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' REPLY BRIEF

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I. INTRODUCTION

The ban on viewpoint discrimination is a bedrock tenet of First Amendment jurisprudence. The Architect of the Capitol ("AOC") fails even to acknowledge this fundamental principle, and concedes that Untitled #1 was retroactively disqualified from the Congressional Art Competition ("Competition") because its perceived viewpoint was politically unpopular. The AOC urges the Court to excuse this constitutional violation through an expansion of the government speech doctrine, which the Supreme Court has warned is "susceptible to dangerous misuse" and should therefore be applied with "great caution." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

Nothing in the AOC's opposition brief justifies extension of the government speech doctrine where the Competition was designed to promote the expression of a diverse set of private speakers. The AOC identifies no unified government-controlled message and no basis on which a reasonable observer would perceive one. Critically, the AOC cannot point to a single instance of asserting editorial control over the Competition and resorts instead to rewriting the Competition's history and the record. Characterizing the Competition as government speech would require this Court to stretch the doctrine beyond its recognizable limits, solely to "silence or muffle the expression of disfavored viewpoints." *Id.* The Court should decline to do so.

So long as Untitled #1 remains officially excluded from the Competition, student artist David Pulphus and Representative William Lacy Clay continue to suffer ongoing irreparable harm to their First Amendment rights. As such, this case is not moot and preliminary injunctive relief remains available and appropriate. 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. ARGUMENT

A. Appellants Were Likely To Succeed On the Merits of Their First Amendment Claim of Unconstitutional Viewpoint Discrimination.

The AOC's answering brief is premised on the assertion that "the Competition is merely a specific exercise of the government's general authority to select the art to be displayed in a government building." AOC Br. at 32. Therefore, the AOC's argument goes, the undisputedly viewpoint-driven and retroactive disqualification of Untitled #1 is "legally irrelevant" as Appellants have no First Amendment rights vis-à-vis the Competition at all. The problem with this argument is (at least) threefold. First, the record does not support the AOC's baseline assumption that the Competition is an exercise in government selection of art. Second, the Competition bears none of the indicia of actual government speech, but is rather a limited public forum. Third, Mr. Pulphus's and Representative Clay's First Amendment rights are well-established and

enforceable. In sum, the AOC's hypertechnical attacks cannot overcome the patently unconstitutional removal of Untitled #1 on the basis of its viewpoint. The district court should be reversed.

1. The Competition is Not Government Selection of Art.

The AOC's brief begins with the inapposite assertion that "the First Amendment does not constrain the government's selection of art displayed in government buildings." AOC Br. at 29. To support its "government selection" narrative, the AOC enumerates statutes governing particular artwork in specific areas of the Capitol, and then claims (without citation) that "the same legal framework applies to the Congressional Art Competition." *Id*. at 30. But none of the cited statutes govern the selection of art for the Competition; nor is Competition art chosen by the AOC or the House Fine Arts Board.

The record further undermines the AOC's claims. For example, though the AOC asserts that Members "cull the submissions" and submit them to the AOC as "arbiter" of whether they will be displayed, the opposite is true. *Id*. at 41. As envisioned in the Competition's founding documents, the competitive aspects of the Competition take place entirely in the districts, where individual Members select the winning works, employing any methods or criteria they choose. [R.7-5 at ¶ 5]. And far from being an "arbiter" of the Suitability Guidelines, the AOC has always subordinated his own view of suitability to the Members' choices, even

when the AOC believed the work to violate the Guidelines. [R.11-2 at 9, ¶11]. This is why the AOC cannot site a single instance where he has ever overruled a Member's choice and remains unable to articulate the purported basis for the disqualification of Untitled #1 here.[1]

Because it is undisputed the AOC does not engage in any "selection" activity with respect to Competition winners, the AOC argues the Competition is nonetheless "government selection of its own art" because the temporary physical exhibition takes place in the Cannon Tunnel, an allegedly "non-public area of a government building."[2] AOC's Br. at 30, 35. But the AOC concedes that the Cannon Tunnel is in fact open to the thousands of members of the public who take free Capitol Tours with their representatives every year, as well as tens of thousands of Congressional staff and Members. [R. 11-1 ¶ 6].[3] For these reasons,

[1] The AOC argues that Untitled #1 ran afoul of the prohibition on "political controversy," but his letter disqualifying the Painting did not state which aspect of the Guidelines Untitled #1 allegedly violated. [R. 7-13]. Below, AOC counsel conceded the basis for the disqualification was unknown, but argued that if the Competition is government speech, then the reason did not matter. *See* [R. 18 at 63:7-64:2-5].

[2] While the AOC claims that only the physical exhibition is relevant, the Supreme Court has long acknowledged that the forum analysis applies to both physical and virtual spaces alike. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (collecting cases); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (equating social media cites to streets and parks); Appellants' Br. at 21 (collecting cases).

[3] The hours the Congressional Office Buildings are "open to the public" are listed on the "For Visitors" page of the AOC's website. https://www.aoc.gov/visitor-hours

the Competition's Suitability Guidelines appropriately characterize the Cannon Tunnel as "highly traveled". [R.7-7, at 3]. In short, the fact that the physical exhibit takes place in the Cannon Tunnel does not amount to government selection of art, nor does it allow the exercise of viewpoint discrimination in a limited public forum. AOC Br. at 32.

Finally, that Members select the winning artwork at district-level competitions does not render all the art displayed in the national exhibition "selected by the government" such that the First Amendment does not apply. The AOC cites no authority that equates actions by individual Members of Congress with their collective bodies, nor could he, as the Supreme Court has long held otherwise. *See Raines v. Byrd*, 521 U.S. 811, 829 n. 10 (1997) (drawing distinction between individual members and House) ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take.") (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986)); *United States v. Ballin*, 144 U.S. 1, 5-6 (1892) (action of any one Member is not an action of Congress as a whole). While the AOC claims the "relevant question is whether Representative Clay was acting in his official capacity," the AOC cites no authority for this proposition, nor explains how an "official act" by a legislator is any more binding on the collective body than an

"unofficial" one.[4] AOC Br. at 42.

In sum, while Congress can certainly select art to ornament the Capitol, it has not done so through the Competition.

2. The Competition is a Limited Public Forum for Private Speech, Not Government Speech.

The government has opened up both physical and virtual property "to a limited class of speakers" via the Competition and thus, it has created a limited public forum. *Rosenberger*, 515 U.S. at 829. It is undisputed that the AOC determined (on multiple occasions) that Untitled #1 satisfied the only two parameters enforced by the AOC for display in the national exhibition: 1) compliance with the size and medium standards; and 2) sponsorship by a Member. Yet the AOC retroactively disqualified the Painting on the basis of its viewpoint. This is unconstitutional. Appellants acknowledge that the Competition is not an opportunity for all high school students to display art in the Capitol. Rather, the forum is reasonably limited to artwork selected and sponsored by a Member of Congress. This limitation does not defeat the existence of the forum as the AOC claims, it merely defines it. *See* Appellants' Br. at 20 (citing cases

[4] The "official act" argument is premised upon the AOC's incorrect assumption that Representative Clay has no enforceable rights in the first place. *Bond v. Floyd*, 385 U.S. 116, 136 (1966) ("The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators."); *see also Powell v. McCormack*, 395 U.S. 486, 550 (1969).

showing reasonable restrictions are routinely applied and upheld to limited forums for private speech).

Rather than dispute Appellants' forum analysis, the AOC instead argues only that the Competition is government speech. *Matal* and recent circuit decisions emphasize the narrowness of the government speech defense and the important policy reasons behind the limitation of that doctrine. Thus, when the Court examines the factors in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) and *Walker v. Texas Division Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015)—including the history and purpose of the Competition, the perception of a government message, and the existence of government control—the Court must "exercise great caution" so as not to suppress private speech via a government seal of approval. Yet the AOC's technical parsing of the three *Summum/Walker* factors throws caution to the wind in aid of suppressing private speech based on viewpoint.

a. The History and Purpose of the Competition is to "Showcase" Private Speakers, Not Communicate a Government Message.

Here, the stated purposes of the Competition are to "provide[] the opportunity for Members of Congress to encourage and recognize the artistic talents of their young constituents" and to "allow[s] high school students ... to showcase their artistic ability." [R.7-16 at 3;R.7-5 ¶ 3; R.7-6 at 2]. Nothing in the

well-documented history of the Competition evidences a past history or present intent to communicate a unified government message via the selection of art.

The AOC argues that "government displays of art and programs supporting the arts have long been treated as distinct from forums for private expression" and therefore are not subject to the First Amendment. AOC Br. at 36. But mere participation in a government program that subsidizes speech does not eviscerate free speech rights. *See Matal*, 137 S.Ct. at 1760-61; *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 37 (2d Cir. 2018). Instead, courts must examine the type of program established to determine the scope of any permissible restrictions. For example, recognizing the implications for private speech in government-supported arts programs, the Supreme Court in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), cautioned that viewpoint discrimination in the provision of government grants is not permissible. Moreover, multiple federal courts have invalidated government attempts to remove art from government-funded museums on viewpoint-based grounds. *See Brooklyn Inst. of Arts and Sci. v. City of New York*, 64 F. Supp. 2d 184, 200 (S.D.N.Y. 1999); *Cuban Museum of Arts & Culture, Inc. v. City of Miami*, 766 F. Supp. 1121, 1130 (S.D. Fla. 1991).

As detailed by Amici, the AOC's argument confuses art programs supported by the government with government commissions of art for government purposes. *People for the Ethical Treatment of Animals, Inc.* ("*PETA*") *v. Gittens*, 414 F.3d 23

(D.C. Cir. 2005), illustrates the difference. In *Gittens*, thousands of applicants sought to be featured in Washington D.C.'s "Party Animals" campaign to show the "whimsical side of Washington." When PETA was not one of the 200 designs selected by the commission adjudicating the campaign, it sued, claiming viewpoint discrimination. This Court held that the commission was not required to select PETA's design. In other words, PETA had no First Amendment right to "win" a contest to communicate on behalf of the government.

By contrast, the national exhibition in the Competition (which is the only aspect overseen by the AOC) is not a contest to communicate a government message or even to make a government-approved aesthetic choice. Rather, it is an exhibition of the district-level winners. The AOC did not participate in selecting those winners, and has never conditioned entry into the national exhibition on a winner's ability to communicate a government-controlled message or meet any other aesthetic criteria. Unlike the selection commission in *Gittens* that "rejected most" entries, the AOC for decades has accepted and displayed all sponsored winners. Moreover, unlike the "Party Animals" campaign, the government has never articulated any message through the Competition that necessitated accepting only certain winners, and the AOC has never refused to display any winners over

the objection of their sponsoring Member.[5]

A final key distinction is that PETA's proposed design was rejected from the start, along with 1,000 others, because it was inconsistent with the manner in which D.C. wanted to communicate its "whimsical side." Untitled #1, by contrast, was accepted and displayed for seven months before it alone was retroactively disqualified due to political pressure. The same reasons that distinguish *Gittens* from the Competition are equally applicable to *Summum*, in addition to the fact that governments have long spoken through the selection of permanent monuments. *Summum*, 555 U.S. at 470.

Though the AOC failed to cite any of the recent decisions interpreting *Matal*, the Second Circuit's decision in *Wandering Dago* is particularly pertinent. Rejecting the state's argument that its food truck program was government speech intended to convey a "family friendly" message, the court ruled that exclusion of a vendor was unconstitutional viewpoint discrimination:

> We acknowledge that viewpoint-based funding decisions can be sustained as government speech when the government disburses public funds to

[5] As Amici note, if art competitions were ruled to be government speech, then "contests or public displays of art would likely become tantamount to contests to convey messages that curry favor with the government, which is more characteristic of totalitarian regimes than our democracy." Amici Br. at 4. This is hardly a hypothetical concern, as non-democratic governments have previously relied on degradation and control of private art to suppress expression. *See The Suppression of Art in Nazi Germany*, Constitutional Rights Foundation, BRIA 13:2 (Mar. 28, 2018), http://www.crf-usa.org/bill-of-rights-in-action/bria-13-2-b-the-suppression-of-art-in-nazi-germany.

> private entities to convey a governmental message. This principle does not apply, however, when a government program is not designed to promote a governmental message. When a government program's very concept contemplates presenting a diversity of views from participating private speakers, the government may not then single out a particular idea for suppression because it is dangerous or disfavored.

Id. at 37 (alterations and internal quotation marks omitted).

Distinguishing *Walker* and *Summum*, the court noted the absence of "any record evidence of a well-established history of [the state's] controlling the names of Lunch Program vendors in order to tailor a government message." *Id.* at 35. Moreover, the program "seem[ed] to contemplate" a diverse group of speakers, the vendors had not been chosen for their ability to communicate government messages, and while all applicants had generally been accepted, the plaintiff's exclusion was "exceptional." *Id.* at 37. Here, the Competition's "very design" also contemplates the assembly of a diverse group of artists based on their selection in the district-level competitions, not on their ability to communicate any given government message. And like the excluded vendor, Untitled #1's retroactive disqualification from the Competition is one-of-a-kind. Without evidence of intent to communicate, the Competition is not government speech under any incarnation of the doctrine.

b. The AOC Has Not Exercised Control Over the Message and a Reasonable Observer Would Not Assume Otherwise.

The AOC's arguments on the second and third *Summum/Walker* factors amount to a claim that even the potential appearance of "government endorsement" of the Competition is sufficient to overcome the AOC's lack of editorial control over the Competition entries. This position is untenable.

First, recognizing the AOC does not select the winning art, the AOC points to the involvement of government staff and placement of the temporary physical exhibit in the Cannon Tunnel to claim that a reasonable observer would consider the Competition government speech. But the potential semblance of some government "endorsement" simply by virtue of government employees or property, a scenario present in virtually every public forum, is insufficient without other evidence of intent to communicate a government message. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (rejecting claim that "proximity to the seat of government" constitutes "endorsement" of religion for alleged Establishment Clause violation); *Wandering Dago,* 879 F.3d at 34-35 (food trucks on state capitol plaza insufficient endorsement for government speech); *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cty. Sch. Distr.*, 880 F.3d 1097, 1104 (9th Cir. 2018) (invalidating ban on picketing on government property and noting that "[e]ven high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to

do so") (internal quotation marks omitted); *Gerlich v. Leath*, 847 F.3d 1005 (8th Cir. 2017) (public university trademarks not government speech); *Higher Soc'y of Indiana v. Tippecanoe Cty.*, 858 F.3d 1113 (7th Cir. 2017) (demonstrations on courthouse steps not government speech); *Miller v. City of Cincinnati*, 622 F.3d 524 (6th Cir. 2010) (press conferences at City Hall not government speech). And contrary to the AOC's claim, *Summum* heavily relied on the permanent nature of the proposed monument to conclude an observer would interpret the monument as government speech, *Walker*, 135 S. Ct. at 2259 ("spatial limitations played a prominent part in our [*Summum*] analysis.") (Alito, J. dissenting); and *Walker* relied on the past use of license plates as "government ID." *Id*. at 2252.

By contrast, no reasonable observer would discern a government-sponsored message from the Competition. To the extent the AOC is concerned about perceived endorsement, a simple disclaimer would remedy the issue. *Pinette*, 515 U.S. at 769 ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such. That would be a content-neutral 'manner' restriction that is assuredly constitutional."); *Freedom from Religion Found., Inc. v. Abbott*, No. A-16-CA-00233-SS, 2016 WL 7388401, at *5 (W.D. Tex. Dec. 20, 2016) (signs disclaiming state endorsement in Capitol exhibit undercut government speech defense).

Second, the absence of editorial control by the AOC sets this case far outside the narrow government speech doctrine. The AOC attempts to equate a claimed unexercised "retention" of the right to control with actual editorial oversight, but cites no authority supporting this proposition. AOC Br. at 42. Instead, the AOC insists that he exercises control via the mandatory review by his panel before hanging. Bizarrely, in the same breath, the AOC then argues that the retroactive nature of the disqualification is "insignificant" because the AOC's staff had not actually reviewed Untitled #1 for suitability at all. AOC Br. at 45. The AOC's assertion of retained control cannot be reconciled with his simultaneous denial of ever seeing the Painting.

Moreover, retroactive restrictions on speech are legally significant, *see* Appellants' Br. at 46, especially when demonstrating government alteration of the usual functioning of a medium. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001) (invalidating restrictions on speech resulting from program that altered attorney-client relationship); *Rosenberger*, 515 U.S. at 836 (invalidating viewpoint restrictions where usual functioning of student newspapers included expressing diverse views). Until now, the Competition has been free from AOC-imposed restrictions on viewpoint, and therefore the retroactive disqualification is constitutionally infirm. *See Brooklyn Inst. of Arts and Sciences*, 64 F. Supp. 2d at 200 (withholding already appropriated subsidy because of Mayor's objection to

exhibit evidenced viewpoint discrimination); *Cuban Museum*, 766 F. Supp. at 1124 (refusal to renew museum lease based on objection to exhibits unconstitutional).

Furthermore, the record demonstrates that Untitled #1 was not only accepted for display by AOC panel members, but AOC staff also repeatedly assisted Representative Clay in rehanging Untitled #1 after its multiple unauthorized removals. [R. 7-5 ¶ 19]. As such, it is likely that the AOC had more opportunities to evaluate Untitled #1 than any other work in the Competition, yet never questioned its suitability. This is not editorial control.

Finally, the lack of editorial control is only buttressed by the AOC's argument that "two layers of government actors" participate in the Competition. While the AOC inaccurately describes the district-level selections as "*initial* curation decisions", they are in fact the only curation decisions in the Competition. In turn, the Competition has featured depictions of drug use, racism, immigration, presidential politics and police brutality directed at African-Americans. As noted in *Matal*, the government speech doctrine is intended to protect the government's ability to transmit its own message, and therefore does not apply when the government facilitates contradictory messages by private parties or does not exert control over the content. *Matal*, 137 S. Ct. at 1758; *see also Wandering Dago*, 879 F.3d at 37 (no government message where only plaintiff's application denied, and other vendor with derogatory name accepted). As such, when 435 Members are

historically empowered to sponsor a vast variety of works—some highly critical of the government—the mere fact that they are Members of Congress does not transform their individual choices into government editorial control for purposes of government speech.

3. The First Amendment Protects Appellants' Speech.

Rather than meaningfully dispute that the Competition is a limited forum, the AOC instead pushes the untenable claim that Mr. Pulphus and Representative Clay have no enforceable First Amendment rights. The Court should refuse to adopt such a radical position.

a. Untitled #1 is the Protected Private Speech of Mr. Pulphus.

Without citation, the AOC claims that Mr. Pulphus has no First Amendment rights in the Competition because he had no "entitlement to have his work *selected* by Representative Clay, or even to have his work judged by any established or neutral criteria." AOC Br. at 47. But Mr. Pulphus does not assert a First Amendment right to win the district-level competition, which is essentially the argument rejected by *Gittens*. Instead, the First Amendment protects Mr. Pulphus's right to avoid having his speech extinguished after it had already been accepted, and to participate in the national exhibition on the same terms with all of the other winners. Because, as the AOC determined, Mr. Pulphus was "otherwise includible" in the forum, his retroactive exclusion was unconstitutional. *Cornelius*

v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) ("[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."). This is just the type of government action the public forum doctrine is designed to prevent.

Indeed, the AOC does not dispute that Untiled #1 is Mr. Pulphus's private speech, which "does not become speech of the government merely because the government provides a forum for the speech or in some way allows or facilitates it." *Wandering Dago*, 879 F.3d at 34–35 (collecting cases).[6] Through his sponsorship, Representative Clay facilitated the entry of Untitled #1 into the national exhibition, a limited forum overseen by the AOC. And while sponsorship by a Member is a necessary condition of entry into the forum, it is well-established that admission into a limited forum does not eliminate First Amendment protection and the AOC cites no case holding otherwise. *Id.* As such, Mr. Pulphus is

[6] Indeed, the United States recently filed an amicus brief in this Court in support of the Archdiocese of Washington, claiming that exclusion of religious ads on Metro buses amounted to impermissible viewpoint discrimination in a limited public forum. Amicus Brief for United States as Amicus Curiae, *Archdiocese of Wash. v. Wash. Metr. Area Transit Auth.*, 17-7171 (D.C. Cir. Jan. 16, 2018), Dkt # 1713118 at 5 ("Thus, when the government creates a forum for expressive activity—regardless whether it opens that forum to all members of the public or only some—it may not restrict a speaker's access to the forum based solely on the speaker's point of view.")

protected by the First Amendment from viewpoint discrimination, and entitled to enforce his rights in this case.

b. Representative Clay Has Enforceable First Amendment Rights.

Representative Clay engaged in protected political speech in selecting Untitled #1, a painting representing events of importance to his district. The AOC concedes that the winning artwork represents both the artist and the sponsoring Member, yet cursorily argues the Competition provides no forum for Member speech because Clay was "acting on behalf of the Architect and the House pursuant to delegated selection authority." AOC Br. at 37-38, 48. There is no evidence of any such "delegation" in the record, and in fact, all evidence is to the contrary.

With an unexplained citation to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the AOC further suggests that by virtue of being a congressman, Representative Clay has no First Amendment rights. *Garcetti* does not apply. *Garcetti* merely holds that under certain circumstances, a public employee can be subject to an employer's reprimand for speech made pursuant to his routine job duties. Nothing in *Garcetti* limits the free speech of elected officials, which has been consistently upheld by the Supreme Court. *See, e.g.*, *Bond*, 385 U.S. at 135-36 ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment ... is that 'debate on public issues

should be uninhibited, robust, and wide-open.'") (internal citations and quotations omitted)).

Finally, the AOC's contention that the viewpoint-based disqualification of Untitled #1 is merely "a dispute between government actors" with "no First Amendment significance" is without merit. AOC Br. at 33. First, to the extent the argument invokes *Garcetti*, it is inapplicable. Representative Clay is not a subordinate of the AOC. Second, taken to its logical end, this argument welcomes unconstitutional discrimination. For example, presumably the AOC would not approve the exclusion of all African-American Members from the Competition, nor argue there would be no recourse for the retroactive disqualification of all paintings sponsored by female Members? Yet characterizing the deprivation of Representative Clay's right to engage in political speech as a simple inter-governmental dispute best resolved internally sanctions an equivalent violation of his fundamental rights. And it is well-established that the House "may not, by its rules, ignore constitutional restraints or violate fundamental rights." *Ballin*, 144 U.S. at 5.

In sum, the Competition is a limited public forum for speech from which Mr. Pulphus and Representative Clay were unconstitutionally excluded. Appellants were likely to succeed on their First Amendment claims and this Court should reverse.

B. The AOC Fails to Rebut Appellants' Vagueness Challenge to the Suitability Guidelines.

The AOC does not explain how the Suitability Guidelines satisfy the constitutional requirements detailed in cases such as *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012). Instead, the AOC claims that vague regulations are "constitutionally tolerable" when the government promotes art. *See* AOC's Br. at 49 (citing *Finley*, 524 U.S. at 590). The AOC's reliance on *Finley* is misplaced. In that facial challenge, the Supreme Court cautioned against viewpoint discrimination, and explained that "merely add[ing] some imprecise considerations to an already subjective process" is not "on its face impermissibl[e]." *See Finley*, 524 U.S. at 590. Yet, the AOC ignores that here the Suitability Guidelines were applied in an unconstitutionally discriminatory fashion: despite initial approval under the Guidelines, the Painting was later disqualified for purportedly violating them. Such unbridled and unreviewable discretion offends the First Amendment. *Wash. Activity Grp. v. White*, 342 F. Supp. 847, 854 (D.D.C. 1971), *aff'd*, 479 F.2d 922 (D.C. Cir. 1973). The district court should be reversed.

C. Appellants Continue to Suffer Irreparable Harm.

The AOC did not dispute Appellants' assertions of harm below,[7] offering only the circular claim that Appellants suffered no injury because they "have been denied no First Amendment rights." [R.11 at 24]. As detailed above, Appellants are protected by the First Amendment.

Moreover, the record is replete with evidence of irreparable injury to Representative Clay related to the disqualification. *See* Suppl. Clay Decl. ¶¶ 7-14; [R. 7-5 ¶¶ 32, 34]; Appellants Br. at 51, 56. The AOC's attempt to parse the harm to Representative Clay from the harm to his hosting of the Competition is without merit and further ignores that the lack of participation and rejection by longtime partners in his district is a cognizable injury in and of itself. *Cf. Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 665 (D.C. Cir. 2006) ("A Member's ability to do his job as a legislator effectively is tied . . . to the Member's relationship with the public and in particular his constituents and colleagues in the Congress."); *see also Foretich v. United States*, 351 F.3d 1198, 1215 (D.C. Cir. 2003) (collecting cases detailing broad range of actionable reputational injuries).

Mr. Pulphus likewise experiences ongoing undisputed irreparable harm. *See* Suppl. Pulphus Decl. ¶¶ 2-9. While the AOC posits, without citation, that "[t]here

[7] Contrary to the AOC's claim, Appellants' injuries, including reputational harm emanating from the Painting's retroactive removal, were raised below. *See* [R. 1 at 15-16]; [R. 7-1 at 37]. These injuries have since intensified.

is nothing inherently stigmatizing in having one's work described as 'unsuitable,'" *see* AOC Br. at 24, this ignores the facts that Mr. Pulphus has been singled out as the only Competition artist ever to be subjected to such second-class treatment and that the public disqualification of his Painting has never been retracted.

The AOC erroneously attempts to distinguish *Elrod v. Burns*, 427 U.S. 347 (1976), by claiming that Appellants are "no longer facing an imminent risk of irreparable harm" because the physical exhibition in the Cannon Tunnel has concluded. *See* AOC Br. at 51. But the AOC concedes that Untitled #1 remains disqualified as well as excluded from the virtual exhibit, which constitutes ongoing First Amendment injury. As such, *Sampson v. Murray*, 415 U.S. 61 (1974), which held only that the plaintiff had failed to allege sufficient harm, is inapposite. AOC Br. at 51. Moreover, *Latino Officers Association v. Safir*, 170 F.3d 167 (2d Cir. 1999) and *Matos ex rel. Matos v. Clinton School District*, 367 F.3d 68 (1st Cir. 2004) are inapplicable. In *Latino Officers*, the court found no irreparable harm where the city-defendant stipulated to withdraw its unlawful policy. 170 F.3d at 171. In *Matos*, the claimed irreparable harm was "objectively unreasonable[.]" *Matos*, 367 F.3d at 73. Here, by contrast, the AOC has not withdrawn its decision retroactively disqualifying the Painting or the unconstitutionally vague Guidelines. Nor can Appellants' injuries be characterized as "objectively unreasonable."

The loss of First Amendment rights, even temporarily, constitutes irreparable injury. *See* Appellants' Br. at 51. Because Untitled #1 remains officially excluded, irreparable harm to Appellants' First Amendment rights continues and preliminary injunctive relief remains appropriate.

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

The AOC offers no substantive response on the final two injunction factors. *See* Appellants' Br. at 52-53. As such, those arguments are conceded.

III. THIS APPEAL IS NOT MOOT

A. The District Court Premised its Decision On an Erroneous Application of the Government Speech Doctrine.

At the outset, the justiciability of Appellants' viewpoint discrimination claims is undisputed. *See* AOC Br. at 18. Rather, the AOC contends only that this appeal is moot. The AOC is wrong.

Courts review with "greater amplitude" a district court's decision that was premised on an erroneous rule of law. *Defs. of Wildlife v. Andrus*, 627 F.2d 1238, 1242 (D.C. Cir. 1980) (quotation marks omitted); *see also Del. & H. Ry. Co. v. United Transp. Union*, 450 F.2d 603, 620 (D.C. Cir. 1971) (if "request for preliminary injunction rests on a premise as to the pertinent rule of law, that premise is reviewable fully and de novo in the appellate court"). Here, the district court premised its decision on an erroneous application of the government speech doctrine, a legal issue for which the record requires no further development. *See*

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952). The AOC does not argue otherwise, nor does the AOC defend the disqualification on any other legal grounds. AOC Br. at 15.[8] Indeed, at oral argument the AOC agreed that no additional facts were necessary for a ruling on whether the Competition was government speech. [R. 18 at 64:2-5]. As such, this Court "has a duty to apply the principle which it believes proper and sound." *United Transp. Union*, 450 F.2d at 620. This Court should thus correct the district court's legal error so that Appellants' viewpoint discrimination claims may be heard under the proper standard on their merits.

B. Untitled #1 Remains Excluded From the Competition.

The AOC's mootness argument erroneously focuses only on the conclusion of the Cannon Tunnel exhibit and ignores Appellants' ongoing demand for reversal

[8] Contrary to the AOC's suggestion that this case's procedural posture renders this appeal moot, AOC Br. at 18, this Court has jurisdiction to consider the merits of an appeal from an interlocutory order, *see* 28 U.S.C §1292(a)(1), including orders denying preliminary injunctive relief, *see, e.g.*, *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 727 (D.C. Cir. 2001). Indeed, in reviewing such decisions, "though technically the case is only at the stage of application for preliminary injunction," appellate courts "further the interest of justice by providing a ruling on the merits[.]" *See Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 832 (D.C. Cir. 1972) (resolving merits because "[t]he present case is one of public moment"); *see also Energy Action Educational Found. v. Andrus*, 654 F.2d 735, 745 n.54 (D.C. Cir. 1980) (reaching merits of dominating issue in protracted case on appeal from denial of a preliminary injunction), *rev'd on other grounds*, 454 U.S. 151 (1981).

of the AOC's disqualification decision and for reinstatement as a winner.[9] The AOC has not withdrawn his decision that the Painting violates the Guidelines, and as such, it is actionable, and redressable by both declaratory and injunctive relief. *See, e.g.*, *Reeve Aleutian Airways, Inc. v. U.S.*, 889 F.2d 1139 (D.C. Cir. 1989); *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). Moreover, the AOC continues to offer no defense of the disqualification other than government speech.

While the AOC questions whether reversing his decision would influence the Congressional Institute's decision to restore the Painting to the virtual exhibition, that question confuses "mootness with the merits[.]" *Chafin v. Chafin*, 568 U.S. 165, 174 (2013). Contrary to the AOC's characterization, the *Chafin* Court detailed numerous "disputes where the practical impact of any decision is not assured" and determined that such uncertainty as to the effectiveness of an order does not deprive a court of jurisdiction. *Id.* at 174-75 (that Scotland might ignore a return order did not moot case). Moreover, this Court has repeatedly

[9] The Government's reliance on *Animal Legal Defense Fund v. Shalala*, 53 F.3d 363 (D.C. Cir. 1995), and *International Internship Programs v. Napolitano*, 463 F. App'X. 2 (D.C. Cir. 2012), is misplaced. In *Shalala*, despite determining that the "case as a whole remains alive," the court dismissed the appeal as moot because the relief sought was limited to attending a meeting that had passed. 53 F.3d at 366. In *Napolitano*, the court declared moot a request for injunctive relief to compel approval of visa requests by exchange students. 463 F. App'X. at *2-4. Here, by contrast, Appellants' injuries and requested relief are not so limited.

found redressable injuries in "cases where a third party would very likely alter its behavior based on our decision, even if not bound by it." *Teton Historic Aviation Found. v. U.S. Dep't of Def.*, 785 F.3d 719, 728 (D.C. Cir. 2015) (collecting cases). Where the Congressional Institute is admittedly a "proud sponsor" of the Competition, featured Untitled #1 in the virtual exhibit until its disqualification, and continues to feature every other past winner, there is no reason to think the Institute would not restore Untitled #1 upon an order even preliminarily invalidating the disqualification on the only grounds the AOC has offered to defend it.[10] *Id.* at 727 ("Article III does not demand a demonstration that victory in court will without doubt cure the identified injury.").

In short, the Painting's ongoing exclusion defeats mootness.

C. The Substitution of the House Office Building Commission Does Not Moot Appellants' Challenge to the Suitability Guidelines.

The unconstitutional nature of the Guidelines is undisturbed by the fact that the House Office Building Commission ("HOBC"), rather than the AOC, will apply them going forward. The HOBC is merely succeeding the AOC. Moreover, the AOC has not argued that the HOBC will refrain from excluding artwork on the basis of viewpoint nor meaningfully defended the Guidelines on their merits. As

[10] *Johnson v. Commission on Presidential Debates*, 869 F.3d 976 (D.C. Cir. 2017), does not hold otherwise. Unlike here, the underlying complaint "omit[ted] entirely any allegation of government action, focusing entirely on the actions of the nonprofit" defendants. *Id.* at 983.

such, nothing about the expanded role of the HOBC prevents this Court from declaring that Appellants are likely to prove the Guidelines unconstitutional. *See* Appellants' Br. at 55 (citing cases).

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

The AOC concedes that Appellants' injuries evade review, but claims that Representative Clay's injuries are unlikely to recur because the HOBC "is not a party to this suit." *See* AOC Br. at 27. This argument fails for the same reason it does with respect to the Suitability Guidelines. *See* Section III.C, *supra*. Moreover, the AOC's contention that Representative Clay "lacks standing" also fails. *See* AOC Br. at 28 (citing *Raines*, 521 U.S. at 821). Unlike the appellees in *Raines*, who were "not singled out for specially unfavorable treatment," Representative Clay is the only House Member in the history of the Competition to have sponsored artwork retroactively disqualified over his objection. Moreover, as this Court in *Foretich* explained, reputational injury would not satisfy Article III standing only "if the challenged action had been rescinded" and if the AOC "satisfied its burden of demonstrating 'that there is no reasonable expectation' that the alleged violation will recur.'" *Foretich*, 351 F.3d at 1214 (citation omitted). Here, the AOC's decision has not been rescinded and other artwork sponsored by Representative Clay remains vulnerable to the same unconstitutional treatment.

In sum, the appeal is not moot.

IV. CONCLUSION

The district court erroneously premised its decision on the government speech doctrine, which has no application to the Competition. Appellants respectfully ask this Court to reverse.

RESPECTFULLY SUBMITTED this 28th day of March, 2018.

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CERTIFICATE OF SERVICE

I certify that on March 28, 2018, I electronically filed the foregoing Appellants' Reply 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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