government speech on the basis of such a diffuse program.

Likewise, as the Supreme Court observed in *Matal*, the fact that government funds are indirectly spent via the participation of AOC staff in the administration of the Competition does not transform it into a medium for government communication. *Matal*, 137 S. Ct. at 1761 ("[J]ust about every government service requires the expenditure of government funds."). Indeed, First Amendment jurisprudence is replete with examples of government employees supporting the operation of public and nonpublic fora without converting such activities into a

[4] *Matal* has since limited *Walker*, noting that *Walker* "represents the outer bounds of the government speech doctrine." 137 S. Ct. at 1760. The dissent in *Walker* was authored by Justice Alito, who went on to write for the Court in *Matal*. *Walker*'s short-lived reign as the defining case on government speech evidences the Supreme Court's intent to limit the doctrine.

"traditional medium" for government speech. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (public school facilities used by private groups); *Rosenberger*, 515 U.S. 819 (university funding student publications); *Cornelius*, 473 U.S. 788 (Combined Federal Campaign); *Perry*, 460 U.S. 37 (public school mail system); *Gerlich v. Leath*, 847 F.3d 1005 (8th Cir. 2017) (public university-administered trademark licensing regime). Numerous courts have likewise rejected a government speech defense even where the government is actively spending its funds beyond the employment or utilization of staff. *See e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (legal services attorney not speaker for government despite funding subsidy for program).

Finally, to the extent the AOC argues that the mere presence of the Competition on the Capitol grounds supports the "traditional medium" factor, this argument fails for two reasons. First, this argument ignores authority recognizing the Capitol as a forum where First Amendment activities are protected. *See, e.g.*, *Lederman v. United States*, 291 F.3d 36, 44 (D.C. Cir. 2002) ("the Capitol Grounds ... is a traditional public forum"); *Cmty. for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 387 (D.C. Cir. 1989) (same); *Bynum v. U.S. Capitol Police Bd.*, 93 F. Supp. 2d 50, 56 (D.D.C. 2000) ("As a nonpublic forum, the government may restrict First Amendment activity in the Capitol so long as the restrictions are 'viewpoint neutral' and 'reasonable in light of the purpose served by the forum.'")

(citation omitted); *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 584 (D.D.C. 1972), *aff'd*, 409 U.S. 972 (1972) (explaining that "[t]he Capitol Grounds (excluding such places as the Senate and House floors, committee rooms, etc.) have traditionally been open to the public"); *Wash. Activity Grp. v. White*, 342 F. Supp. 847, 854 (D.D.C. 1971), *aff'd*, 479 F.2d 922 (D.C. Cir. 1973) (applying forum analysis to anti-war display in Capitol Crypt). As the *Bynum* court noted, 40 U.S.C. § 5104, which prohibits certain conduct within the Capitol Building, was enacted with the express intent of balancing the First Amendment rights of Capitol visitors with the government's need to prevent disruption of the legislative process. *Bynum*, 93 F. Supp. 2d at 56 (citing H. REP. NO. 90–745 at 2).

Second, the lack of statutory authorization for the Competition further undercuts the "traditional medium" factor. As the AOC conceded, Congress directs the AOC by statute or resolution on the specific placement and management of art in the Capitol. *See, e.g.*, 2 U.S.C. § 2131 (Joint Committee on the Library votes on placement of statues in Statuary Hall); 2 U.S.C. § 2133 (authorizes Joint Committee to accept art deemed suitable and determine its placement in the Capitol); 2 U.S.C. § 2121 (House Fine Arts Board has authority over all art that is property of Congress for use or display in House wing of Capitol). In short, when Congress "speaks" through the placement of art in the Capitol, it passes a statute or resolution. It failed to do so here.

In sum, the Competition is not a traditional medium for government speech, and the first of the *Summum*/*Walker* factors supports reversal.

2. The Competition is Not Reasonably Perceived as the Speech of the Government.

After acknowledging that the government did not traditionally "speak" through the Competition or art in the Capitol in general, the district court contradicted itself by ruling that viewers seeing the Competition artwork would likely assume a government message. Thus, the Court ruled that the second of the *Summum*/*Walker* factors supported the AOC's government speech defense. This was error, as neither the physical features of the Competition nor the diverse (and unregulated) content of the artwork support a reasonable perception that the government is speaking.

a. The physical layout of the Competition does not support perception of a government-controlled message.

Because the Competition's physical exhibit is in the Cannon Tunnel, the district court ruled that it is "easy for the Court to believe that the public would reasonably associate the art competition and the art displayed in the Tunnel …with the government." [R.16 at 17.] Though the court relied primarily on *Summum*, the Competition fundamentally differs from that case. In *Summum*, the Supreme Court's analysis of the public's perception focused largely on the physical limitations inherent in the display of park monuments. There, the small park could

accommodate only a limited set of physical structures. By contrast, the Competition annually hosts over 400 student works, and has hosted thousands in its 35-year history. Moreover, in *Summum*, the permanent monuments in the park were government speech because they were selected by government decision makers to "portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture," and were therefore "meant to convey and have the effect of conveying a government message." 555 U.S. at 472. Here, by contrast, the Competition winners are selected by over 400 different sponsoring Members employing untold criteria for selection, do not project any common identity or message, and are only temporarily hung in the Capitol. [5]

For these same reasons, the district court's reliance on *Newton v. LePage*, 700 F.3d 595 (1st Cir. 2012) is misplaced. As a threshold matter, the First Circuit did not decide whether the mural at issue was the government's speech or the

[5] In analogizing to *Summum*, the court also emphasized that the Cannon Tunnel is accessible only with a security pass provided by congressional staff. [R. 16 at 17.] However, though the Cannon Tunnel is frequented by Members and their staff, it is also open to Capitol visitors, and the Tunnel is opened to all Competition winners, their family members, staff and other visitors for the Competition's annual June reception. [R.7-5 ¶ 13; R.7-3 ¶¶ 5-6.] The Suitability Guidelines note this area is "highly traveled." [R.7-16 at 14.] Moreover, the Congressional Institute website that operates as the "digital record" and virtual exhibition of the work is obviously open to the public at large. Finally, limited access to the Cannon Tunnel would not preclude a forum analysis under *Washington Activity Group*, 342 F. Supp. at 854 (applying forum analysis to anti-war display in Capitol Crypt).

artist's speech, but rejected the challenge to the mural's relocation because plaintiffs were "private citizens attempting to compel a governor to keep in place a mural, owned by the state, in a particular location[.]" *Id.* at 602. Unlike here, the state in *Newton* had commissioned the mural, owned it, and was planning only to relocate the mural, not permanently remove the mural from all public view. *Id.* Further, the artist did not challenge the relocation. Critically, the court observed that the "mural's prominence, filling two walls of a small waiting room" at the Maine Department of Labor ("MDOL"), combined with a plaque indicating it had been commissioned by the MDOL would lead viewers to perceive government endorsement of the mural's message. By contrast, Untitled #1 was but one of over 400 works in the diverse Competition exhibition, did not have any particular "prominence" and was neither commissioned nor owned by the government. Finally, *Mech v. School Board of Palm Beach County, Florida*, 806 F.3d 1070, 1079 (11th Cir. 2015), *cert. denied*, 137 S. Ct. 73 (2016), is also inapposite. That case involved banners on school grounds thanking school sponsors, which the court ruled were government speech. The schools did "not allow the banners to list anything but the sponsor's name, contact information, and preexisting business logo" and required the use of school colors and the school's initials. "The message set out in the banner was "from beginning to end the message established by the

[school]" and was quite literally the government speaking to "express gratitude" to its sponsoring organizations.

If, as the district court suggests, the Competition's placement on government property or involvement of government officials is sufficient to create the perception of government speech, then the government speech defense obviates the forum analysis altogether. That is not the law. *See supra*, at 22 (collecting cases employing forum analysis on government property or via government programs).

b. The court should have examined the content of the Competition to determine the reasonable perception of a government message.

Though the district court accepted the AOC's generalized "support for artists" as the operative message of the Competition, in doing so, it failed to explain how Untitled #1 was inconsistent with that message, or how its disqualification was necessary for its promotion. In so doing, the court erroneously disregarded the wide-ranging content of the art showcased in the Competition in determining whether the public would reasonably perceive any government-controlled message. This was error.

The district court based its refusal to look at the diverse content of the work on an analogy to "thoughts contained in the books in a city library," the specific content of which is not reasonably attributed to the library itself. [R.16 at 18.] But as the district court recognized, this analogy turns on the government's actual

exercise of editorial control over the work, and the public's reasonable expectation that such control is exercised. [*Id.*] As detailed further below, the government has not in fact exercised editorial control over the Competition and, in light of the long history of this fact, the public could have no reasonable expectation that such control existed. *See Matal*, 137 S. Ct. at 1758 (no government speech where "[t]he Federal Government does not dream up these marks, and it does not edit marks submitted for registration").

Matal v. Tam illustrates this point. There, the Patent and Trade Office ("PTO") argued that federally registered trademarks were "government speech" such that the First Amendment did not apply. The Supreme Court rejected this "far-fetched" claim outright based on the fact that the PTO does not ensure consistency among the marks and that many marks in fact convey diametrically contradictory messages:

> If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.

Matal, 137 S. Ct. at 1758 n. 9 (internal citations omitted).[6]

[6] *See also id.* ("Compare "Abolish Abortion," Registration No. 4,935,774 (Apr. 12, 2016), with "I Stand With Planned Parenthood," Registration No. 5,073,573 (Nov. 1, 2016); compare "Capitalism Is Not Moral, Not Fair, Not Freedom," Registration No. 4,696,419 (Mar. 3, 2015), with "Capitalism Ensuring Innovation," Registration

The questions posed by the Supreme Court in *Matal* are instructive here: If the Competition is government speech, what is the government saying through this vast array of paintings and photographs? And why is the exclusion of Untitled #1 necessary to say it? The topics cover every conceivable subject, from still-life fruit, animals, and family, to violence, politics, and racism. [R.16 at 5.] In 2016 and years past, many winning submissions highlighted issues pertaining to racial tensions and police brutality, while others honored military veterans and first responders. Other submissions are purely depictions of fantasy, many "visually disturbing" as the district court noted. [*Id.*] No reasonable viewer seeing such a hodgepodge of student work would perceive the requisite intent to convey a government message. To the contrary, the differing views of various House Members confirms a representation of the broader "marketplace of ideas" through the lens of students from across the country, rather than a singular government-controlled position.

Moreover, it is well-established that it is not reasonable to assume the government is speaking where a government program has facilitated speech by a diverse group of speakers. *See Matal*, 137 S. Ct. at 1758 (given lack of control over trademark applicants, forum analysis more appropriate than government

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No. 3,966,092 (May 24, 2011); compare "Global Warming Is Good," Registration No. 4,776,235 (July 21, 2015), with "A Solution to Global Warming," Registration No. 3,875,271 (Nov. 10, 2010).").

speech); *Summum*, 555 U.S. at 480 (forum analysis would apply to a permanent monument in a park that was open to a designated class of citizens invited to write their own message upon it); *Velazquez*, 531 U.S. at 543-44 (legal services attorney not speaker for government despite funding subsidy for program); *Miller v. City of Cincinnati*, 622 F.3d 524, 537 (6th Cir. 2010) ("[N]o one can reasonably interpret a private group's rally or press conference as reflecting the government's views simply because it occurs on public property."); *NAACP v. City of Philadelphia*, 834 F.3d 435 (3rd Cir. 2016) (invalidating ban on non-commercial ads where airport full of other non-commercial messages not attributable to the government); *Gerlich*, 861 F.3d at 708 (university trademarks not government speech where they were licensed to approximately 800 student organizations, including groups espousing opposite viewpoints); *Higher Soc'y of Indiana v. Tippecanoe Cty.*, 858 F.3d 1113, 1118 (7th Cir. 2017) ("We seriously doubt that reasonable citizens of Lafayette will believe, solely based on the rally's location [on the courthouse steps], that their County government has endorsed marijuana legalization.").

In sum, the second of the *Summum/Walker* factors—perception of a government-controlled message—does not support a finding of government speech. This Court should reverse.

3. The AOC Has Not Exercised Sufficient Editorial Control Over the Competition to Render the Competition Government Speech.

The final *Summum*/*Walker* factor necessary for government speech is the government's exercise of direct "editorial control" over the speech in question. *See, e.g.*, *Walker*, 135 S. Ct. at 2247–50. In finding sufficient editorial control here, the district court relied primarily on the general involvement of AOC staff in the administration of the Competition and the AOC's reservation of rights "to make final determinations regarding the content suitability of any work chosen." [R.16 at 19, 23.] Ignoring that the AOC's admitted practice is wholly inconsistent with this reservation, the district court nonetheless concluded that the exercise of "some control," albeit not "extensive" or "as thorough as the rules would seem to require" is sufficient to meet the standard for government speech. [*Id.* at 21–22.] Although Untitled #1 is the only painting ever removed over a Member's objection, the district court erroneously insists "[t]his is not a case in which the government has surrendered control of the exhibit to a private party, or has failed to ever exercise its authority." [*Id.* at 23.]

The undisputed record, however, reveals that the AOC has never exercised editorial control over the Competition. Moreover, the fact that Untitled #1 was disqualified long after Competition winners were selected and displayed undermines any claim that the AOC was "curating" the Competition by removing the Painting. The district court should be reversed.

a. Editorial control for purposes of government speech must be exercised, not merely reserved.

The cases cited by the district court demonstrate that for purposes of government speech, "editorial control" requires more than an unused reservation of rights or general involvement of government staff. Equating the city's "final approval authority" over monuments in *Summum* to that of the AOC's mere reservation of authority here, the court ignored that the city in *Summum* had actually exercised "receptive selectivity" in accepting a limited number of monuments. *Summum* is further distinguishable because there was no "claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors." *Summum*, 555 U.S. at 472–73. Here, by contrast, the AOC has undisputedly opened the Competition to whatever art is sponsored by a Member. It concedes that it has only ever rejected art that a Member agrees is not suitable, and that it has never before rejected a work that remains sponsored. [R.11-2 ¶¶ 9-11; R.11-3 ¶¶ 7–8.] In fact, the *Summum* Court hypothesized that, if a town "created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message," then the forum analysis (and concomitant First Amendment protections) would apply. 555 U.S. at 480. Here, the Competition is far more like this hypothetical public monument than the actual

facts of *Summum*, where the Competition is open to all Members and all sponsored works have historically been accepted.

The AOC's practice is thus also unlike the department of licensing's practice at issue in *Walker*, which exercised "direct" and "sole control over the design, typeface, color and … pattern for all license plates," 135 S. Ct. at 2249, or the Secretary of Agriculture's "exercise[] [of] final approval authority over every word used in every promotional campaign" in *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 561 (2005). The *Johanns* Court took pains to emphasize that the Secretary's role was not "limited to final approval or rejection." Rather, the Court found significant that Department of Agriculture Officials "attend and participate in the open meetings at which [the advertising] proposals are developed." *Id.* at 561; *see also Ranchers-Cattlemen Action Legal Fund v. Perdue*, CV 16-41-GF-BMM, 2017 WL 2671072, at *5 (D. Mont. June 21, 2017) (effective control "has been understood to mean that the government must at least hold statutory control over the entity that makes the challenged speech….").

Here, unlike the editorial control in the cases cited by the district court, the AOC has both disclaimed any intent to curate the artwork and has relinquished editorial control to individual Members, who must personally attest to being

"responsible for the content" of their sponsored choice.[7] Coupled with the lack of theme, content parameters, and long history of accepting numerous works that arguably conflict with the Suitability Guidelines, the AOC's admittedly "light hand on the reins" is thus unlike any case on which the district court relies for evidence of "editorial control." [R.16 at 23.]

The AOC's lack of prospective curatorial intent and exercised control also distinguishes the Competition from the art exhibit commissioned by the District of Columbia in *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005). In *Gittens*, which predates *Summum* and *Walker*, the District of Columbia's Commission on the Arts

[7] In dicta, the district court also suggests that Representative Clay's involvement in the selection of the Painting also constitutes editorial control by the government such that the AOC's disqualification of Untitled #1 is simply one government actor overruling another, all within the confines of the "government" speaking. [R.16 at 23]. This makes no sense. First, the court's suggestion begs the ultimate question in this case, i.e., whether the AOC's "overruling" of Clay's choice on the basis of viewpoint violates Plaintiffs' First Amendment rights. Second, Clay's sponsorship of Untitled #1 is not selection by "the government." Individual members are not "Congress." *United States v. Ballin*, 144 U.S. 1, 7 (1892) ("The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole."). Finally, this Court has affirmed the "basic tenet that there is no unreviewable discretion where the First Amendment is concerned." *Wash. Activity Grp.*, 342 F. Supp. at 854. Prohibiting Representative Clay from challenging the AOC's removal of Untitled #1 would constitute such "unreviewable discretion." As the Supreme Court has held, "the House may not by its rules ignore constitutional restraints or violate fundamental rights." *Ballin*, 144 U.S. at 5.

and Humanities sponsored "the largest public art project in the history of the District of Columbia." *Id.* at 25 (quotation marks omitted). The project involved placing 200 pre-formed statues of donkeys and elephants in prominent locations around the District, to "foster an atmosphere of amusement and enjoyment" and display the "whimsical side" of the Nation's Capital. *Id.* at 26 (quotation marks omitted). The Commission solicited artists and organizations to decorate the statues, but retained complete editorial control over which designs would be included for display. As sole curator of the project, the Commission's Selection Committee applied specific parameters and a limited theme to screen and evaluate proposed submissions, rejecting substantial numbers that did not meet the criteria. *Id.* at 25-26 ("More than 1,000 artists entered designs, most of which the Selection Committee rejected."). Notably, the Commission also retained ownership over the sculptures created from the accepted designs to sell them at a fundraising auction. Finally, the Commission made its sponsorship of the project obvious, labeling each sculpture with a plaque bearing the artist's name and the following statement: "DC Commission on the Arts & Humanities Anthony A. Williams, Mayor www.partyanimalsdc.org." *Id.* at 26.

Here, by contrast, the AOC does not select the work at all, and has in practice ceded his final approval authority to all individual Members. Moreover, while the district court noted that the AOC staff reviews "(most) of the work

submitted for compliance with the suitability guidelines" as evidence of "control," *see* [R.16 at 23], the AOC staff implied in their declarations that due to the size of the Competition, even viewing all the submissions before they are hung is "a daunting challenge". *See* [R.11-3 ¶ 6.]

On this record, the district court erred by relying solely on the AOC's mere reservation of authority, to the exclusion of the AOC's actual practice. As the Supreme Court explained in *Matal*, the government speech doctrine is narrow and subject to "dangerous misuse." 137 S. Ct. at 1758. Recognizing the potential for unconstitutional limitations on private speech, the Court warned that courts must "exercise great caution" before extending government speech precedent. *Id.* Allowing a paper reservation of authority to trump actual practice would mark a dangerous extension of current law. Indeed, this Court and numerous others have emphasized the importance of actual practice in assessing the reasonableness of restrictions on speech. *See*, *e.g.*, *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1021 (D.C. Cir. 1988) ("Mere statements of policy, if consistently contradicted by practice, are not dispositive."); *Bryant*, 532 F.3d at 896 ("To ascertain the government's intent, we look not only to the government's "stated purpose" but also at 'objective indicia of intent,' such as … the *consistent* policy and practice of the government.") (emphasis in original)); *Hopper v. City of Pasco*, 241 F.3d 1067, 1076 (9th Cir. 2001) ("A policy purporting to keep a forum closed (or open to

expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it is not enforced or if exceptions are haphazardly permitted."); *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of City of Chicago*, 45 F.3d 1144, 1153 (7th Cir. 1995) ("The government may not 'create' a policy to implement its newly-discovered desire to suppress a particular message. . . . Neither may the government invoke an otherwise unenforced policy to justify that suppression."); *see also Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991) ("actual practice speaks louder than words"). Again, these authorities demonstrate the importance of a bona fide neutral policy crafted in advance and applied consistently, the exact opposite of what happened here.

Because the AOC's actual practice is so far removed from its paper "reservation" of authority, the district court erred in finding editorial control consistent with government speech. *See Stewart*, 863 F.2d at 1019 ("It is from such objective factual indicia that real intent is often inferred even when expressed intent runs counter.").

b. The AOC was not acting as an "arts patron" when it retroactively disqualified Untitled #1.

Although the record shows the AOC failed to exercise editorial control, the district court nonetheless ruled that because the AOC had excluded Untitled #1 for its supposedly "offensive" viewpoint, it was therefore acting as a "patron of the

arts" not subject to the First Amendment. [R.16 at 19.] The district court's analysis turns the "editorial control" inquiry on its head, and renders inapplicable the "arts patron" authority cited by the district court.

In *Gittens*, this Court acknowledged the deference occasionally afforded the government in its "role as patron of the arts, television broadcaster, and librarian." 414 F.3d at 29. But in the arts cases cited by the district court, experts employing government funds in arts programs made "aesthetic judgments" or "exercise[d] journalistic discretion" to further a stated statutory goal.[8] Nothing in the record, however, suggests the AOC acted in any of these special capacities by retroactively disqualifying Untitled #1. Despite receiving and hanging Untitled #1 with the other works, the AOC did not exercise its supposed curatorial power until seven months later, and only then reluctantly in response to intense political pressure. The government cannot avoid the First Amendment implications of retroactively disqualifying a painting on the basis of complaints about the Painting's viewpoint by labeling it "aesthetic judgment" after the fact. Moreover, the AOC has never articulated any artistic basis for the Painting's removal.

[8] *Gittens*, 414 F.3d at 29 ("As a television broadcaster, the government must 'exercise ... journalistic discretion,' *Forbes*, 523 U.S. at 674; as an arts patron, the government must 'make esthetic judgments,' *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998); and as a librarian, the government must 'have broad discretion to decide what material to provide to [its] patrons.' *Am. Library Ass'n,* 539 U.S. at 204 (plurality opinion)" (internal citations shortened)).

Unsurprisingly, none of the "arts patron" cases cited by the district court involved the retroactive *removal* of a piece of art on viewpoint grounds. To the contrary, the AOC's post-hoc removal of Untitled #1 is precisely the evidence of viewpoint discrimination that the Supreme Court warned against in *Finley* and *Arkansas Education Television Commission*. *See Finley*, 524 U.S. at 587 ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case…. [E]ven in the provision of subsidies, the Government may not "'aim at the suppression of dangerous ideas.'" (citations omitted)); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676 (1998) ("[A] broadcaster cannot grant or deny access to a candidate debate on the basis of whether it agrees with a candidate's views.").

The district court's reliance on *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003), is also misplaced. There, a divided Supreme Court upheld a statute conditioning federal funding for public libraries on the use of internet filters. While acknowledging that libraries have latitude to use their traditional expertise in making content-based collection decisions, the plurality decision acknowledged that, to the extent erroneous blocking of non-pornographic websites "presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."

Id. at 209. Here, the retroactive disqualification of a painting previously found to be acceptable is not consistent with any exercise of expertise, and the "constitutional difficulties" of excluding the Painting cannot be remedied by Mr. Pulphus, Representative Clay or the viewing public. Finally, *Matal* suggests that the analysis in cases such as *Finley* and *American Library Association* is more appropriately applied to cases involving cash subsidies or their equivalents, and not government speech. *Matal*, 137 S. Ct. at 1761.

In sum, none of the indicia of the "arts curating" present in *Gittens* or any other cited case applies here. Although the government could in theory establish an arts funding program or curate an exhibit as a form of government speech, the AOC has not done so via the Competition. A single incidence of retroactive viewpoint-based discrimination does not equate to "curating" outside the bounds of the First Amendment.

4. The Competition is Neither Accountable to the Electorate Nor the Political Process.

A final basis on which to reject the application of the government speech doctrine here is the absence of political accountability inherent in the set-up of the Competition. As the Supreme Court explained in *Velazquez*:

> The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its

> advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."

531 U.S. at 541–42 (quoting *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000)); *see also Johanns*, 544 U.S. at 563 ("government speech is subject to democratic accountability"). Here, the AOC is neither accountable to the electorate nor the political process. Moreover, just as there is no way for the electorate to object to the unconstitutional removal of Untitled #1, there is also no recourse for a member of the public strolling through the Cannon Tunnel or viewing the Congressional Institute website to "vote" against an offensive painting, outside of the unlikely scenario that the offending work was sponsored by the citizen's representative. As such, the policy advanced by the government speech doctrine is not present here. On the other hand, the policies underlying the First Amendment are best served by allowing individual Members of Congress to openly critique or state their views on the Painting (as many did), without granting them the right to remove the Painting based on personal political preferences.

In sum, the Competition is not government speech. As the district court acknowledged, without the government speech defense, there was "little doubt" that Appellants were likely to succeed on the merits of their viewpoint discrimination claims. Because the district court misapplied the relevant

government speech factors, the denial of Appellants' Motion for Preliminary Injunction should be reversed.

D. Appellants Were Likely to Succeed on the Merits of Their Claim That the Suitability Guidelines Are Unconstitutionally Vague.

As with their viewpoint discrimination claims, the district court ruled Appellants were unlikely to succeed on the merits of their vagueness challenge to the Suitability Guidelines because the First Amendment does not apply to the Competition. [R.16 at 24.] For the reasons detailed above, this was error. Additionally, the district court erroneously confined the void-for-vagueness doctrine to violations resulting in "civil or criminal penalties," regardless of whether constitutional rights have been infringed upon. [*Id.* at 25.] The district court was wrong.

Arising from due process principles, the void-for-vagueness doctrine requires regulations to be drafted (1) in a manner that allows regulated parties to understand "what is required of them" and (2) with "precision and guidance ... so that those enforcing the law do not act in an arbitrary or discriminatory way." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012). In the First Amendment context, the vagueness doctrine applies with special force, requiring "rigorous adherence" to these requirements "to ensure that ambiguity does not chill protected speech." *Id.* Applying this heightened standard, courts have routinely overturned impermissibly vague regulations that have imposed only First

Amendment or reputational injuries, as opposed to civil or criminal penalties. *See id.* at 255-56 (sustaining vagueness challenge based on "reputational injury" even absent imposition of fine); *Miller*, 622 F.3d at 540 (sustaining vagueness challenge to policy denying plaintiffs permit to use municipal buildings); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 360 (6th Cir. 1998) (same for bus advertisement policy rejecting plaintiffs' application for advertisement).

Here, the Suitability Guidelines are "so standardless" that they "invite arbitrary enforcement." *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015); *see also Hodge v. Talkin*, 799 F.3d 1145, 1173 (D.C. Cir. 2015) (terms commanding "wholly subjective judgments . . . yield indeterminacy of a kind occasioning invalidation on vagueness grounds") (internal quotation marks omitted), *cert. denied*, 136 S. Ct. 2009 (2016). The unconstitutional imprecision of the Guidelines is borne out by their selective enforcement against "Untitled #1" alone. As the district court observed, the guidelines apparently permitted numerous submissions that "arguably depict subjects of 'contemporary political controversy,' including racism and racial injustice related to policing" and still others that are arguably "gruesome," depict or suggest violence, or are otherwise visually disturbing. [R.16 at 5.] The AOC could not articulate any rationale for excluding Untitled #1 and permitting other similar works, rendering the "contours

of the coverage" of the Suitability Guidelines unconstitutionally vague. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997).

In other words, the vagueness of the Guidelines afforded the AOC with uncurbed discretion to discriminate against speech—that is, to do precisely what the void-for-vagueness doctrine forbids. *See Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1040 (D.C. Cir. 1980) ("The standards may not be so imprecise that they afford latitude … to discriminate against those engaged in protected First Amendment activities."). As such, the district court erroneously ruled that Appellants were unlikely to prevail on this claim.

E. Appellants Continue to Suffer Irreparable Harm Due to the District Court's Improper Denial of the Motion for Preliminary Injunction.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" where the injury is threatened or occurring at the time of a plaintiff's motion for a preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Untitled #1's unconstitutional exclusion from the Competition on the basis of viewpoint constitutes a loss of First Amendment freedoms that began on January 14, 2017, and continues unabated today. Appellants have therefore shown irreparable harm. *See, e.g., Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 84 (D.D.C. 2012) (finding irreparable harm where plaintiffs "demonstrated that their 'First Amendment interests were either threatened or in fact being impaired at the time

relief was sought'") (quoting *Nat'l Treasury Emps. Union v. United States*, 927 F.2d 1253, 1254–55 (D.C. Cir. 1991) (alterations omitted)).

F. The Balance of Harms and the Public Interest Continue to Favor Appellants.

As with harm, the district court's determination of the final two injunction factors was premised on Appellants' lack of First Amendment rights under the government speech doctrine. Specifically, the court noted that a preliminary injunction would harm the government by interfering with its ability to control the content of its own speech, and that where Appellants possessed no First Amendment rights, the public interest did not favor an injunction. [R.16. at 26.] The district court was wrong.

Entering preliminary injunctive relief pending a final decision on the merits will not harm the AOC. The AOC initially approved the Painting as suitable for display, and it is undisputed that neither he nor anyone else suffered any harm during the nearly seven months that the Painting was displayed. Moreover, even assuming that the lawmakers who complained about the Painting suffered any cognizable harm as a result of the Painting's display, a fact unsupported by the record and one that Appellants strongly dispute, such harm is substantially outweighed by the harm to Appellants and the viewing public that results from the continued suppression of Appellants' protected speech. *See Lebron*, 749 F.2d at 898 (noting that the thumb of the court should be on the speech side of the scales).

Moreover, the public interest supports an injunction. The Supreme Court and has long recognized the strong public interest in upholding First Amendment principles. *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). By contrast, continuing to bar the Painting from display because its perceived message offends certain objectors would hinder the unfettered interchange of ideas—including political and social commentary—that the First Amendment was designed to protect. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972).

In sum, the district court erroneously denied Appellants' Motion for a Preliminary Injunction. Preliminary injunctive relief is still appropriate to redress the ongoing deprivation of Appellants' First Amendment rights.

VII. THIS APPEAL IS NOT MOOT

The AOC moved to dismiss this appeal because the physical exhibition of the 2016 winners ended on May 1, 2017. As detailed below, the AOC cannot meet its "heavy burden" of proving mootness. *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989); *see Flight Engineer Int'l Ass'n, EAL Chapter, AFL-CIO v. Nat'l Mediation Bd.*, 338 F.2d 280, 282 (D.C. Cir. 1964) (Appeal not moot where, "[i]f the District Court erred in denying the preliminary injunction it would have power, notwithstanding the intervening events, to grant relief to appellant in some form appropriate to the nature of the case.").

Appellants' injuries are ongoing and redressable. The AOC's motion should be denied.

A. The Unconstitutional Exclusion of Untitled #1 is Ongoing and is Redressable by this Court.

It is true that Appellants filed their motion for preliminary injunction intending that, if granted, a component of the relief from reinstatement would include re-hanging the Painting in the Cannon Tunnel exhibition. [R.7 at 1.] However, the removal of the Painting from the physical exhibition was not the only injury pleaded, and rehanging the Painting in the physical exhibition was not the only relief sought. [*Id.* (seeking reversal of disqualification *and* re-hanging in the Cannon Tunnel exhibit); *see also* R.1 at 18 (seeking declaration that disqualification was unconstitutional and injunction preventing exclusion from the Cannon Tunnel *and* placement on relevant Competition websites).] While the "brick and mortar" exhibition of the 2016 winners has concluded, the virtual exhibition is ongoing. The Congressional Institute's website features every painting sponsored by Representative Clay going back to 2012, with the exception of Untitled #1. Suppl. Clay Decl. at 10-14; Suppl. Pulphus Decl. at 3 ¶ 8. As such, Appellants' unconstitutional exclusion on the basis of viewpoint from the Competition continues to this day. This Court could cure this ongoing deprivation by reversing the denial of the preliminary injunction and remanding for entry of an

injunction reinstating Untitled #1 as a winner in the Competition while this case is litigated on the merits.

To the extent the AOC argues that an order reinstating the Painting would not be effective to restore Untitled #1 to the virtual exhibit because the Congressional Institute is not a party, these arguments "confuse mootness with the merits" and are not an appropriate inquiry at this stage of the case. *Chafin v. Chafin*, 568 U.S. 165, 174 (2013). As the Supreme Court recently held, uncertainty regarding enforcement of an order "does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured." *Id.* at 175. Regardless, as a "proud sponsor" of the Competition, the Congressional Institute would be subject to any injunctive relief entered in this case under Federal Rule of Civil Procedure 65(d)(2). *See, e.g., Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 10 (D.C. Cir. 2015). Further, declaratory relief would likewise be effective to redress some of Appellants' harms. *See Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("[A] court may grant declaratory relief even though it chooses not to issue an injunction."); *Wash. Activity Group*, 342 F. Supp. at 855 (granting declaratory relief on First Amendment claim against the AOC).

Because excluding the Painting from the virtual exhibition and official record of the Competition constitutes an ongoing harm, and reinstating the Painting

as a winner would be at least a partial remedy, this appeal is not moot. *Chafin*, 568 U.S. at 177; Decl. of Hunter O'Hanian (exclusion of Untitled #1 deprives Mr. Pulphus of "valuable professional development opportunity").

B. Appellants Suffer Ongoing Reputational Harm.

Appellants also suffer ongoing reputational injuries that are redressable by an order of this Court reversing the denial of the preliminary injunction. Appellants' reputational injuries derive "directly from an unexpired and unretracted government action" and thus present an actionable controversy. *See Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003); *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52, 56–57 (D.C. Cir. 2001).

In the weeks leading up to the Painting's disqualification, numerous government officials attacked Untitled #1 based on its perceived "anti-police" viewpoint. [R.7-26, 7-27.] The AOC's order sanctioned these disparaging statements by making a post-hoc determination that the Painting was "unsuitable" for inclusion in the Competition. Since then, Appellants have continued to receive threats, harassment and negative targeting on social media. Suppl. Pulphus Decl. at ¶ 6; Suppl. Clay Decl. at ¶¶ 11, 12. Such direct and ongoing reputational injuries are actionable. *Meese v. Keene*, 481 U.S. 465, 475 (1987).

This Court's decision in *McBryde* is instructive. There, a judge's appeal of a public reprimand and suspensions was heard after the suspensions had expired. While the challenge to the suspensions was mooted by the passage of time, the Court held that the "dispute over the public reprimand, however, remain[ed] alive." *McBryde*, 264 F.3d at 57. The Court observed:

> Any thought that the reprimand is a past and irreversible harm is belied by the fact that it continues to be posted on the web site of the Fifth Circuit Court of Appeals…. Even absent that use of modern technology it would be a part of the historical record. Were Judge McBryde to prevail on the merits it would be within our power to declare unlawful the defendants' issuance of stigmatizing reports and thereby to relieve Judge McBryde of much of the resulting injury.

Id. at 56-57. The same is true here. Untitled #1's retroactive disqualification is a part of the "historical record" memorialized both by its own terms (and the resulting widespread media coverage) and by the absence of Untitled #1 on the Congressional Institute website with the other winners. *See, e.g.*, *Foretich*, 351 F.3d at 1214 (challenge to legislation preventing parental visitation not mooted by daughter's majority where legislation amounted to official declaration that father was abusive); *Reeve*, 889 F.2d at 1143 (revoked suspension actionable where airline demonstrated negative reputational injury from reduced business).

Consistent with this authority, Appellants' reputational injuries are concrete and result directly from the "unretracted and unexpired" decision to disqualify the

Painting. As a young artist, Mr. Pulphus fears his disqualification from the Competition and accompanying negative portrayal of him as "anti-police" will diminish his career prospects and limit future opportunities. Suppl. Pulphus Decl. at ¶¶ 4, 9. He also questions whether it will impact his personal safety. *Id.* at ¶ 6. Mr. Pulphus is further injured by the fact that Untitled #1 has been erased from the Competition's "digital record." *Id.* at ¶ 8. This is particularly true given the importance of a strong online presence for young artists. Decl. of Hunter O'Hanian at ¶ 6.

Representative Clay likewise continues to suffer direct and ongoing impacts of the disqualification on his reputation. Competition entries from his District decreased by 50% this year, with high schools and individuals in the art community—once enthusiastic supporters—now declining to participate. Suppl. Clay Decl. at ¶ 7. Like the drop in air traffic in *Reeve*, the demonstrated negative impacts to Representative Clay's reputation flowing from the disqualification render Appellants' claims justiciable. *Reeve*, 889 F.2d at 1143. And like in *McBryde*, a declaration from this Court reversing the denial of the preliminary injunction would relieve much of the stigma associated with the Painting's disqualification. *McBryde*, 264 F.3d at 57.

In sum, the harm caused by the ongoing exclusion of Untitled #1 and the resulting impacts on Appellants' reputations are cognizable and redressable injuries. This appeal is not moot.

C. Appellants' Challenge to the Suitability Guidelines is Ongoing.

Appellants' challenge to the Suitability Guidelines has likewise not been mooted by the end of the Cannon Tunnel exhibition. [R.7-1 at 26.] To the contrary, the AOC concedes that the Suitability Guidelines remain in place and Representative Clay continues to face the threat of viewpoint-based discriminatory treatment as a result.

It is well-established that a "plaintiff's challenge will not be moot where it seeks declaratory relief as to an ongoing policy." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321 (D.C. Cir. 2009); *see also Super Tire Eng. Co. v. McCorkle*, 416 U.S. 115, 125 (1974). An order from this Court reversing the denial of the preliminary injunction on this ground will redress the ongoing injuries caused by the unconstitutionally vague Suitability Guidelines. For this additional reason, this appeal is not moot.

D. Representative Clay's Injuries Are Capable Of Repetition And Would Otherwise Evade Appellate Review.

Even if this Court construes the injury in this case to be only the physical removal of Untitled #1 from the Cannon Tunnel, which it should not do, the exception to the mootness doctrine presents a fourth and independent reason to

reach the merits of this appeal. That exception applies when (1) the "challenged action is in its duration too short to be fully litigated in the United States Supreme Court before it expires" and (2) "there is a reasonable expectation that the same complaining party will be subject to the same action again." *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 321 (D.C. Cir. 2014) (internal quotations omitted). Representative Clay satisfies both requirements.

First, Representative Clay's injuries evade review because the Competition's physical exhibition in the Cannon Tunnel lasts only eleven months. *Del Monte*, 570 F.3d at 322 (finding that orders of less than two years' duration ordinarily evade review).

Representative Clay's injuries are also likely to recur. Given that the vague Suitability Guidelines remain in place, Representative Clay is likely to again be subject to viewpoint-based discrimination in the Competition. The question of recurrence does not turn on "whether the precise historical facts that spawned the plaintiff's claims are likely to recur but whether the legal wrong complained of by the plaintiff is reasonably likely to recur." *Id.* at 324 ("same action" means same agency policies or guidelines); *see also Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); *District of Columbia v. Doe*, 611 F.3d 888, 895 (D.C. Cir. 2010) (same "legal issue" likely to arise for same complaining party).

Here, Representative Clay has already submitted a painting on behalf of his District for the 2017 Competition, and he plans to participate in every Competition so long as he remains in office. Suppl. Clay Decl. at ¶ 14. Without this Court's review, the district court's radical expansion of the government speech doctrine will continue to preclude First Amendment challenges to the AOC's unconstitutional exclusion of artwork on the basis of viewpoint. Moreover, the AOC's defense of the Suitability Guidelines on the basis of government speech only makes its repetition all the more certain. *See Reeve*, 889 F.2d at 1143 ("In this case there is a clear policy, [the Department of Defense ("DOD")] has defended it, and a federal court has approved it. Indeed, DOD's very defense of [the challenged] regulations makes it more likely that Reeve will be subject to the procedures.").

In sum, this appeal is not moot, as Mr. Pulphus and Representative Clay continue to suffer the ongoing adverse impacts of the unconstitutional retroactive disqualification of Untitled #1 from the Competition. An order from this Court reversing the denial of the preliminary injunction and ruling that Appellants are likely to succeed on the merits of their First Amendment claims would cure this deprivation while this case proceeds.

VIII. CONCLUSION

The government speech doctrine is a limited exception to the First Amendment, meant to preserve the government's ability to advance a government-controlled message. It is not a blanket excuse for viewpoint discrimination by government officials seeking to suppress politically unpopular speech. Permitting the government to retroactively claim the views of private speakers as its own—only to silence them—strikes at the heart of the First Amendment and is contrary to decades of Supreme Court authority. Thus, while the district court was right that the AOC's retroactive disqualification of Untitled #1 from the Competition was viewpoint-motivated, the court was wrong that the AOC's post-hoc claim of government speech was enough to justify the exclusion. To the contrary, Appellants were likely to succeed on their First Amendment claims, and the irreparable harm to Appellants' First Amendment rights is ongoing.

For these reasons, Appellants respectfully request that this Court reverse the district court's denial of Appellants' Motion for Preliminary Injunction, and remand for entry of an order preliminarily reinstating Untitled #1 as a winner in the Competition while Appellants' First Amendment claims are heard on their merits.

RESPECTFULLY SUBMITTED this 29th day of December, 2017.

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Dated: December 29, 2017

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I certify that on December 29, 2017, I electronically filed the foregoing Appellants' Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF Document Filing System. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system by sending notification of such filing to all parties of record.

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