IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Jonathan Cole, Katie Sullivan, and Nathaniel Faflick, Plaintiffs, vs. 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. 5:19-cv-04028

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs are prohibited from engaging in core First Amendment activity in any part of the Kansas Statehouse and on the building's grounds, including assembling without prior approval and engaging in a silent picket with handheld signs. Moreover, it is undisputed that each Defendant has unfettered discretion to censor Plaintiffs' protests: Defendant Goossen has regulatory authorization to determine whether a protester's event has a government purpose and can decline to issue a permit for any reason, Defendant Day has unconditional authority to approve or reject an event on the upper levels of the Statehouse, and Defendant Jones has the ability to issue bans blocking individuals from accessing the seat of their government. In defense of their presumptively

invalid prior restraints, Defendants superficially argue that Plaintiffs need to risk arrest or articulate a specific plan to break the rules in order to establish standing to bring the facial challenge at issue in the present motion for preliminary injunction. Defendants' position directly contradicts the well-established principles of First Amendment standing, particularly that the chilling effects of an overbroad regulation are a recognized form of First Amendment injury. Moreover, Defendants premise their argument on the erroneous assertion that only Plaintiffs' Memorandum in Support of Preliminary Injunction contains allegations of chill—despite the manifest pleading of identical allegations in the Amended Complaint.

Defendants also assert that their categorical bans and unfettered discretion to silence speech are permissible because each of the six levels and all 57,600 square feet of the Statehouse building, including the 20-acre grounds surrounding it, are to be treated as one homogeneous unit constituting a nonpublic forum, or at most a limited public forum. This is clearly not the case. Even if Defendants' distinction-less forum analysis were appropriate and their argument that the entire Statehouse is a nonpublic forum were correct, their regulations cannot be upheld under even the most forgiving standard of scrutiny. The Statehouse Usage Policy and Department of Administration regulations therefore violate the First Amendment and must be enjoined.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION.

There can be no serious argument that Plaintiffs must risk arrest or present a detailed playbook on how they plan to violate facially invalid rules in order to demonstrate an injury-in-fact. First Amendment plaintiffs may challenge an overbroad statute even if their own rights to freedom of expression are not violated, as long as the statute would have a chilling effect on the expressive activity of other people. *Peterson v. Nat'l Telecomm. & Info. Admin.*, 478 F.3d 626, 633-34 (4th Cir. 2007) ("The Supreme Court has relaxed standing requirements for overbreadth challenges to

allow litigants 'to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'") (*quoting Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). Nonetheless and contrary to Defendants' assertions, Plaintiffs have amply demonstrated both that: (1) the plain language of Statehouse regulations and policies coupled with Lieutenant Hacker's threat of enforcement unconstitutionally chilled Plaintiffs' desired First Amendment protected activities; and (2) these policies facially prohibit and actively deter others from engaging in constitutionally protected expression in the Statehouse.

Plaintiffs "need not 'first expose [themselves] to actual arrest or prosecution to be entitled to challenge a statute that [they] claim deters the exercise of [their] constitutional rights.'" *Cressman v. Thompson*, 798 F.3d 938, 947 (10th Cir. 2015) (*citing Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). A plaintiff in a suit for prospective relief based on a "chilling effect on speech" can satisfy the injury-in-fact requirement by showing the following factors: (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat of enforcement. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006). The Tenth Circuit has adopted a flexible approach to the first prong noting "evidence of past activities obviously cannot be an indispensable element--people have a right to speak for the first time." *Id.* at 1089; *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2344 (2014) (noting one of the petitioner's "intended future speech" was sufficient to establish standing). Plaintiffs have met all three factors.

First, Plaintiffs have alleged that they engaged in the type of speech restricted by the challenged regulations. Specifically, Plaintiffs describe their March 27th, 2019 Statehouse protest in the Amended Complaint, including details that they assembled in a small group and asserted their position on Medicaid expansion through a sign. ¶¶ 29-30. Though the size of the signs and precise location of their upcoming protests may differ, evidence of identical past conduct is not necessary to meet this prong. *See Susan B. Anthony List*, 134 S. Ct. at 2343 (noting Petitioner SBA List had sufficiently alleged that it engaged in restricted speech in the past where the complaint described dissemination of their prohibited message through alternative mediums of communication); *Walker*, 450 F.3d at 1091 (finding the plaintiff's previous ballot measures to protect animal rights in other states was sufficient to demonstrate a present desire to bring similar initiatives in Utah). Plaintiffs' past silent, small group protest in favor of Medicaid expansion therefore undoubtedly supports their present desire to engage in future silent, small group protests about health equity issues and budgetary matters. *See* Am. Compl. ¶¶ 3, 9-11, 34.

Second, Plaintiffs allege a present desire to engage in a silent, small group protest with handheld signs at the Statehouse in their initial pleadings. Am. Compl. ¶¶ 3, 9-11,14, 34. The Amended Complaint explicitly describes Mr. Cole, Ms. Sullivan, and Mr. Faflick's desire to conduct silent pickets with handheld signs as early as May 1, 2019. *Id.* at ¶34. Third, Plaintiffs have alleged a credible concern that they will be arrested if they engage in a silent, small group protest based on Lt. Hacker's directive that they were required to obtain a permit and the plain language of the statute. *See* Am. Compl. ¶¶ 31-34; *Cressman*, 798 F.3d at 947 (holding state official confirmation that conduct would be subject to criminal penalty "combined with the clear statutory prohibition" represents a credible threat of prosecution.).

Defendants argue that Plaintiffs failed to state an injury-in-fact because the Amended Complaint contains too few details about their desired protest plans. In support of their position,

Defendants overstate the level of factual detail required in pleadings to establish an injury in fact, ignore clearly plead allegations in Plaintiffs' complaint, and mischaracterize the restrictions created by their regulations. Defendants inexplicably suggest in a footnote that the only allegations regarding future intent to protest in the Statehouse appear in Plaintiffs' Memorandum in Support of the Motion for Preliminary Injunction. Def's Resp. Mem. at 10. However, the Amended Complaint contains identical facts to those referenced by Defendants, including in paragraph 3 which states: "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 paragraph 34 which explains "Plaintiffs would like to demonstrate on issues that will come up during the veto session beginning on May 1, 2019 as well as issues that will be debated by interim committees and taskforces this summer." Am. Compl. ¶¶ 3, 34.

Defendants also misrepresent the scope of their restrictions, arguing that the prior approval requirements challenged in Count I apply only to the permitting of events on the First and Second floors of the Statehouse. However, Plaintiffs are challenging K.A.R. 1-49-10, which explicitly requires every person to obtain prior permission to conduct any meeting, demonstration, or solicitation in the Statehouse or on its grounds, without exception. Moreover, there is no definition of what constitutes "an event" in Statehouse policies, only a requirement that an event relate to governmental purposes— a qualification subjectively determined by Defendant Goossen or his designee. Defendants have also conceded in their response brief that Plaintiffs are subject to unfettered prior approval requirements to use the Third and Fourth floors of the Statehouse as well. Def's Resp. Mem. at 23. The blanket sweep of the Statehouse regulations and policies therefore make clear that Plaintiffs do have an injury-in-fact resulting from these restrictions.

Next, Defendants argue that there "is no allegation that plaintiffs plan to or have been 'chilled' from silently displaying a hand-held sign. *Id.* at 11. Plaintiffs are not required to and

"indeed, should not, have a present intention to engage in [challenged] speech at a specific time in the future." *Walker*, 450 F.3d at 1088. Moreover, Plaintiffs clearly allege a present desire to "silently display signs expressing opposition or support for pending legislation" that is reasonably chilled by Defendants' maintenance of Rule 3(h)(xxii), a rule which bans all personal signage from the Statehouse. Am. Compl. ¶¶ 3, 10, 42-45. Further, despite Defendants' suggestion, Plaintiffs' failure to identify the specific location where they wish to display their signs is irrelevant to standing. The ban on signs explicitly applies to the entire Statehouse building and security is empowered to confiscate signs at the entrance. Thus, Plaintiffs have stated an identifiable injury regardless of whether they seek to display signs on the lower or upper levels of the building.

Finally, Defendants argue that Plaintiffs lack standing to challenge Defendant Jones's unfettered discretion to exclude them from the property because they "are not currently banned" and have failed to describe what they propose to do that would result in their exclusion. Plaintiffs need not be currently banned in order to be chilled. Indeed, the fact that Plaintiffs have been banned in the past bolsters their credible fear they will be arbitrarily excluded if they engage in future, silent protests with signs. Plaintiffs also have plainly alleged the conduct that could result in a ban, since K.A.R. 1-49-1 permits Capitol Police to expel a person for *any* violation of the rules and they have alleged a present desire to assemble as a small group without a permit and hold signs in violation of K.A.R. 1-49-10 and Rule 3(h)(xxii). Plaintiffs' expressed desire to violate these rules would subject them to a potential premises ban under K.A.R 1-49-1.

Plaintiffs have therefore met all indicia to establish an injury-in-fact for chilling effects under the First Amendment.

II. ALTHOUGH THE TRADITIONAL PRELIMINARY INJUNCTION STANDARD APPLIES TO THIS MOTION, PLAINTIFFS HAVE SATISFIED THE HEIGHTENED STANDARD FOR PRELIMINARY RELIEF INVOKED BY DEFENDANTS.

Defendants have misconstrued the circumstances that trigger heightened review of preliminary injunctions. The Tenth Circuit holds: "Under the traditional four-prong test for a preliminary injunction, the party moving for an injunction must show (1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). That traditional standard applies in this case, because Plaintiffs simply seek to be able to assemble in small groups without prior approval and display handheld signs inside the Statehouse.

A request for injunctive relief that alters the status quo, meanwhile, is subject to a heightened burden of showing that the preliminary injunction factors weigh in the movant's favor. Tenth Circuit courts look to the reality of the existing status and relationship between parties and "not solely parties' legal rights." *Dominion Video Satellite, Inc. v. Echo Star Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc). Thus, a motion to halt enforcement of a rule is not subject to a heightened standard if, in reality, the rule had not been enforced prior to the litigation. *Dominion*, 269 F.3d at 1155.

A number of Defendants' rules have not been enforced and were only raised as a basis to control Plaintiffs' future protests. For example, personal signage has consistently been permitted

in the Kansas Statehouse Rotunda.[1] Therefore, the status quo is Defendants' policy prior to Plaintiffs' March 27th protest, which was one of non-enforcement of at least the sign display prohibition. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005) (noting that "the 'last peaceable uncontested status existing between the parties before the dispute developed'" is the existing status quo) (*quoting* 11A Charles Alan Wright, et al., Federal Practice and Procedure § 2948, at 136 (2d ed. 1995)).

In any event, were the Court to apply a heightened standard of review for preliminary relief, Plaintiffs would certainly meet it here. Even where an injunction is properly characterized as mandatory or altering the status quo, the Tenth Circuit requires only that a party "make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms[.]" *O Centro*, 389 F.3d at 976. Here, Plaintiffs readily satisfy a heightened standard in light of the extraordinary harm that will occur in the absence of an injunction, and the limited burden to Defendants. All that is necessary for relief is to permit silent, non-disruptive protests protected under the First Amendment. Indeed, Defendants voluntarily agreed to cease enforcement of the challenged policies and regulations for the duration of the legislative veto session. ECF No. 16. This invalidates any argument suggesting that it would be burdensome for Defendants to comply with a preliminary injunction order. Thus, Plaintiffs can easily meet the heightened standard.

[1] Jim McLean, *Medicaid Work Requirement Could Jeopardize Coverage Even For People Who Comply*, KCUR. 89.3 (Jun. 12, 2018), https://www.kcur.org/post/medicaid-work-requirement-could-jeopardize-coverage-even-people-who-comply#stream/0; Greg Palmer, *Medical Marijuana Supporters To Rally At Kansas Statehouse*, 13 WIBW (Jan. 15, 2015), https://www.wibw.com/home/headlines/Medical-Marijuana-Supporters-To-Rally-At-Kansas-Statehouse-288664861.html (each containing pictures of individuals holding handheld signs in the Statehouse).

III. THE PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT DEFENDANTS' POLICIES AND REGULATIONS VIOLATE THEIR FIRST AMENDMENT RIGHTS.

A. The Rotunda and Grounds of the Statehouse Building are at Least a Designated Public Forum.

The Tenth Circuit engages in a fact-specific inquiry into the nature of government property at issue to determine the status of a forum. *Verlo v. Martinez*, 820 F.3d 1113, 1142 (10th Cir. 2016) (noting "forum status is an inherently factual inquiry"). A traditional public forum is one that "has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Education Ass'n v. Perry Local Educator's Association*, 460 U.S. 37, 45-46 (1983). A designated public forum is government property "which the State has opened for use by the public as a place for expressive activity," while a limited public forum is government property "limited to use by certain groups or dedicated solely to discussion of certain subjects." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1128 (10th Cir. 2012) (*citing Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009)). In addition to factors like the physical characteristics of the forum, courts look at the purpose of the forum, the extent of the use of the forum, and the government's intent to provide a forum when distinguishing between a designated public forum and a limited public forum. *Doe*, 667 F.3d at 1130. Selective access that would establish a limited public forum generally manifests in the form of speaker-based or subject-matter limitations. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998). The fact that the government maintains a rule requiring permission to use the forum does not amount to the level of selectivity needed to demonstrate a limited forum. *See*, *e.g.*, *Bowman v. White*, 444 F.3d 967, 980 (8th Cir. 2006) (finding university space was a designated public forum notwithstanding the permitting scheme regulating use of the space); *Cantrell v. Rumman*, Case No. 04 C 3041, 2005 U.S. Dist. LEXIS 9512 (N.D. Ill. Feb. 9, 2005) (finding the state plaza was a public forum

notwithstanding the defendant's unfettered discretion to restrict use and impose requirements on the space).

Given the Statehouse's geographic breadth, it likely contains a variety of fora. Different spaces and venues in the building have different purposes and historical uses. For instance, Plaintiffs are not arguing that the Senate chamber is a public forum or designated public forum. However, the rotunda, state library, and hallways have all been opened for use by the public as a place for expressive activity. Further, the grounds—particularly the south steps— have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions for over a century. Contrary to Defendants' argument, they have not selectively limited use of the grounds or the interior of the Statehouse building to certain groups nor have they restricted speakers to a limited set of specific subjects. There may be discrete parts of the Statehouse that are limited or nonpublic fora, but the rotunda and grounds are open to the public at large for assembly and expression.

1. *The Statehouse Grounds*.

The Statehouse grounds are a traditional forum. The grounds are a "park-like setting" that "serve[] as a gathering place" for activities and events.[2] Activists have consistently used the Statehouse grounds for political rallies since the building opened in the early 1900s. Suffragists convened on the north steps in 1916,[3] thousands of anti-war activists demonstrated outside of the building in May 1970,[4] and the Ku Klux Klan used the Statehouse to protest on MLK Jr. Day in

[2] *The Kansas Statehouse*, KANSAS HISTORICAL SOCIETY (2013), p.97.
[3] *Id*. at 62.
[4] *Governing Kansas, 1966 to 1986*, KANSAS HISTORY: A JOURNAL OF THE CENTRAL PLAINS 31 (Summer 2008), at 84, *available at* https://www.kshs.org/publicat/history/2008summer_introduction.pdf.

1994.[5] In recent years, the Statehouse grounds have been the site of dueling rallies on gun reform,[6] pro-life protests,[7] and a "White Unity" rally.[8] The public has also frequently used the grounds for apolitical activities including food truck festivals[9] and "South Step Fridays," a weekly summer event for live musical performances and vendors.[10] Historically, Defendants have not been selective in granting access to the forum. A former Department of Administration representative explained "we rarely deny applications for usage of the grounds […] Usually when we do deny, it is on the basis of a conflicting event."[11] It is also worth noting that in *RFI*, the case regarding the Texas Capitol exhibit displays that Defendants cite in support of their claim that the entire Statehouse and grounds is a limited forum, the Court recognized that Capitol grounds open to the public without regard to content are at least a designated public forum. *Freedom from Religion Found., Inc. v. Abbott*, Case No. A-16-CA-00233-SS, 2016 U.S. Dist. LEXIS 176114, at * 20 (W.D. Tex. Dec. 20, 2016) (*citing Ark. Soc. of Freethinkers v. Daniels,* Case No. 4:09CV00925SWW, 2009 U.S. Dist. LEXIS 116982, at *5 (E.D. Ark. Dec. 16, 2009)).

In sum, as Plaintiffs alleged in their opening brief, the Statehouse grounds are a traditional public forum or at the very least have been opened as a designated forum.

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[5] Katie Moore, *15 years after Nazi rally at Kansas Statehouse, Topeka still grappling with race relations*, TOPEKA CAPITAL-JOURNAL (Aug. 22, 2017), https://www.cjonline.com/news/local/2017-08-22/15-years-after-nazi-rally-kansas-statehouse-topeka-still-grappling-race.

[6] Hunter Woodall, *Kobach tells national walkout students at gun-rights rally to stay in class*, KANSAS CITY STAR (Apr. 20, 2018), https://www.kansascity.com/news/politics-government/article209222789.html.

[7] Irin Carmon, *Kansas abortion ban challenged in court*, MSNBC (June 1, 2015), http://www.msnbc.com/msnbc/kansas-abortion-law-challenged-court.

[8] Scott Rothschild, *Neo-Nazis to rally in Topeka*, LAWRENCE JOURNAL-WORLD (July 11, 2002), http://www2.ljworld.com/news/2002/jul/11/neonazis_to_rally/.

[9] Tim Hrenchir, *Music, food, art: Abundance of activities characterizes weekend in Topeka*, TOPEKA CAPITAL-JOURNAL (Jun. 1, 2017), https://www.cjonline.com/news/local/2017-06-01/music-food-art-abundance-activities-characterizes-weekend-topeka?template=ampart.

[10] *South Steps Fridays kick off June 12*, KAN. DEPARTMENT OF ADMINISTRATION (2015), https://admin.ks.gov/required/AllNewsItems/2015/06/08/south-steps-fridays-kick-off-june-12.

[11] *See supra* note 8.

2. The First and Second Floors of the Rotunda.

The purpose of the first and second levels of the Statehouse rotunda is at least partially to provide the public a place to assemble, discuss political issues, and enjoy apolitical socializing. The rotunda space is distinguished from the exhibition venues on the lower levels and is designated as a space for events. In the past, groups have used the First and Second floors of the rotunda for rallies on specific legislative issues,[12] to advocate for the resignation of the Governor,[13] for ice cream socials for professional associations,[14] and for charity chili cook-offs.[15] Defendants clearly have not limited access to groups who wish to speak about specific subject matters. Similarly, Defendants have not restricted use to certain groups or classes of speakers. An indiscriminate variety of speakers have assembled on the first and second levels of the rotunda over the last four years to protest about a variety of issues.

3. The Third, Fourth, and Fifth Floors of the Rotunda.

The upper levels of the rotunda do not have an evident purpose other than assembly and providing ingress and egress for individuals walking around those floors. Further, in past years the upper levels of the rotunda have been opened to assembly for political protests, including a rally to expand KanCare in January 2019[16] and a thousand-person crowd united for religious freedom.[17]

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[12] *Advocacy Day at Capitol for Sexual and Domestic Violence Programs*, KANSAS COALITION AGAINST SEXUAL & DOMESTIC VIOLENCE (Jan. 30, 2017), https://www.kcsdv.org/kcsdv-pr17advocacy-day/.

[13] Grace Foiles, *Dozens rally at Capitol to protest Brownback*, WASHBURN REVIEW (May 22, 2015), http://www.washburnreview.org/news/dozens-rally-at-capitol-to-protest-brownback/article_d29e50b6-00e1-11e5-9a84-67044cbb39d2.html.

[14] *KSAE Ice Cream Social at the Capitol*, KANSAS SOCIETY OF ASSOCIATION EXECUTIVES (2019), http://ksaenet.org/event-3256213.

[15] *Department of Administration Chili Cook-off, auction set for Thursday*, KAN. DEPARTMENT OF ADMINISTRATION (Oct. 27, 2015), https://admin.ks.gov/offices/public-affairs/2015/10/27/department-of-administration-chili-cook-off-auction-set-for-thursday.

[16] *The Time Is Now*, ALLIANCE FOR A HEALTHY KANSAS (2019), https://expandkancare.com/event/2019-state-of-the-state-address/.

[17] Phil Anderson, *Large crowd rallies for religious freedom*, TOPEKA CAPITAL-JOURNAL (Feb. 17, 2016), https://www.cjonline.com/news/2016-02-17/large-crowd-rallies-religious-freedom. ("Some people who sought a better vantage point made their way to the third floor, where they looked down over a brass rail. Still others filled alcoves on the fourth and fifth floors").

Events on the upper levels of the rotunda are also not limited to any specific subject or group. Instead, the space is available to anyone who wishes to use it and who is deemed suitable by Defendant Day, who has no set criteria or qualifications to determine whether a person gets approval. In short, nothing in the venue's discernible purpose and past use suggests that the spaces are anything other than a designated public forum. There can be little doubt that this exceeds the "strong showing" necessary even under the heightened preliminary injunction standard.

B. Even if the Statehouse is a Nonpublic or Limited Public Forum, the Statehouse Usage Policy Grants the Government Unbridled Discretion and is Facially Invalid Even Under the Most Deferential First Amendment Review.

Rule 2(e)(i) of the Statehouse Usage Policy provides that "the Secretary of Administration or designee will have final authority in determining whether an event may be approved, whether the event relates to a governmental purpose or whether or not any provision of this policy may be waived." This is, unambiguously, unbridled discretion to accept or reject speech at the Statehouse for any reason or no reason. Rule 3(i)(ii)'s requirement to obtain a legislative sponsor similarly confers unbridled discretion on legislators to determine what messages can be heard at the Statehouse. Finally, Capitol Police have limitless authority to choose what speech should result in a ban from the building, and for how long citizens should be banned from the Statehouse building. Mem. in Supp. at 23-24.

Defendants are incorrect that the forum analysis is at all necessary to invalidate the challenged Statehouse rules since their permitting scheme and policies cannot survive even the lowest level of scrutiny. Def's Resp. Mem. at 21-22. Indeed, the 10th Circuit authority Defendants rely on specifically notes that even in a nonpublic forum where reasonableness is the touchstone of government regulation, the government's limitless discretion to reject speech violates the First Amendment because it permits viewpoint-based discrimination. *Summum v. Callaghan*, 130 F.3d

906, 916 (10th Cir. 1997) ("Regulations of speech in a nonpublic or limited public forum are subject to the more deferential reasonableness standard. *This does not mean the government has unbridled control over speech*, however, for it is axiomatic that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (internal quotations and citations omitted) (emphasis added).

Several other circuits have also expressly held that limitless government discretion is a *per se* violation of viewpoint neutrality in a nonpublic forum. *See*, *e.g.*, *Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012) (invalidating discretionary speech regulation in a nonpublic forum for violating viewpoint neutrality); *Amidon v. Student Ass'n* , 508 F.3d 94, 103 (2d Cir. 2007) (noting the "appropriateness" of "incorporat[ing] the rule against unbridled discretion into the requirement of viewpoint neutrality"); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006) ("[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints"); *Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002) ("[W]e conclude that the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement"); *see also Perry Education Ass'n*, 460 U.S. at 46 (noting that even in a nonpublic forum "the regulation on speech [must be] reasonable and not an effort to suppress expression *merely because public officials oppose the speaker's view*") (emphasis added).

Contrary to Defendants' assertions (Def's Resp. Mem. at 20), Plaintiffs in their opening brief plainly argued both that the Statehouse Usage Policy's permit regime fosters viewpoint discrimination and that it is unreasonable. *See* Mem. in Supp. at 18-19 ("Viewpoint discrimination in exercising discretion over permits under the Statehouse usage policy is inevitable […] the legislative sponsor requirement also bears no reasonable relationship to the state's articulated

goals"). This is enough to invalidate these aspects of the Statehouse policy regardless of the type of forum at issue. *See Summum*, 130 F.3d at 916.

Further, Defendants' reliance on *McDonnell v. City of Denver* is misplaced, as that decision was reached without any assessment of whether the permitting process at issue propagated viewpoint discrimination in a nonpublic forum by providing government with uncontrolled discretion in issuing a permit or banning certain speakers. *See McDonnell*, 878 F.3d 1247, 1253 n.2 (10th Cir. 2018) ("[a]ccess to a nonpublic forum . . . can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view") (internal quotations and citations omitted). Defendants have therefore presented no authority remotely suggesting that unbridled discretion to reject speech is permissible in even a limited or nonpublic forum, let alone a public forum.[18]

C. The Statehouse Usage Policy's Categorical Ban on Handheld Signs Is Unreasonable Even Under Nonpublic Forum Analysis.

Citing no cases, Defendants have claimed that their categorical ban on handheld signage at the Statehouse is a reasonable restriction of speech in a nonpublic forum.[19] Def's Resp. Mem. at 22-23. But this is a factual inquiry necessarily rooted in the government's proffered reasons for the regulation and whether those reasons have any legitimate justification. *McDonnell*, 878 F.3d at 1257 (noting that the reasonableness inquiry is fact intensive and based on "the purpose served by the forum").

The sole basis Defendants have put forth for the categorical ban on handheld signage is that: "[l]imiting the signage to the area permitted, in that the banner and signage must be attached

[18] Importantly, Defendants have also not contested the wealth of cases recited by Plaintiffs holding that the permitting policies at issue here would be patently unconstitutional if the Statehouse is indeed a kind of public forum. *Compare* Mem. in Supp. at 17-20, *with* Def's Resp. Mem. at 20.

[19] Again, Defendants make no effort to suggest that a categorical ban on handheld signage would ever be constitutional in a traditional or designated public forum. *Compare* Mem. in Supp. at 20-23, *with* Def's Resp. Mem. at 20.

to easels, tables or panels in the area assigned, protects the fostering and display of the building and its contents." Def's Resp. Mem. at 22. Of course, nothing prevents a person from taking an easel or a table and moving it outside a permitted area. Additionally, the categorical ban would prevent holding handheld signs even within an appropriate permit area, which bears no connection to the stated goal of protecting the "display of the building and its contents." *Id.* This goal is further problematized by Defendants' statements that they would allow protestors to parade through the halls of the Statehouse with messages on their tee shirts even without a permit. *Id.* at 23. Defendants provide no explanation as to how protestors parading with small handheld signs would harm the display of the building and its contents when those same protestors bearing messages on their shirts would not. Nor is it availing to suggest that preventing handheld signs stops materials from being posted or attached to the Statehouse walls or floors (Def's Resp. Mem. at 22)— indeed, the very nature of handheld signs means that they would not be affixed to the Statehouse.

Absent any evidence that handheld signs pose any distinct risk to the display of the Statehouse building and its contents, Defendants have not articulated a reasonable justification for their categorical ban on all handheld signs. *See*, *e.g.*, *Wickersham v. City of Columbia*, Case No. 05-4061-CV-C-NKL, 2006 U.S. Dist. LEXIS 15438, at *28 (W.D. Mo. Mar. 31, 2006) (government provisionally allowed signs in a nonpublic forum after litigation had commenced, and because the signs caused no disruption during the pendency of litigation, the Court subsequently found that "given this record, it would be unreasonable to implement a rule that prohibits all signs […]." The signage ban is therefore facially invalid even in a nonpublic forum.

D. Statehouse Regulations Unambiguously Require Individuals and Small Groups to Obtain a Permit for Expressive Activities, and Defendants Offer No Legitimate Defense of These Regulations.

As described in Plaintiffs' opening brief, Defendants' regulations impose an unqualified requirement that even an individual person obtain prior permission before engaging in a protest.

See K.A.R. 1-49-10 ("*No person* shall conduct *any* meeting, demonstration or solicitation [...] without prior permission") (emphasis added). The Statehouse Usage Policy also lacks any written exception for small groups. Mem. in Supp. at 14. Indeed, Lt. Hatcher of the Capitol Police informed Plaintiffs that their group of three would be required to obtain a permit prior to engaging in any subsequent demonstration at the Statehouse. *Id.*

Defendants do not even suggest that a policy requiring individuals to obtain a permit to express themselves at the Statehouse is reasonable. Instead, their sole contention is that the terms "event" and "demonstration" should be narrowly construed so as not to apply to small groups. Def's Resp. Mem. at 24. But before a narrowing construction can be applied, as Defendants note, the relevant restriction must be "readily susceptible" to limitation. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). This is because the Court "will not rewrite a state law to conform it to constitutional requirements." *Id.*

The Statehouse Usage Policy and K.A.R. 1-49-10 contain no threshold group size to which the permit rules should apply. Asking the Court to read these policies as being limited to a particular group size is therefore asking the Court itself to choose the threshold group size— effectively rewriting the Statehouse rules to make them constitutional. Defendants must rewrite their own regulations and policies to the extent they agree that they are impermissibly overbroad.

E. Plaintiffs' Facial Challenge to the Statehouse Rules Granting Unbridled Authority to Ban Individuals is Not Moot; By Admitting There is No Governing Policy Defendants Have Also Admitted to a Constitutional Violation.

That Plaintiffs had their ban from the Statehouse lifted has no impact on the facial challenge to Statehouse policy at issue in their motion for preliminary injunction. Defendants have not provided a single case in which a facial challenge to a speech regulation was rendered moot because the regulation was no longer being applied to the plaintiffs. A plaintiff's individual case is entirely irrelevant to a facial challenge. *Faustin v. City & County of Denver*, 423 F.3d 1192,

1196 (10th Cir. 2005) ("*A facial challenge considers the restriction as a whole*, while an as-applied challenge tests the application of that restriction to the facts of a plaintiff's concrete case") (internal citations omitted) (emphasis added); *see also Jordan v. Pugh*, Case No. 02-cv-01239-MSK-PAC, 2006 U.S. Dist. LEXIS 66732, at *9 (D. Colo. Sept. 6, 2006) ("This Court previously determined that [Plaintiff]'s facial challenge to the regulation is not moot because the regulation still exists. The [Defendants] have cited no law to this Court which supports a contrary ruling"); *Dunham v. Roer*, 708 N.W.2d 552, 563-64 (Minn. App. 2006) ("In the context of this facial challenge, it is inconsequential that appellant is no longer subject to a restraining order because the statute itself has not been repealed"). As described above, Plaintiffs clearly have standing to bring a facial challenge to the limitless discretion allowed Defendants in banning citizens from the Statehouse, and that challenge is not moot because the policy is still in place.

Turning to the merits, Department of Administration regulations clearly codify the unqualified authority to issue bans blocking individuals from being present on Statehouse grounds. K.A.R 1-49-9. Defendant Tom Day has also asserted in public testimony that he would not support any policy that would limit this discretion.[20] Defendants are content to claim that Plaintiffs' ban from the building was a misunderstanding of policy, at the same time as they assert that there is in fact no written policy guiding Defendants' decision-making. Def's Resp. Mem. at 25. Remarkably, Defendants still appear to argue that the lack of a written policy saves their conduct from First Amendment scrutiny. *Id.* at 24 ("even if discretion to ban is unreasonable, there is no ban policy"). But it is precisely the limitless discretion granted to Defendants in the absence of a proper policy

[20] Recording of Testimony Before the Legislative Coordinating Council on Nov. 9, 2018 from 11:08:30 AM to 11:09:50 AM, *available at* http://sg001-harmony.sliq.net/00287/Harmony/en/PowerBrowser/PowerBrowserV2/20181109/-1/4157.

that makes this Statehouse regulation facially invalid— regardless of the forum. *See Kaahumanu*, 682 F.3d at 806; *see also* Section 3(B) above.[21]

Defendants are likewise incorrect that Plaintiffs' procedural due process claims related to premises bans are somehow "subsumed" by their First Amendment claims. *Hirt v. Unified Sch. Dist. No. 287*, Case No. 2:17-CV-02279-HLT, 2018 U.S. Dist. LEXIS 204850, at *21. (D. Kan. Dec. 4, 2018) (noting that substantive due process claims may be "subsumed" into a First Amendment claim, but that procedural due process claims merit separate analysis). As discussed at some length in Plaintiffs' opening brief, a discretionary policy allowing individuals to be banned from a place that members of the public otherwise have a right to be requires at least a post-deprivation hearing. *See* Mem. in Supp. at 26-27. This procedural due process claim is very much live notwithstanding the fact that Plaintiffs' previous ban from the Statehouse has been lifted. *See Sanchez v. City of Austin*, Case No. A-11-CV-993-LY, 2012 U.S. Dist. LEXIS 190686, at *24 (W.D. Tex. Sept. 27, 2012) (finding that plaintiffs' First Amendment rights were at high risk of erroneous deprivation in the future because of "the broad guidelines provided for use by officials in implementing the policy").

CONCLUSION

For all of the foregoing reasons, Defendants' enforcement of the prior restraints restricting speech and assembly at the Statehouse should be preliminarily enjoined.

[21] Defendants claim that Plaintiffs' expulsion from the building was the result of misconduct. Def's Resp. Mem. at 25. This is entirely irrelevant to the question of whether the discretionary ability to ban individuals from the premises is an impermissible prior restraint on future expressive activity. *Barna v. Bd. of Sch. Dirs.*, 143 F. Supp. 3d 205, 223 (M.D. Penn. 2015) ("prohibitions on speech and attendance that are directed at and prohibit future expressive activity are unlawful").

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Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, on this 1st day of May, 2019, which will send a notice of electronic filing to all attorneys of record.

/s/ Zal K. Shroff
Zal K. Shroff