IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Jonathan Cole, Katie Sullivan, and Nathaniel Faflick, Plaintiffs, v. Duane Goossen in his official capacity as Secretary of Administration, Tom Day in his official capacity as Legislative Administrative Services Director, and Herman Jones, Superintendent of Kansas Highway Patrol, Defendants.	)	Case No. 19-cv-04028-HLT

DEFENDANTS' RESPONSE
TO MOTION FOR PRELIMINARY HEARING

1. Summary of Position

Plaintiffs' motion for injunctive relief should be denied. Plaintiffs have not shown they have the constitutional standing required to prosecute their claims. Moreover, they cannot establish the required likelihood of success needed for the Court to grant the demanded preliminary injunction.

2. Background

Capitol's Statehouse

The Kansas Statehouse is listed in the National Register of Historical Places. The Kansas Historical Society says:

> "[T]he Kansas State Capitol is the state's most important architectural treasure. The site was donated through the efforts of Cyrus K. Holliday,

> president of the early Topeka Town Company and one of the founders of the Atchison, Topeka & Santa Fe Railway.
>
> Construction began after the east wing cornerstone was laid October 17, 1866. The brown stone selected for construction did not harden sufficiently. Following a harsh winter in 1867, the cornerstone and foundation of the wing crumbled. Harder limestone from Geary County was used to replace the foundation and continue construction on the wing. The west wing Limestone from Cottonwood Falls was selected for use elsewhere in the construction. Construction on the north and south wings began in 1883."
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> "Construction on the Capitol took 37 years; the building was officially completed March 24, 1903. The total cost was $3,200,588.92."
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> "The Kansas State Capitol, like other U.S. statehouses built in the 19th century, was inspired by classical architecture in Greece, Rome, and Europe. The design of the U. S. Capitol was no exception and influenced the plans proposed by Edward Townsend Mix in 1866. The designs Mix proposed were originally selected by the building committee, which wanted to incorporate modifications in the plans."

https://www.kshs.org/p/kansas-state-capitol-history/19082 (last visited 4/18/19).

The Statehouse underwent a multiyear and multimillion dollar restoration project which began in 1999. The project was aimed to return the Capitol Statehouse to its original grandeur and preserve it for the next century. On January 29, 2014, the state dedicated the newly restored Statehouse.

Presently the Statehouse is part museum, part art gallery, and is a fully operating to house the Kansas Legislature's and the Kansas Governor's operations and activities. It has many offices for the legislature's members and officers and for the Governors and his staff. Naturally, the House and Senate Galleries are located in the building. Exhibit A is a Kansas Historical Society document which further describes the Statehouse.

The public has access to parts of the Statehouse. Subject to policies, some events can be scheduled and conducted within the Statehouse or on its grounds. But the Statehouse is not an event center. It is not, and cannot be, available for use as an open public forum for expressive activity.

Plaintiffs' behavior.

The Plaintiffs' alleged constitutionally protected First Amendment activity was on 3rd through 5th floors of the Statehouse. The plaintiffs, possibly with the assistance of others, hung one or more 10 feet wide by 24 feet long banners from the Statehouse's 5th floor railings down the open rotunda, as shown below, on March 27, 2019. Defendant understand that a banner fell on the heads of people below when it was unfurled.

The hanging of the banner(s) was contrary to common sense; and violated unwritten rights of any property owner and arguably the "Policy for Usage of the Statehouse and Capitol Complex," Exhibit B, 3.h.xix.

Tom Day, the Director of Legislative Services, either instructed the plaintiffs to remove their banners or had them removed. In any event, they were removed after a few minutes.

The capitol police were notified that a banner had been hung from the Statehouse's 5th floor railing and saw a picture of the banner. The plaintiffs were located, eventually told to leave, and escorted from the Statehouse with their banners.[1]

Officer Scott Whitsell told the plaintiffs that they were "banned" from the Statehouse for one year before they left. But, on March 28, 2019, Whitsell's superior notified the plaintiffs that they were no longer banned from the Statehouse.

This suit was filed April 4, 2019. At the same time, plaintiffs filed a motion for preliminary injunction. The First Amended Complaint was filed April 6, 2019. The defendants' answers or responsive pleadings are due in early July.

Plaintiffs Jonathan T. Cole alleges that he "wishes to exercise his First Amendment rights to free expression, assembly, and to petition his government at the Statehouse." He says, "Defendants' permit and sign rules prevent [him] from doing so without risking being banned from the building." First Amended Complaint,

[1] The plaintiffs entered the Statehouse at approximately 9:40 am. They left the Statehouse at approximately 10:25 am.

¶ 9. Plaintiff Katie Sullivan alleges that she "would like to meet with legislators as well as other activists at the Statehouse without first obtaining a permit. Additionally, [she states that] she would like to display handheld signs and engage in non-disruptive demonstrations in the Statehouse without prior approval. However, [she claims that] Defendants' permit and sign rules prevent her from doing so without risking being banned from the building." *Id.* ¶ 10. Plaintiff Nathaniel Faflick alleges he "wishes to engage in First Amendment activity in the Statehouse but is restricted from doing so by Defendants' sign and permit policies." *Id.* ¶ 11. Each of the three plaintiffs asserts: "Defendants' unnecessary detention of and excessive penalty against [plaintiff] for exercising [their] First Amendment rights on March 27th, 2019 has had a chilling effect on his political advocacy at the Statehouse. *Id.* ¶¶ 9-11.

Plaintiffs wish to challenge the constitutionality of aspects of Kansas Department of Administration's administrative regulations 1-49-1 *et seq*. and State of Kansas Department of Administration's Policy for Usage of the Statehouse and Capitol Complex ("Statehouse Policy"). *See* Exhibit B. However, the aspects of the regulations and policy, which plaintiffs would have the Court declare unconstitutional, are not related to their behavior on March 27.

The Department of Administration's regulations

K.A.R. 1-49-1[2], provides:

> **Personal conduct limitations and animal restrictions**. (a) No person shall climb upon or hang over any rotunda, hall or portico, railing, or stair railing located in or upon any of the following properties: (1) The statehouse; [list of other state properties omitted]

[2] Referenced in the First Amended Complaint at ¶¶ 18 & 20.

> (b) No person shall run up or down the halls or stairways, or crowd, push, or shove any other person upon the stairways of any of the buildings listed in subsection (a)….

K.A.R. 1-49-4[3], states:

> **Unnecessary noise**. Persons in the halls or upon the stairways of any buildings listed in K.A.R. 1-49-1, shall refrain from boisterous, noisy conduct or shouting. Groups of five or more children under the age of eighteen years shall be in the charge of some adult person who shall be held responsible for the conduct of the children

K.A.R. 1-49-5[4], states:

> **Damage to public property**. No person shall write, scratch, cut or otherwise deface or damage any of the walls, floors, woodwork, doors, glass or other public property located in or on any of the buildings or grounds of buildings listed in K.A.R. 1-49-1. Any person violating this regulation shall be prosecuted as provided by law.

K.A.R. 1-49-9[5], provides:

> **Penalty and enforcement**. Any person violating any of these regulations may be expelled and ejected from any of the buildings or grounds of buildings listed in K.A.R. 1-49-1. If any person is responsible for damage to or destruction of public property as the result of violation of these regulations he or she may be prosecuted as provided by law.

Finally, K.A.R. 1-49-10[6] reads:

> **Prior approval of activities.** No person shall post any notices or petitions upon any of the grounds or in any of the public areas of the buildings listed in K.A.R. 1-49-1, except on the bulletin board of an agency when the consent of the agency has been secured. No person shall conduct any meeting, demonstration or solicitation on any of the grounds or in any of the buildings listed in K.A.R. 1-49-1 without the

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[3] Referenced in the First Amended Complaint at ¶ 18.

[4] Referenced in the First Amended Complaint at ¶ 18.

[5] Referenced in the First Amended Complaint at ¶ 20 without citation.

[6] Referenced in the First Amended Complaint at ¶¶ 18 & 26 without citation.

> prior permission of the secretary of administration or the secretary's designee.

Policy for Usage of the Statehouse and Capitol Complex

The Capitol Complex Event Coordinator, Office of Facilities and Property Management ("OFPM"), which is part of the Department of Administration, controls the use of areas inside the Statehouse on the Ground Level and 1st and 2nd Floors.[7] Exhibit B, p. 3, ¶1.c. By contrast, the Director of Legislative Administrative Services ("LAS") controls the use of other areas inside the Statehouse, *i.e.*, Legislative Chambers, 3rd, 4th and 5th Floors, Legislative Committee Rooms and other space managed by the legislature. *Id.*, ¶1.d.

The OFPM requires an application to conduct an "event" within the areas that it controls within the Statehouse. *Id.*, pp. 3-4, ¶2.a. The application for an "event" within this space has to be submitted and received by the OFPM no later than ten working days in advance.[8] An application fee must be paid. *Id.*, pp. 3-4, ¶¶2.a. – 2.c.[9]

Use of the Statehouse for an "event" is limited. "The Statehouse is not an Events Center." Exhibit B, p. 3, ¶1.i. Events have been historically limited to areas on the 1st and 2nd Floors within the Statehouse and its South Steps. *See* Exhibit C, "Capitol Complex Events Application."

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[7] A virtual tour of the Statehouse is available on-line at https://www.kshs.org/p/kansas-state-capitol-online-tours/15843.

[8] If not so received, the application may be denied. Exhibit B, p. 3, ¶ a.ii.

[9] There are other requirements for the application. But they do not appear to be relevant to plaintiffs' claims. Exhibit B, pp. 3-4, ¶ 2.a-c.

However, for approval of any "event," the event must relate to a governmental purpose, have a legislative sponsor and a submitted itinerary and setup diagram, as well as other requirements. Exhibit B, *id.*, p. 7, ¶ 3.i. While "[b]anners and signage, as part of the event, may be attached to easels, tables and/or panels" and "left up for up to two weeks during non-session times," "personal signage" is not allowed, *id.*, p. 6, ¶ 3.h.v., p. 7, ¶ 3.h.xix & xxii, p. 7, and

> No banner, signs, exhibits or any other materials will be taped, tacked, nailed, hung or otherwise placed in any manner within the Capitol Complex."

Id., p. 7, ¶ 3.h.xix.

Summary of relevant background

Plaintiffs' activities on March 27 were not an "event." Anyway, they were not conducted on OFPM controlled areas so the application did not apply. They were also not conducted in areas where events have been allowed. Plaintiffs were expelled and ejected from the Statehouse, possibly under K.A.R. 1-49-9, because they abused their presence in the Statehouse by hanging large banner(s) in a nonpublic area or areas. Their conduct exposed themselves to danger to injury and anyone tasked with removing the banners with the same dangers. Their conduct could have damaged Statehouse property. It certainly impaired the aesthetics of the historically landmarked building and the views to its displayed artwork – albeit for a short period.

In short, there is no connection between the complaints that plaintiffs launch about the aspects of involved regulations and Statehouse Policy and plaintiffs' conduction or the defendants' responses to that conduct.

3. Plaintiffs have not shown that they have standing to pursue their claims

At this stage, the Court must accept as true all material allegations of the complaint and must construe the complaint in their favor. *Petrella v. Brownback*, 697 F.3d 1285, (10th Cir. 2012) (*citing and quoting Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 892 (10th Cir. 2011)). However, even at the pleading stage, the plaintiff must "clearly ... allege facts demonstrating" each element of standing. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016).

A plaintiff asserting entitlement to prospective relief carries the burden of proof to show (1) that the plaintiff suffers injury in fact which is concrete rather than conjectural or hypothetical; (2) that the facts reveal a causal connection between the injury and the conduct complained of; and (3) that it is likely and not merely speculative that the injury complained of will be redressed by a favorable decision. *Outdoor Systems, Inc. v. Lenexa*, No. 98–2534–KHV, 1999 WL 203461 *2, (D. Kan. April 6, 1999) (*citing Horstkoetter v. Department of Pub. Safety*, 159 F.3d 1265, 1279 (10th Cir.1998)). *Accord, Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013). Furthermore, the "plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006).

A plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper,* 568 U.S. at 416 (holding attorneys and human rights, labor, legal, and media organizations lacked standing to challenge Section 702 of the Foreign Intelligence Surveillance Act of 1978). "If the law were otherwise, an

enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Id*.

Plaintiffs' First Amended Complaint does not assert facts necessary to show standing. They do not present facts – even by allegation – of a causal connection between concrete injury to them and the conduct complained of. Count I of the First Amended Complaint concerns permitting of events. Plaintiffs object that small groups or persons are subject to "event" permitting that requires an application, payment of a fee, a legislative sponsor, and approval. First Amended Complaint, ¶¶ 36-41. Yet, plaintiffs do not allege they plan to or would conduct an "event" at the Statehouse. *Cf. id.*, ¶¶9-11.[10] And their conduct on March 27 was not an "event" and was on the 3rd through 5th Floor of the Statehouse where most of the application processes in the Statehouse Policy which are challenged by plaintiffs do not apply.

In Count II, plaintiffs' object that they "are prohibit[ed] [ ] them from silently displaying a hand-held sign inside the Statehouse in areas that are already open to all other members of the public." First Amended Complaint ¶ 43. This allegation leaves the Court unable to determine where the display would take place. More

[10] In support of plaintiffs' motion for preliminary injunction, they assert that "Plaintiffs seek to engage in individual and three-person demonstrations at the Statehouse without prior approval, to silently display signs expressing opposition or support for pending legislation, and to ensure that neither they nor anyone else is impermissibly or arbitrarily issued a categorical Statehouse premises ban." Plaintiffs' Memorandum, p. 2. This does not provide enough meat to cure the failure to plead facts showing standing. Further, defendants are not aware of any authority allowing the Court to substitute statements in briefs into a party's pleadings for its evaluation of standing.

importantly, it is no allegation that plaintiffs plan to or have been "chilled" from silently displaying a hand-held sign.

In Count III, plaintiffs assert that defendants maintain "an official policy and practice that empowers Capitol Police to ban individuals from the Statehouse if they suspect the individual's First Amendment activity will result in a violation of building rules." First Amended Complaint ¶ 47. Plaintiffs admit they are not banned now. *Id.* ¶ 2. The only "official policy" identified in the Complaint is K.A.R. 1-49-9, provides:

> **Penalty and enforcement**. Any person violating any of these regulations may be expelled and ejected from any of the buildings or grounds of buildings listed in K.A.R. 1-49-1 …

However, plaintiffs fail to describe what they propose or would to do *which is a violation of Department of administration's administrative regulations*.

Finally, count IV maintains that defendants' "actions to ban Plaintiffs from the Statehouse for a year constitute unlawful official retaliation for their exercise of First Amendment rights to free expression, peaceable assembly, and petitioning for the redress of grievances." First Amended Complaint ¶ 52. Again plaintiff admit that they are not banned now. *Id.* ¶ 2. In this count, plaintiffs do not pretend there is a basis to redress past alleged misconduct by a favorable decision.[11]

[11] Plaintiffs have sued the defendant officials in their official capacities. *See* caption of First Amended Complaint. *Cf.* First Amended Complaint, ¶¶ 12-14. They do allege they were denied rights in connection with their March 27 activities and do not assert any of the defendants were actively involved with the ban which was immediately removed. They seek only prospective relief. *See* First Amended Complaint, at 16, "wherefore" clauses.

It is true that the Supreme Court has carved out a limited exception to prudential standing requirements where the plaintiff challenges the facial validity of a law impacting speech protected by the First Amendment. *See Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984).[12] However, while this overbreadth doctrine can permit a party to make a facial challenge to aspects of a statute or regulation that has not been unconstitutionally applied to that party, it does not dispense with requirement that party itself suffer justiciable injury. *E.g.*, *National Council for Improved Health v. Shalala*, 122 F.3d 878 (10th Cir. 1997) ("Plaintiffs here have attempted to challenge the constitutionality of the health claims regulations without identifying any specific harm caused them by the regulations. Unlike *Munson*, which alleged its own identifiable injury and thereby provided the vehicle to bring a First Amendment facial challenge premised on the statute's overbreadth, plaintiffs have alleged no injury in fact and thus cannot raise constitutional issues pertaining to them or to anyone else."). *See also Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997) ("Regardless of [concern that speech may be chilled so as to justify society's interest in having a statute challenged], a plaintiff bringing a facial challenge to a statute on First Amendment grounds must still satisfy the 'injury-in-fact' requirement in order to demonstrate standing").

4. Plaintiffs have not established the required likelihood of success

[12] Facial overbreath challenges are "manifestly strong medicine" which must be employed "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). When a party asserts such a challenge, the overbreath "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id*. at 615.

Standing cannot be assumed "in order to proceed to the merits of the underlying claim, regardless of the claim's significance." *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 543 (10th Cir. 2016). If, however, the Court is somehow persuaded plaintiffs have shown that they have standing, entry of a preliminary injunction would still be inappropriate because plaintiffs fail to establish the required likelihood of success on any of their claims.

The right to preliminary injunction relief must be clear and unequivocal. *McDonnell v. City & Cty. of Denver*, 878 F.3d 1247, 1257 (10th Cir. 2018). The moving party must establish the following elements to obtain relief: (1) the movant "is substantially likely to succeed on the merits; (2) [the movant] will suffer irreparable injury if the injunction is denied; (3) [the movant's] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009). Furthermore, some preliminary injunctions are disfavored such that movants must satisfy a heightened standard. These include preliminary injunctions that alter the *status quo*. *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012).

Accepting at face value plaintiff's description of the regulations and policies at issue, plaintiffs are not seeking preservation of the *status quo*. Accordingly, in this case, plaintiffs must "make[ ] a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Beltronics*, 562 F.3d

at 1071 (*quoting O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (*en banc*)).

a. The Statehouse is non-public or limited public fora depending on the involved location within the building.

The applicable constitutional framework, in this case, is the forum analysis. Under which there are four categories of government property: (1) traditional public fora ("streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"); (2) designated public fora ("public property which the State has opened for use by the public as a place for expressive activity"); and (3) limited public forum ("governmental entities establish limited public forums by opening property 'limited to use by certain groups or dedicated solely to the discussion of certain subjects'"), and (4) nonpublic fora ("[p]ublic property which is not by tradition or designation a forum for public communication"). *Doe v. City of Albuquerque*, 667 F.3d 1111, 1128 (2012) (*quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009); *Summum v. Callaghan*, 130 F.3d 906, 916 (10th Cir. 1997)). *Accord, Hirt v. Unified School Dist. No*. 287, No. 17-2279, 2018 WL 6326412 *5 (D. Kan. Dec. 4, 2018).

Plaintiffs claim that the Statehouse and its grounds are public fora or, alternatively, designated public fora. However, public fora is effectively limited to some parks, streets and sidewalks. *Verlo v. Martinez*, 820 F.3d 1113, 1139 (10th Cir. 2016); *Verlo v. City and County of Denver, Colorado*, 741 Fed.Appx. 534, 544 (10th

Cir., *unpub.*, July 5, 2018). *See also Verlo v. Martinez*, 262 F.Supp.3d 1113, 1134-46 (D. Colo. 2017) (tracing the Supreme Court and Tenth Circuit precedent, stating "public fora comprise an essentially fixed set of historically determined categories: public streets, public sidewalks, and public parks").[13]

The Tenth Circuit "identified three non-exhaustive factors to consider in determining whether the government has created a designated public forum: (1) the purpose of the forum; (2) the extent of use of the forum; and (3) the government's intent in creating a designated public forum." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1130 (10th Cir. 2012).

Under these factors, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Furthermore, the government does not create a public forum merely because "'members of the public are permitted freely to visit a place owned or operated by the Government.'" *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (*quoting Greer v. Spock*, 424 U.S. 828, 836 (1976)).

[13] Plaintiffs cite *ACT-UP v. Walp*, 755 F. Supp. 1281, 1287 (M.D. Penn. 1991), for the proposition that statehouses are traditional public fora. The district court found that the Pennsylvania Capitol was a public forum, particularly its rotunda. Likewise in *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1391 (11th Cir. 1993), the court found that the government could not prevent a religious display on the plaza in front of Georgia's Capitol Building. But the court, in 1993, did not distinguish between designated and limited public fora. These courts reasoned from older decisions which are out of step with current Supreme Court and Tenth Circuit jurisprudence.

The Tenth Circuit's reasoning in *Celebrity Attractions, Inc. v. Oklahoma City Public Property Authority,* 660 Fed.Appx. 600 (10th Cir., *unpub*., Aug. 19, 2016), should be persuasive here. The Oklahoma City Public Property Authority, which operated the city's music hall, denied plaintiff Celebrity's application for a permit to use the hall. The district court found the theater was not a public forum. The Tenth Circuit's panel agreed. It wrote:

> Celebrity relies on *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 [ ] (1985), where the court held that a charity drive aimed at federal employees qualified as a nonpublic forum. In so holding, the Supreme Court contrasted the charity drive with the "municipal auditorium and ... city-leased theater" found to be "a public forum" in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 [ ] (1975). *Cornelius*, 473 U.S. at 803 [ ]. But Celebrity's reliance on *Cornelius* and *Southeastern Promotions* is misplaced in that both cases predate the Supreme Court's delineation of limited public fora as a distinct type of government property. *See Doe v. City of Albuquerque*, 667 F.3d 1111, 1130 (10th Cir. 2012) (observing that "the Supreme Court has only recently clarified the terminology of 'designated' and 'limited' public fora" [ ]. Indeed, *Cornelius* identified the universe of fora as only "the traditional public forum, the public forum created by government designation, and the nonpublic forum." 473 U.S. at 802 [ ]. Moreover, at least one Circuit court views *Southeastern Promotions* as indicating that "city-leased theaters" are limited public fora. (citation omitted).
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> In any event, this court has offered "three non-exhaustive factors to consider in determining whether the government has created a designated public forum" instead of a limited public forum: (1) the forum's purpose; (2) the extent of the forum's use; and (3) the government's intent in opening the forum to the public. *Doe*, 667 F.3d at 1129. As the district court found, the purpose of the Thelma Gaylord Theatre is to serve as a venue for large scale productions of art forms like ballets, symphonies and Broadway shows. That purpose indicates a selective design as to the speakers and types of speech allowed at the theater, which suggests a limited public forum, *see Verlo*, 820 F.3d at 1129 n.6.
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> As to the second factor, the extent of the forum's use is limited. The theater is not open to all speakers indiscriminately. Even speakers

> engaged in the art forms listed above must seek a permit to use the theater. Further, the permitting process is largely focused on groups "that offer season show packages," as that "is the best method to reduce the financial risk and to secure the number of attendees necessary ... to break even or make a profit." [ ] This limited access is inconsistent with the general access to a designated public forum. *See Doe*, 667 F.3d at 1129 (identifying a designated public forum as one with "general access to, or indiscriminate use of, the forum" [ ]; *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 496 (9th Cir. 2015) ("The defining characteristic of a designated public forum is that it's open to the same indiscriminate use and almost unfettered access that exist in a traditional public forum." [ ]).
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> As to the third factor—the government's intent in opening the property to the public—the Authority operates the theater under lease from the City "to bring year-round, world class entertainment, by offering the best of ballet, theatre, Broadway, chorus, and orchestra and to develop a revenue stream needed to maintain, operate and upgrade the [venue]." [ ]. This factor, like the others, weighs in favor of finding the Thelma Gaylord Theatre to be a limited public forum as it has been opened for use by only "certain groups or dedicated solely to the discussion of certain subjects." (citation omitted)
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> …. [W]e conclude the theater's overarching purpose, the extent of its use, and the government's intent in opening it to the public show "selective access to some speakers or some types of speech"—the hallmarks of a limited public forum. *See Verlo*, 820 F.3d at 1129 n.6 (internal quotation marks omitted).

660 Fed.Appx. at 604-06. [14]

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[14] Plaintiffs cite decisions from other jurisdictions about statehouses which are not helpful here. In *Kissick v. Huebsch*, 956 F. Supp. 2d 981, 999 n. 18 (W.D. Wis. 2013), the parties agreed the areas in the statehouse were traditional public or designated public fora. The court accepted this without analysis. In *Watters v. Otter*, 986 F. Supp. 2d 1162, 1173 (D. Id. 2013), the district court sustained challenges to a statute banning camping public open space. The *Watters* court had held the plaintiff's tent city was located on the grounds surrounding the old Ada County Courthouse, across the street from the Idaho Statehouse, which was "public open space is highly visible and physically close to the seat of State Government, making it a natural forum for political protests." This, it had concluded, was a "traditional public forum" under the Ninth Circuit's precedent. *Watters v. Otter*, 854 F.Supp.2d 823, 828-29 (D. Id. 2012). However, that precedent is not in step with Tenth Circuit law. Likewise, the finding

In *Religion Foundation, Inc. v. Abbott*, No. A–16–CA–00233, 2016 WL 7388401 W.D. Texas Dec. 20, 2016), plaintiff claimed that the Texas Capitol exhibition area was a traditional or designated forum. The asserted that "the space is not 'generally open' to all who wish to exhibit, either by tradition, or by the government opening it up for that purpose" and "exhibitors must obtain a State official sponsor, and satisfy the Texas State Preservation Board's (Board) application and 'public purpose' requirements."

The court quickly rejected the traditional forum claim because the exhibition "area is not akin to a street or park 'that the public since time immemorial has used for assembly and general communication.'" *Id.* at *7 (*quoting Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 758 (5th Cir. 2010)).

The court also rejected the designed forum argument, concluding at best the area was a limited public forum. It reasoned evidence that the Board had allowed "hundreds of disparate displays in just the last three years," including a "nativity scene for the express purpose of exercising citizens' 'free speech rights' " did not illustrate the Texas government's desire to designate the Capitol exhibition area as a place for public discourse. *Abbott*, 2016 WL 7388401 *7. Rather, exhibitors were required to obtain a State official sponsor and satisfy the Board's application requirements before exhibitions were allowed. *Id.* at *6. And the court found it

in *Reilly v. Noel*, 384 F. Supp. 741, 747 (D. R.I. 1974), that a statehouse rotunda was a public forum, is inconsistent with current Supreme Court law and the Tenth Circuit's forum analysis.

important that the Texas government had limited the Capitol exhibition area to certain subjects, i.e., exhibits must have a "public purpose." *Id.* at *7.

Defendants acknowledge that the determination of forum status is inherently a factual inquiry about the government's intent and the surrounding circumstances. And this usually requires a district court to make detailed factual findings. *Verlo v. Martinez*, 820 F.3d 1113, 1143 (10th Cir. 2016). However, defendants believe the information provided to the Court in the parties briefing and at an evidentiary hearing will show the Statehouse's purpose, its use; and state's intent is not that it serves as in opening the forum to the public for expressive conduct.[15]

The very policies that plaintiffs challenge – permits, legislator sponsorship, approvals and limitations of events relevant to governmental purpose – show the purpose, use and intent are parts of the Statehouse may be used as a limited public forum. This is consistent with the state's purposes: protecting its building and investments in the building, fostering and displaying the building's and its content's aesthetic beauty and their histories, permit the viewing and appreciation of its art and architecture, allowing visitors to observe the public workings of government and, at the same time, allowing government to do its work.[16]

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[15] Plaintiffs exclaim the Statehouse has been described as the "people's house." Whatever purpose that rhetoric served when used, the same can be said for every federal or state courthouse or any city hall. That the legislature works for the interests of the people does not express an intention that the Statehouse is a designated public forum for speech or expressive activity.

[16] Even if plaintiffs could show parts of the Statehouse are traditional or designed public fora, the Court would not apply strict scrutiny in the First Amendment analysis. *See Ward v. Rock Against Racism*, 491 U.S. 781, 789-99 (1989). Rather,

b. In this case, at most, the questioned regulations and policy only need to be reasonable and plaintiffs' challenges do not address their reasonableness.

Plaintiffs do not assert that the challenged administrative regulations or the capitol policy restrict or limit expression of any particular viewpoint. *Compare, Hirt v. Unified School Dist. No. 287*, No. 17-cv-02279, 2018 WL 6326412 (D. Kan. Dec. 4, 2018) (finding factual dispute whether defendants' conduct was viewpoint-neutral). They do not claim that there is an effort to limit speech because of their message.

Plaintiffs also do not argue that the regulations or the capitol policy are unreasonable when tested as regulations in nonpublic or limited public fora. Regulations of speech in a nonpublic or limited public forum are subject to the more deferential reasonableness standard. *Summum v. Callaghan*, 130 F.3d 906, 916 (10th Cir. 1997) (*citing Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995)). The State may regulate the boundaries of the limited public forum it has created, but any government restriction on speech must be (1) reasonable in light of the purpose served by the forum and (2) viewpoint neutral. *Cornelius*, 473 U.S. at

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content-neutral regulation of the time, place, or manner of protected speech is enforceable if "narrowly tailored to serve the government's legitimate, content-neutral interests." *Id.* at 791. "[I]t need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* at 798. And "[t]he validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted. *United States v. Albertini*, 472 U.S. 675, 689 (1985).

806. Regulations governing speech in a nonpublic forum are evaluated by analyzing the reasonableness of the restriction in light of the purpose of the forum. Reasonableness is measured by evaluating the government's interest in "preserving the property for the use to which it is lawfully dedicated." *Lee*, 505 U.S. at 688 (O'Connor, J., concurring) (quotations and alterations omitted); *Cornelius*, 473 U.S. at 799-800; *McDonnell v. Denver*, 878 F.3d 1247, 1254 (10th Cir. 2018). Any restriction "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Lee*, 505 U.S. at 683; *McDonnell,* 878 F.3d at 1254. The reasonableness of a subject-matter or speaker-based limitation in a limited public forum "must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809.

Plaintiffs' arguments pertaining to prior restraint, permit discretion, ban on signs and the like are premised on the assumption that the forum analysis is irrelevant. Not so. In *McDonnell v. Denver*, 878 F.3d 1247 (10th Cir. 2018), protesters claimed policies and regulations governing protests and demonstrations at an airport violated their First Amendment rights. The protestors were required to obtain a permit and to apply for the permit seven days in advance. Our circuit court found that the district court abused its discretion by granting a preliminary injunction. The lower court decided, although the airport was a limited public forum, the protesters would likely prevail on their claims that a prior permit requirement did not account for the possibility of spontaneous or short-notice demonstrations regarding suddenly relevant issues and the defendants had discretion to control location of permitted

speech. *Id.* at 1253, 1255. These decisions, the circuit noted, were wrongly based on a public fora analysis. *Id.* at 1253-55. The circuit court admonished: "The substantial difference between the legal standard applicable to a public forum and the standard applicable to a nonpublic forum renders the comparison inappropriate and legally erroneous." *Id.* at 1254.

The defendants should not be required to prove (or even address) reasonableness in defense of plaintiffs' motion for preliminary injunctive relief. In fact, the Court is not required to reach the question.

However, the regulations and Statehouse Policy are reasonable. Removal of individuals from Statehouse premises aligns with any property owner's rights when the individual's activities would or might damage property, cause injury to them or others, or interfere with operations on the property (here the functioning of the state's legislature and executive). Permitting events assures, where public use of parts of the Statehouse are allowed, the space is available and reserved to the permitted group. Limiting the signage to the area permitted, in that the banner and signage must be attached to easels, tables or panels in the area assigned, protects the fostering and display of the building and its contents. Placement or location of the events can protect property and people. It assists in preventing unreasonable disruption of the state's business and interference with other visitors' enjoyment of the Statehouse. Certainly it is reasonable that the state does not want material posted or attached to its walls, banners, floors, etc. The obvious concern is the building may be damaged or the posting or attachment will require cleanup.

On the other hand, restrictions from the Department of Administration's regulations or the Statehouse Policy are minimal. As just a few examples, plaintiffs may go into any part of the Statehouse open to the public, together or alone, during regular visiting hours. They may speak to legislators; request appoints to see legislators in the legislators' offices. They can non-disruptively parade through each of the areas open to the public with tee shirts displaying their messaging. All this can be done without a permit. Or plaintiffs can apply and obtain a permits from the OFPM to conduct an exhibit on the lower floors of the Statehouse or just call Tom Day to secure a place for an event on the third or fourth floor of the Statehouse.

c. Plaintiffs' single or small group argument fails because it is lashed to the flawed assumption that the Statehouse is a public forum and because single or small group assembly and speech is not restricted by any administrative regulation or the Statehouse Policy.

As explained above plaintiffs' permitting arguments are predicated on their incorrect claim that the Statehouse is a historical public or designated public forum. Independent of this, nothing prevents the three plaintiffs, individually or collectively, from gathering within the Statehouse or from approaching others to communicate plaintiff's views.

A "silent demonstration by three peaceful activists on the south steps of the Statehouse," Plaintiff's Memorandum, p. 16, is not prohibited by the regulations or the policy that plaintiffs attack.[17] Plaintiffs are wrong in assuming that the Capitol

[17] Plaintiffs also do not allege that they would engage in such activity in the First Amended Complaint.

Policy requires permitting of such activity. The individual or small group alone is not an "event." And, "demonstrations," as used in K.A.R. 49-1-10 are operationally defined by the Statehouse Policy as events.

And, if plaintiff could imagine "event" or "demonstrations" should be understood differently, then in considering their facial challenge to the policy, "if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

d. Plaintiffs' short-lived ban from the statehouse argument also fails: The issue is moot; even if discretion to ban is unreasonable, there is no ban policy; and ejecting plaintiffs did not deprive them a constitutional right.

Plaintiffs are not now banned[18] from the Statehouse. While mootness can be thorny question, it isn't here. It is now impossible for the Court to grant any effectual relief whatever to plaintiffs on the ban complaint. *See Phelps v. Hamilton*, 122 F.3d 1309 (10th Cir. 1997) (describing the mootness doctrine). *See e.g., Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F.Supp.2d 1448, 1452 (D. Wyo. 1998) (finding claim moot, stating: "While the Court could permanently enjoin the NPS from instituting any commercial climbing ban, such an order would constitute relief to a hypothetical and non-existent injury. Consequently, any permanent injunction at this stage would be futile").

[18] They were ejected from the Statehouse. They were told they were banned, but the day after the officer's superior notified them they were not banned.

Even if not moot, plaintiffs' arguments do not support a violation of constitutional rights, as applied or facially. They continue to overlook the proper forum analysis. They rely on decisions pertaining to bans from public or designated public forums. *E.g., Catron v. City of St. Petersburg*, 658 F.3d 1260 (11th Cir. 2011) (concerning homeless person's right to access to public parks).[19]

Additionally, there is no written policy that bans individuals from the Statehouse. Plaintiffs reference an isolated event in which the Statehouse doors were locked for a short time to protect the safety and security of visitors, staff and state officials within the Statehouse. This does not reflect a ban policy and is not factually analogous to any claimed restraint on speech made in this case. Moreover, based on best information now, the statement to plaintiffs that they were banned for a year was a misunderstanding of written policy that was quickly corrected. As to this, however, it must be emphasized that the officer properly ejected the plaintiffs from the Statehouse.

The prior restraint element of plaintiffs' argument misses the point because their removal from the Statehouse was not a prior restraint, but response to their misconduct. In the constitutional lexicon it is at worst "retaliation" to their expressive

[19] And even in *Catron* the court acknowledged that a person may forfeit this liberty right by trespass or other violation of law. 658 F.3d at 1266, *citing Church v. City of Huntsville*, 30 F.3d 1332, 1345 (11th Cir.1994) ("Even if we were to impute to the City full responsibility for the removal of the homeless and their property, we would still be unable to agree that such action is indicative of a City policy to violate the rights of the homeless").

conduct or speech. *Brammer-Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1182* (10th Cir. 2010); *Hirt*, 2018 WL 6326412 *4.

As to the plaintiffs' due process argument, it is subsumed within their First Amendment claim. *Hirt*, 2018 WL 6326412 *7. Plaintiffs certainly do not demand prospective relief to vindicate an alleged right to procedural due process concerning a ban which is no longer in place if it ever was.

5. Conclusion

For the reasons stated, the defendants request that the Court deny plaintiffs' motion for temporary injunction. And, if the Court agrees that plaintiffs have not pleaded facts supporting standing but plaintiffs assert they want another chance to try, the defendants suggest plaintiffs be granted leave to file a Second Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 18th day of April, 2019, I electronically filed the above and foregoing with the Clerk of the Court using the Court's Electronic Filing System, which will send a notice of electronic filing to all counsel of record:

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