[ORAL ARGUMENT NOT SCHEDULED]

No. 17-5095

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

INITIAL BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The appellants are David Pulphus and William Lacy Clay, Representative, United States House of Representatives, who were the plaintiffs in the District Court. The appellee is Stephen T. Ayers, in his official capacity as Architect of the Capitol, who was the defendant in the District Court. There was no amicus curiae below.

B. Rulings Under Review

The ruling challenged in this appeal is the April 14, 2017 Order and Memorandum Opinion by the Honorable John D. Bates, No. 1:17-cv-310 (D.D.C.) (Dkt. No. 16), denying Plaintiffs' motion for a preliminary injunction.

C. Related Cases

This case has not previously been before this Court. There are no pending related cases.

s/ Joshua M. Salzman
Joshua M. Salzman

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INTRODUCTION

Congress has, by statute, vested exclusive authority for selecting the art to be displayed in the Capitol and congressional office buildings in a handful of congressional committees and agents, including, as relevant here, the House Office Building Commission (House Building Commission). Even Members of Congress cannot unilaterally choose works of art for display in the Capitol halls. However, the House Building Commission has adopted a program, known as the Congressional Art Competition (Competition), which authorizes each Member to select a single work of art by a high school student from the Member's district for inclusion in an exhibition in the Cannon Tunnel, which connects the Cannon House Office Building to the Capitol. The Cannon Tunnel is not generally open to the public, and access requires approval from congressional staff. The Competition is held annually, so Members who choose to participate in the exhibition select a new piece of artwork for display each year.

The Competition rules afford Members great latitude in making their annual selections for the exhibition, but in order to "assure that the dignity and appearance of the Capitol Buildings are maintained" (JA__[Dkt.11-1@50]), the rules provide that if a Member selects a work that is unsuitable for exhibition, it will not be displayed. To that end, the Competition rules have always included certain Suitability Guidelines, and have provided that a committee chaired by the Architect of the Capitol

(Architect) has the authority to determine whether a work selected by a Member is unsuitable for exhibition.

This suit arises from a determination by the Architect that a painting by David Pulphus, which was selected by Representative William Lacy Clay for inclusion in the 2016 exhibition, did not meet the Suitability Guidelines and should be removed from the Cannon Tunnel. At the time this decision was made, only a few months remained in the 2016 exhibition. Pulphus and Representative Clay filed suit alleging that their First Amendment rights had been violated, and sought expedited consideration of a motion for a preliminary injunction that would have required the Architect to restore Pulphus's painting to the Cannon Tunnel for the remainder of the 2016 exhibition. The district court denied that motion on the merits, concluding that the government speech doctrine is controlling, and that plaintiffs have no First Amendment rights in the Competition. JA__[Dkt.16@26-27]. Although the 2016 exhibition concluded soon after the district court ruled, plaintiffs filed this appeal from the denial of their motion for a preliminary injunction.

As an initial matter, this Court should dismiss this appeal as moot. The only question before the Court is whether plaintiffs should receive *preliminary* injunctive relief. Yet it is undisputed that the 2016 Competition has concluded and that Pulphus's painting is now ineligible to be rehung in the Cannon Tunnel. Plaintiffs allege assorted continuing injuries, but they cannot show that this Court could give

them any effective relief through the grant of a preliminary injunction or that an injunction is necessary to avoid any irreparable harm.

In any case, the district court was correct to reject plaintiffs' claims on the merits. The House Building Commission has not relinquished ultimate control over the Cannon Tunnel or created any type of open forum for private speech. Rather, the government's exercise of editorial discretion in selecting the works to be included in the Cannon Tunnel exhibition, first through Members acting in their official capacities, and then through the right of review retained by the Architect, constitutes a classic form of government speech that is not subject to First Amendment scrutiny.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. JA__[Dkt.1@2]. The district court denied plaintiffs' motion for a preliminary injunction on April 14, 2017. JA__[Dkt.16@27]. Plaintiffs filed a timely notice of appeal on April 28, 2017. JA__[Dkt.19]. This Court has jurisdiction pursuant to 28 U.S.C. § 1292.

STATEMENT OF THE ISSUES

1. Whether plaintiffs' appeal from the denial of their motion for a preliminary injunction is moot, as it is conceded that Pulphus's painting is no longer eligible to be rehung in the Cannon Tunnel;

2. Whether the district court correctly concluded that the government speech doctrine protects the Architect's determination that Pulphus's painting was not suitable for display on the walls of the Capitol; and

3. Whether plaintiffs have demonstrated that they will suffer irreparable harm in the absence of a preliminary injunction.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

Congress has through various statutes delegated authority for the management and oversight of the Capitol building and the congressional office buildings. In particular, ultimate control over the House of Representatives Office Building is vested in the House Building Commission, which consists of the Speaker of the House of Representatives and two other Representatives, currently Majority Leader Kevin McCarthy and Democratic Leader Nancy Pelosi. *See* 2 U.S.C. § 2001; JA__[Dkt.11-1@2]. The House Building Commission exercises this control by, for example, promulgating extensive rules regulating the furnishings and artwork that may be placed in the hallways of the House Office Building. JA__[Dkt.11-1@2], JA__[Dkt.11-1@18]. Day-to-day responsibility for control and supervision over the House Office Building is vested in the Architect, a Presidentially appointed, Senate-confirmed official who has general responsibility for overseeing the Capitol and the

House and Senate office buildings (among other properties). *See* 2 U.S.C. § 2001; JA__[Dkt.11-1@2]; *see also* 2 U.S.C. §§ 1801 *et seq.* (provisions related to the appointment and responsibilities of the Architect).

Congress's exercise of control over the Capitol and the congressional buildings extends to dictating which persons are authorized to select works of art for display in those buildings. *See* JA__[Dkt.11-1@3]. Congress has prohibited the display of privately owned art in many areas of the Capitol. *See* 2 U.S.C. § 2134. Congress has also authorized the Joint Committee on the Library, "to accept any work of the fine arts, on behalf of Congress . . . and to assign the same such place in the Capitol as they may deem suitable," pursuant to "their judgment" of whether the work should be accepted and displayed. *Id.* § 2133. One of the Architect's subordinates, the Curator for the Architect of the Capitol, is responsible for assisting the Joint Committee on the Library by coordinating donations and commissions of art with the relevant committees. JA__[Dkt.11-3@1].

Congress has also created committees in each house of Congress responsible for overseeing the art to be displayed in spaces that are controlled by a single house. A Senate commission has been delegated responsibility to exercise "judgment to accept any works of art" for display in Senate buildings. 2 U.S.C. § 2102(a). Likewise, a statutorily created committee within the House of Representatives, known as the Fine Arts Board, is "authorized to accept, on behalf of the House of Representatives," art for display in the House Office Buildings and other areas under the control of the

House of Representatives. *Id.* § 2122. The Fine Arts Board exercises its authority "in consultation with the House Office Building Commission," and the Architect is charged with assisting the Fine Arts Board in carrying out its responsibilities. *Id.* § 2121.

B. The Congressional Art Competition

1. In 1981, a preliminary proposal was submitted to then-Speaker of the House Tip O'Neill, in his capacity as Chairman of the House Building Commission, for a program to exhibit artwork created by high school students in the tunnels connecting the Capitol to the House Office Buildings. JA__[Dkt.11-1@29]. Speaker O'Neill expressed openness to the idea on the grounds that it would contribute to the "aesthetic enlivenment" of the tunnels, but emphasized that measures would need to be implemented to "assure that the dignity and appearance of the Capitol Buildings are maintained." JA__[Dkt.11-1@50]. To that end, he insisted that "professional juries screen the exhibits on behalf of the House Office Building Commission" and that "the jury . . . have the authority to approve final selection of student works to be exhibited." *Id.*

A more detailed proposal for a Congressional Art Competition was prepared by the then-Architect of the Capitol. JA__[Dkt.11-1@53-54]. The plan provided Members of Congress "the opportunity to encourage and recognize the rich artistic talents of young Americans" by allowing each Member to select a single work of art by a high school student from the Member's district for display in the Cannon

Tunnel. JA__[Dkt.11-1@53]. The Cannon Tunnel connects the Cannon House Office Building to the Capitol and may be accessed by members of the public "only if accompanied by a congressional staff member or if they are in possession of a security pass issued by authorized congressional staff for specified purposes." JA__[Dkt.11-1@4].

Consistent with Speaker O'Neill's direction, the Architect's two-page proposal specified in two separate places—once in all capital letters—that the "decision regarding suitability for exhibition in the Capitol shall rest within the discretion of a panel of qualified persons chaired by the Architect of the Capitol." JA__[Dkt.11-1@53-54]. The proposal also specified that submissions should have to meet certain technical requirements. JA__[Dkt.11-1@53]. In submitting the proposal to the House Building Commission, the Architect recommended the program as a means of "aesthetic enlivenment of the tunnels." JA__[Dkt.11-1@52]. Nothing in the proposal stated any intent to create a forum for speech. The House Building Commission approved the proposal as so framed. JA__[Dkt.11-1@52].

The resulting Competition has been held every year since 1982. While the phrasing of the rules has evolved over time, the rules have consistently included a requirement that the art selected be "suitable" for display and reserved the suitability determination for a committee chaired by the Architect. JA__[Dkt.11-1@5]. To help encourage the selection of suitable works, the Architect's staff provides guidance to Members on suitability during the selection process. JA__[Dkt.11-3@3].

As a general matter, the Architect has relied on the Member sponsoring a particular work of art to ensure that the work satisfies all of the Competition's requirements, including the requirement of compliance with the Suitability Guidelines. JA__[Dkt.11-1@8]. But the Architect's staff nonetheless independently review the works selected for the exhibition. JA__[Dkt.11-3@2]. When the Architect's staff identify a selection as potentially unsuitable, their practice has been to contact the sponsoring Member to note the potential unsuitability and to suggest that an alternative submission be considered. JA__[Dkt.11-3@2-3], JA__[Dkt.11-2@4]. On at least two occasions, the Member agreed with the suggestion of unsuitability and voluntarily withdrew the submission. JA__[Dkt.11-3@3-4]. On other occasions, Members have responded that they continue to wish to sponsor the flagged work, and the Architect has elected to allow the flagged work to be exhibited. JA__[Dkt.11-2@16], JA__[Dkt.11-2@18], JA__[Dkt.11-2@22].

2. For several years, a private non-profit entity called the Congressional Institute has assisted with the administration of the Competition. JA__[Dkt.1@5]. Among other things, the Congressional Institute maintains a website that features pictures of the art selected in the Competition. JA__[Dkt.11-3@2]. The Architect, though, does not maintain or control any such website. JA__[Supp.Ayers.Decl.@5].

C. The 2016 Competition

1. The 2016 Competition followed the structure originally approved by the House Building Commission. Each Member was authorized to select a single work of

art for display in the Cannon Tunnel for the period of June 2016-May 2017. Works were to be displayed with placards naming both the artist and the Member who had selected the work. JA__[Dkt.1@9-10].

The Competition Rules also included Suitability Guidelines that stated:

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

JA__[Dkt.11-1@68-69] (emphasis added); *see also* JA__[Dkt.11-1@73] (identical language in version of rules for students and teachers).

The Competition materials included a "Student Information & Release Form" to be completed upon the selection of a work for inclusion in the 2016 exhibition. JA__[Dkt.11-1@76-77]. One section of the form, which was to be signed by the student whose work was selected, stated in part that the "undersigned acknowledge[s] that the final decision regarding the suitability of an art entry to be displayed in the Capitol will be made by a House panel chaired by the Architect of the Capitol." JA__[Dkt.11-1@77]. Another section, which was to be signed by the Member who selected the work, stated: "I have viewed the above-signed student's artwork and

approve of its content. I understand that by signing this form I am supporting this artwork and am responsible for its content." *Id.*; *see also* JA__[Dkt.7-19@3] (release form as signed by plaintiffs).

2. In May of 2016, Representative Clay selected a painting by David Pulphus, named "*Untitled #1*," to represent Missouri's First Congressional District in the Cannon Tunnel. JA__[Dkt.1@8]. Plaintiffs describe the painting as portraying "the tragic events in Ferguson, Missouri," which is located in Representative Clay's district. *Id.* Among other things, the work depicts two police officers and a young man, where the officers "appear to have the heads of warthogs, while the young man has the head of a wolf and a long tail." JA__[Dkt.1@7].

The Architect convened a panel to review the 2016 selections. JA__[Dkt.11-2@2]. *Untitled #1* was initially set aside because it did not comply with the exhibit's framing requirement. JA__[Dkt.11-2@3]; *but see* JA__[Dkt.7-42@2]. Accordingly, the 2016 panel "did not assess the content of 'Untitled #1'" for compliance with the Suitability Guidelines at that time. JA__[Dkt.11-2@3]. When *Untitled #1* was resubmitted without the improper frame, it was hung without undergoing suitability review. JA__[Dkt.11-2@5].

Several months after the Pulphus painting was first displayed in the Cannon Tunnel, the painting began to receive negative attention in the national media and was publicly criticized by several Members of Congress. In response to the controversy, the painting was removed from the Cannon Tunnel on a handful of occasions by

Members acting without authorization. JA__[Dkt.11-1@9]. On each occasion, Representative Clay had the painting rehung. *Id.* Ultimately, the Architect received a formal request from Representative Reichert asking him to review the painting's compliance with the Suitability Guidelines. JA__[Dkt.11-1@81-82]. The Architect obliged and—after conferring with the Architect's Curator and outside industry experts—ultimately decided that the painting failed to meet the Suitability Guidelines and thus should be removed from the exhibition. JA__[Dkt.11-1@10], JA__[Dkt.11-1@88].

Representative Clay appealed the Architect's decision to the House Building Commission, which upheld the Architect's decision. JA__[Dkt.11-1@10].

D. Prior Proceedings

1. In February 2017—with only a few months remaining before the conclusion of the 2016 exhibition—Pulphus and Representative Clay brought suit against the Architect in the District Court for the District of Columbia, alleging that the removal of the painting from the Cannon Tunnel violated their First Amendment rights, and seeking declaratory and injunctive relief. JA___[Dkt.1@17-18]. Before the Architect made any responsive filing, plaintiffs moved for a preliminary injunction requiring the Architect to:

> (1) reverse his January 16, 2017 decision disqualifying the Painting from the 2016 Competition; (2) rehang the Painting in the Cannon Tunnel alongside the other winning entries until the expiration of the 2016 Competition display period or the conclusion of this litigation on the merits, whichever is sooner; and (3) take any and all necessary steps to

> preserve the integrity of the exhibit and ensure that the Painting is not removed from the Cannon Tunnel without his prior approval.

JA__[Dkt.7@1-2].

Plaintiffs asked that their motion be heard on an expedited basis, explaining that "the Painting is eligible for display only until the end of May, 2017, when the exhibition period for the 2016 Competition is set to expire," and "[a]ccordingly, less than four months remain during which the Painting could be displayed in the Cannon Tunnel." JA__[Dkt.7@2].

2. The district court denied plaintiffs' motion for a preliminary injunction, determining that plaintiffs had failed to show a likelihood of success on the merits because "under controlling authority this case involves government speech, and hence plaintiffs have no First Amendment rights at stake." JA__[Dkt.16@2]. In reaching that conclusion, the district court applied the Supreme Court's three-part test for identifying government speech. JA__[Dkt.16@13-24] (discussing, *inter alia*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009)). The court found the first of these factors—whether the speech in question is expressed through a medium that has historically been used for governmental communications—to be inconclusive. JA__[Dkt.16@14-16]. But the court found the remaining two factors—whether the public is reasonably likely to interpret the government as a speaker and whether the government maintains editorial control—to be dispositive.

As to the reasonable perception of the public, the district court emphasized that "the art competition clearly takes place under the aegis of Congress"; the art is "chosen by members of the House," subject to rules that explicitly state that the "determination as to the suitability of the entry will be made by 'a House panel chaired by the Architect of the Capitol'"; the art is displayed in "an area that the public may only access if accompanied by a congressional staff member, or if they are in possession of a security pass issued by authorized congressional staff"; and is "labeled with . . . the sponsoring House member's name." JA__[Dkt.16@16-17]. Accordingly, the court found it "easy . . . to believe that the public would reasonably associate" the Competition and art display with the government. JA__[Dkt.16@17].

The district court similarly concluded that the government exercised editorial control over the Competition. JA__[Dkt.16@18-23]. The court emphasized that "[t]here is no dispute here that, according to the competition rules, the [Architect] retains the right to make final determinations regarding the content suitability of any work" sponsored for inclusion. JA__[Dkt.16@19]. While the Architect has exercised this right to exclude sponsored works only rarely, the existence of editorial control does not require that the control be exercised often. *Id.* Moreover, the court noted, the Members making sponsorship decisions are themselves government actors who are acting in their official capacities. JA__[Dkt.16@22].

Having determined that "the speech activity here is likely government speech" and that "plaintiffs have no First Amendment rights at issue," the district court also

rejected plaintiffs' vagueness challenge to the Suitability Guidelines. JA__[Dkt.16@24]. The Court also held that without any First Amendment injury, plaintiffs failed to demonstrate either any irreparable harm or that the public interest supported the grant of an injunction. JA__[Dkt.16@25-26].

3. On April 28, 2017, plaintiffs appealed the district court's denial of their motion for a preliminary injunction. JA__[Dkt.19]. Three days later, the 2016 Competition officially concluded, and on May 1, staff began removing artwork from the Cannon Tunnel. JA__[Supp.Ayers.Dec@2]. The Cannon Tunnel now features works selected for the 2017 Competition. JA__[Supp.Ayers.Decl.@3]. Those works were selected under guidelines different from those used for the 2016 Competition. The House Building Commission changed the rules to remove the role of the Architect in evaluating whether sponsored works adhere to the Suitability Guidelines. Now, any dispute between Members regarding the suitability of a work is to be resolved only by the House Building Commission itself. *Id.*

4. The Architect moved to dismiss this appeal, arguing that it had become moot upon the completion of the exhibition of 2016 Competition winners. A motions panel of this Court referred the mootness question to the merits panel and ordered merits briefing. Order (Sept. 13, 2017).

SUMMARY OF ARGUMENT

1. This appeal should be dismissed as moot. Plaintiffs appeal only from the denial of their motion for a preliminary injunction, which sought to require the

Architect to rehang Pulphus's painting in the Cannon Tunnel for the duration of the 2016 exhibition. It is undisputed that the 2016 exhibition has now concluded and that the Pulphus painting is no longer eligible for display in the Cannon Tunnel. Plaintiffs allege that they nonetheless have continuing injuries, but these newly presented arguments are not cognizable on appeal. In any event, plaintiffs fail to show more than a speculative possibility that a grant of *preliminary* injunctive relief would provide them any relief at all, even with regard to these newly asserted injuries.

2. If the Court concludes it has jurisdiction, it should affirm the district court's decision. The walls of the Cannon Tunnel, like other spaces within the Capitol, are not a forum open to private art displays. The 2016 Congressional Art Competition did not bestow any entitlement on any private individual, including Members acting in their private capacities, to display art in the Cannon Tunnel. Rather, that program authorized Members of Congress, acting in their official capacities, to select art by high school students for exhibition on Congressional walls. Moreover, the Competition rules unambiguously reserved for the Architect authority to determine whether a selected work was suitable for display. In concluding that this exercise of editorial judgment by two layers of government actors constituted government speech, the district court faithfully applied the Supreme Court's government speech precedents and this Court's decision in *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005).

Moreover, the motion for a preliminary injunction should be denied because even if plaintiffs have a continuing injury that is sufficient to save the appeal from mootness, their alleged injuries are not irreparable. Accordingly, preliminary injunctive relief is inappropriate.

STANDARD OF REVIEW

This Court decides de novo whether an appeal has become moot. *See Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1285 (D.C. Cir. 2016).

This Court reviews the denial of a preliminary injunction for abuse of discretion, but reviews legal conclusions de novo. *See Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED AS MOOT BECAUSE THE CONCLUSION OF THE 2016 COMPETITION HAS STRIPPED THE COURT OF THE ABILITY TO PROVIDE MEANINGFUL PRELIMINARY INJUNCTIVE RELIEF

This appeal should be dismissed as moot. The 2016 Competition has concluded and *Untitled #1* is no longer eligible for display in the Cannon Tunnel or in any other forum controlled by the Architect, who is the sole defendant in this action. The only question at issue in this appeal—whether plaintiffs are entitled to *preliminary* injunctive relief—is now moot.

Plaintiffs sought preliminary injunctive relief requiring the Architect to "rehang the Painting in the Cannon Tunnel alongside the other winning entries *until the*

expiration of the 2016 Competition display period" and to take steps to ensure that the painting was not removed during the display period without the Architect's approval. JA__[Dkt.7@1-2] (emphasis added). Plaintiffs asked that their motion be heard on an expedited basis, noting that the "the Painting is eligible for display only until the end of May, 2017." JA__[Dkt.7@2]. The 2016 Cannon Tunnel display is now long over. JA__[Supp.Ayers.Decl.@2-3]; Pls. Br. 54 (conceding "the 'brick and mortar' exhibition of the 2016 winners has concluded"). Because it is undisputed that the painting is no longer eligible for display, plaintiffs "no longer have a legally cognizable interest in the determination of whether the preliminary injunction was properly denied." *Animal Legal Def. Fund v. Shalala*, 53 F.3d 363, 366 (D.C. Cir. 1995); *see also International Internship Programs v. Napolitano*, 463 F. App'x 2, 4 (D.C. Cir. 2012) (per curiam) (unpublished) (dismissing as moot an appeal from the denial of a preliminary injunction where "the time period for which [plaintiff] sought relief has passed" and thus "the court cannot provide effective relief").

This appeal is not saved from mootness by the fact that plaintiffs' preliminary injunction motion included a request that the Architect be ordered to "reverse his . . . decision disqualifying the Painting." JA__[Dkt.7@1]. Plaintiffs assert that they continue to experience assorted injuries that allegedly could be redressed by an injunction reversing the Architect's decision. These arguments are each wrong for reasons discussed below. But they share two common defects.

First, the injuries on which plaintiffs seek to rely are being presented for the first time on appeal. In district court, plaintiffs' sole claimed irreparable injury was tied to the removal of *Untitled #1* from physical display in the Cannon Tunnel. *See* JA__[Dkt.7-1@31] ("Plaintiffs' right to display the Painting as part of the Competition is being impaired and will continue to be impaired unless and until the Painting is rehung."). Plaintiffs' new alleged injuries, which are not related to the exclusion of *Untitled #1* from physical display in the Cannon Tunnel, are not cognizable when raised for the first time on an appeal from the denial of a preliminary injunction. *See Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007).

Second, these new arguments ignore the procedural posture of the case. Plaintiffs make little effort to explain why their alleged injuries are redressable through *preliminary* injunctive relief. Even assuming that plaintiffs are right that "some of [their] harms" would be remedied by "declaratory relief" establishing that the painting was removed inappropriately (Pls. Br. 55), a preliminary injunction would not provide such a declaration of the merits, *see University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (emphasizing that a determination that a plaintiff has made a sufficient showing of *likelihood* of success on the merits as to warrant a preliminary injunction is not the equivalent of a decision on the ultimate merits). Thus, even if plaintiffs' alleged injuries are sufficient to save the underlying litigation from mootness—a question the Court need not decide—they fail to provide an ongoing basis for preliminary injunctive relief.

A. This Appeal Is Not Saved From Mootness By Speculation That An Injunction Would Lead The Non-Party Congressional Institute To Post An Image Of *Untitled #1* On Its Website

Plaintiffs argue that while the 2016 Competition winners are no longer on display in the Cannon Tunnel, there continues to be a "virtual" display of winners on the website of the Congressional Institute. Pls. Br. 54-55. Plaintiffs posit that an injunction against the Architect would lead the Congressional Institute to include *Untitled #1* in this digital display. But the injunction that plaintiffs sought would not and could not bind the Congressional Institute, and there is no indication that the grant of a preliminary injunction would induce the Congressional Institute to voluntarily post an image of *Untitled #1* on its website.

Plaintiffs did not request any relief against the Congressional Institute, and could not have because the Congressional Institute is a private entity that is a not a party to the case. JA__[Dkt.7@1] (plaintiffs' motion for a preliminary injunction, which sought relief only against the "Defendant"). Moreover, because the Congressional Institute is a private party, its web posting decisions are not state action capable of violating the First Amendment. *See Johnson v. Commission on Presidential Debates*, 869 F.3d 976, 983 (D.C. Cir. 2017). An order requiring a private entity to post an image on its website would itself implicate grave constitutional concerns under the First Amendment's bar on compelled speech. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995).

Plaintiffs nonetheless assert that under Federal Rule of Civil Procedure 65(d)(2), which extends injunctions to non-parties in "active concert" with the defendant, an injunction against the Architect would also run against the Congressional Institute as a co-sponsor of the Competition. But there is no suggestion here that the Congressional Institute played any role in the decision to apply the Suitability Guidelines to *Untitled #1*; that there is the requisite privity between the Architect and the Congressional Institute to implicate Rule 65(d), *see* 11A Charles Allen Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2956 (3d ed.); or that the Architect "completely controls" the Congressional Institute, *Washington Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 9 (D.C. Cir. 2015).

Moreover, Rule 65(d) applies only to attempts to "nullify" the injunction against the party named in the injunction. *Washington Metro. Area Transit Comm'n*, 776 F.3d at 9. Plaintiffs' proposed preliminary injunction said nothing at all about the Congressional Institute, and thus a refusal by the Congressional Institute to post *Untitled #1* on its website would not violate, or even circumvent, any of the terms of the injunction sought by the plaintiff—which, again, was limited to the Cannon Tunnel display and thus has already been "nullified" by the passage of time. Nor could Rule 65(d) have provided a basis for plaintiffs to have sought an injunction specifically requiring the non-party Congressional Institute to post an image of *Untitled #1* on its website. *See Lake Shore Asset Mgmt. Ltd. v. Commodity Futures Trading Comm'n*, 511 F.3d 762, 767 (7th Cir. 2007) (recognizing that Rule 65(d) does not

provide a basis for a court to "direct [a named defendant] to do things that only some other member of the [defendant's corporate] group, not named as a defendant, could perform").

Plaintiffs also hypothesize that the Congressional Institute will voluntarily post *Untitled #1* if a preliminary injunction is issued. But there is no reason to think that the Congressional Institute would list *Untitled #1* as a competition winner based on an interlocutory (or even final) ruling, given that it would not be bound by the judgment. This Court has recognized that a case is not saved from mootness by "a speculative chance" that an order might provide relief. *Munsell v. Department of Agric.*, 509 F.3d 572, 583 (D.C. Cir. 2007). Indeed, this Court's precedents make clear that plaintiffs lack standing when the redressability of the asserted injury depends on "the unfettered choices made by independent actors not before the courts" unless plaintiffs can adduce evidence that the third party will choose to take the actions needed to redress the asserted injury. *Miami Bldg. & Const. Trades Council, AFL/CIO v. Secretary of Def.*, 493 F.3d 201, 205 (D.C. Cir. 2007); *see also Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (recognizing that Article III "requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court"). Plaintiffs have not even attempted to make such a showing.

Plaintiffs claim support in *Chafin v. Chafin*, 568 U.S. 165 (2013), which they cite as standing for the proposition that "uncertainty regarding enforcement of an order

'does not typically render cases moot.'" Pls. Br. 55 (quoting *Chafin*, 568 U.S. at 175). But what *Chafin* actually says is that uncertainty over whether a *party* may "defy" enforcement of an order does not render a case moot. 568 U.S. at 175. *Chafin* says nothing about whether a case is moot when the requested judicial relief would be ineffective without the voluntary cooperation of a non-party. Indeed, *Chafin* appears to assume that a case *would* be moot if a court order would be "ineffectual" without the voluntary cooperation of an unwilling non-party (in that case, Scotland), and suggests that the litigation at issue there was saved from mootness only because the court was able to provide relief directly against a party. *Id.* at 174-75.

For these reasons, the absence of *Untitled #1* from the "virtual display" on the Congressional Institute website does not save plaintiffs' motion for preliminary injunctive relief from mootness.

B. Plaintiffs' Alleged Reputational Injuries Do Not Save This Appeal From Mootness

Plaintiffs also argue that this appeal is not moot because they allegedly continue to suffer reputational harm as a result of the Architect's decision. Pls. Br. 56-59. But this argument conflates permissible criticism of the painting with the removal decision itself. And even if these alleged injuries were judicially redressable through a final judgment overturning the Architect's decision, plaintiffs' claim for preliminary injunctive relief would still be moot.

Plaintiffs complain that "numerous government officials attacked Untitled #1 based on its perceived 'anti-police' viewpoint." Pls. Br. 56. As an initial matter, the mere fact that public officials have criticized the painting is not, by itself, a cognizable injury. This Court has recognized that there is no reason "why government officials may not vigorously criticize" private parties "for all sorts of conduct that might well be perfectly legal, including speech protected by the First Amendment." *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1015-16 (D.C. Cir. 1991). "If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized." *Id.* at 1016.

Plaintiffs' injuries are also disconnected from the relief sought. A preliminary (or even permanent) injunction requiring the Architect to reverse the decision to have the painting removed would not require any government official to retract a criticism of the painting. Indeed, on plaintiffs' own telling, public criticism was a precursor to, not a consequence of, the Architect's decision. A ruling in plaintiffs' favor, which would reignite the controversy surrounding *Untitled #1*, might well prompt additional public criticism of the painting.

Plaintiffs insist that the Architect's decision "sanctioned" the disparaging statements by branding the painting as "unsuitable" for display. Pls. Br. 56. But the Architect's decision said nothing more than that the painting should not be displayed because it does not conform to the Suitability Guidelines, which exclude depictions of

contemporary political controversy. JA__[Dkt.7-13@2]. There is nothing inherently stigmatizing in having one's work described as "unsuitable" merely because it depicts politically controversial themes. Plaintiffs freely concede that *Untitled #1* depicts a subject of contemporary controversy. *See* Pls. Br. 22 (describing the painting as depicting "race relations, the treatment of African-Americans by law enforcement, and policing"); JA__[Dkt.7-11@2] (letter co-signed by plaintiff Clay describing the painting as "address[ing] a matter of public concern" that "[o]ver the last several years . . . ha[s] generated protest and debate"). Because plaintiffs' objection is not that *Untitled #1* satisfies the Suitability Guidelines, but that those Guidelines were enforced in a viewpoint discriminatory manner, a judgment in plaintiffs' favor will not redress the purported injury that *Untitled #1* has been branded as "unsuitable."

Plaintiffs err in relying on *McBryde v. Committee to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52 (D.C. Cir. 2001), which held that a plaintiff could challenge an unexpired public reprimand which was, on its face, disparaging to the plaintiff. *Id.* at 56-57. Similarly, in the unusual circumstances of *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003), the plaintiff was held to have a cognizable reputational injury where a law, though very nominally neutral on its face, clearly evidenced "a congressional determination that [plaintiff] is a child abuser and a danger to his own daughter." *Id.* at 1213. In any event, neither *McBryde* nor *Foretich* (or any of plaintiffs' other cases) suggests that *preliminary* injunctive relief, which would not decide the merits of the case, can redress a reputational injury. The Supreme

Court has suggested the opposite. *See Sampson v. Murray*, 415 U.S. 61, 91-92 (1974) (finding in another context that a "claim that [plaintiff's] reputation would be damaged as a result of the challenged agency action . . . falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction").

Moreover, *McBryde* confirms that where the direct consequence of the challenged order *has* expired, any allegation of continuing reputational injury will generally not save the case from mootness. *See* 264 F.3d at 57 (concluding that completed suspensions, unlike an unexpired reprimand, could not be challenged). The Architect's decision to remove the painting from the Cannon Tunnel has expired. Plaintiffs insist that they are challenging the "'unretracted and unexpired' decision to disqualify the Painting," which resulted in the painting being "erased from the Competition's 'digital record.'" Pls. Br. 57-58. But the Architect did not order the painting permanently stricken from some official record of the Competition. Indeed, plaintiffs do not even allege that the Architect—or any government actor—maintains an official record of past works selected for exhibition. Pls. Br. 32 n.5 (describing the website maintained by the non-party Congressional Institute as the "digital record" of the Competition). The Architect's decision was modest, and said only that the Architect had decided to have "the artwork removed from the exhibition and returned to [Representative Clay's] office." JA__[Dkt.11-1@88]. There is no dispute that the effect of that decision has expired and can no longer be judicially remedied.

In any case, plaintiffs fail to show that Mr. Pulphus's artistic reputation has been harmed by the removal of the painting from the Cannon Tunnel exhibition. Pulphus suggests that he will no longer be able to list this accolade on his resume (JA__[Dkt.7-3@2]), but nothing in the Architect's narrow decision to have the physical painting removed from the exhibition precludes Pulphus from noting on his resume that his painting was selected by Representative Clay and hung on the Cannon Tunnel wall. Pulphus worries, "[e]ven if I tell people I was initially selected for the Competition, there is no way to prove it because I remain excluded from the virtual exhibition." JA__[Supp.Pulphus.Decl.@3]. But this fear is perplexing in light of plaintiffs' recognition that the Architect's decision is "memorialized" in "widespread media coverage" (Pls. Br. 57); there are any number of readily available sources for verifying that Pulphus was a selectee. Nothing in the record contradicts Representative Clay's prediction that "[r]emoving Mr. Pulphus's painting" would be "undoubtedly good for his budding artistic career," presumably because it would bring far greater attention to his work. JA__[Dkt.7-11@2].

Finally, Clay argues that he suffers negative reputational impacts that are manifested in the fact that he received fewer submissions for the 2017 Competition than he had received in prior years. Pls. Br. 58-59. But Clay's own declaration ascribes the drop in participation to a lack of desire on the part of his constituents to be associated with the *Competition*, not their lack of desire to be associated with Clay

himself. JA__[Supp.Clay.Decl.@4]. At a minimum, he fails to assert a reputational injury that could be redressed by a preliminary injunction.

C. Plaintiffs' Other Arguments Lack Merit

Plaintiffs also argue that the litigation is not moot because they have a continuing challenge to the Suitability Guidelines and because Representative Clay's injury is capable of repetition, yet evading review. Pls. Br. 59-61. But dismissal of this appeal on the ground that the preliminary injunction issue is moot will not prevent plaintiffs from pressing their arguments in the underlying litigation.

Plaintiffs' arguments suffer from still other deficiencies. While plaintiffs now assert that they have brought a challenge to the Suitability Guidelines, their complaint challenges only the disqualification of Pulphus's painting and contains no broader challenge to the Suitability Guidelines. JA__[Dkt.1@18]. Moreover, in the wake of the 2016 Competition, the House Building Commission substantially revised the process through which determinations are made under the Suitability Guidelines. JA__[Supp.Ayers.Decl.@3-4]. Notably, these revisions "eliminate the responsibility of the Architect and a panel of qualified persons to make final decisions regarding the suitability of artwork." JA__[Supp.Ayers.Decl.@3]. Instead, disputes over whether selected work are unsuitable are now made by the House Building Commission, which is not a party to this suit. Accordingly, no dispute between the parties here is likely to recur and no exception to mootness applies. *See People for the Ethical Treatment of Animals, Inc. v. Gittens,* 396 F.3d 416, 422 (D.C. Cir. 2005) ("One function of the

'capable of repetition' doctrine is to satisfy the Constitution's requirement, set forth in Article III, that courts resolve only continuing controversies between the *parties*.") (emphasis added).

Representative Clay also lacks standing to press a challenge based on his desire to protect his prerogative to make unfettered selections in future Competitions. Representative Clay's opportunity to select art for display in the Cannon Tunnel is not a personal right, but rather a function delegated to him in his official capacity as a Member of Congress. Supreme Court precedent is clear that Members have no standing to assert alleged injuries that are "not claimed in any private capacity but solely because they are Members of Congress." *Raines v. Byrd*, 521 U.S. 811, 821 (1997). Thus, Representative Clay has no cognizable injury that can save this appeal.

For all of these reasons, the court should dismiss this appeal as moot.

II. PLAINTIFFS ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

Even were this appeal not moot, plaintiffs would still fail to show entitlement to preliminary injunctive relief. The district court correctly found that the selection of art to be displayed in the Cannon Tunnel is a form of government speech, and that plaintiffs are not likely to succeed on the merits of their claims. Plaintiffs also cannot demonstrate any irreparable harm or satisfy the other preliminary injunction requirements.

A. Plaintiffs Have Not Shown That They Are Likely To Succeed On The Merits

As the district court correctly concluded, plaintiffs are unlikely to prevail on the merits of their claims because the selection by government actors of paintings for display in a non-public area of a government building is a paradigmatic example of government speech and, thus, does not implicate plaintiffs' First Amendment rights.

1. The First Amendment Does Not Constrain The Government's Selection Of The Art Displayed In Government Buildings

There is no dispute that, under normal circumstances, the selection of artwork by government actors for display in a public building like the Capitol is a form of government speech immune from First Amendment scrutiny. *See People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005) (*Gittens*) ("There could be no persuasive argument that the First Amendment would prohibit the [government] from engaging in viewpoint discrimination when it decided which [statue] designs to accept and which to reject" for display in "public buildings."); *see also* Amicus Br. of Americans for the Arts 11 (conceding that "[i]n almost any other part of the Capitol building, visitors could see art erected as government speech"). Thus, for example, in areas controlled by the House of Representatives, the House Fine Arts Board, "in consultation with the House Office Building Commission," has been delegated discretion to choose the art to be displayed. *See* 2 U.S.C. § 2121(a); *see also id.* § 2001. The Fine Arts Board is free to favor works that depict a favorable view

of democratic institutions over works that do not. *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 479-80 (2009) (recognizing the government could accept the Statue of Liberty without giving equal consideration to a Statue of Autocracy). Plaintiffs do not appear to contest that the government was under no obligation to be viewpoint neutral in selecting the hundreds of pieces of art presently displayed at the Capitol. Pls. Br. 30 (accepting Congress's power to delegate authority over art selection).

The same legal framework applies to the Congressional Art Competition, a program adopted for the "aesthetic enlivenment" of the Cannon Tunnel (JA__[Dkt.11-1@52]), especially because the tunnel is a non-public area of a government building (JA__[Dkt.11-1@4]). The Competition involves the selection of artwork created by high school students for exhibition in that non-public government space, pursuant to a qualified delegation of selection authority from the House Building Commission (which has ultimate authority over the House Office Buildings) to other governmental actors, namely, individual Members of Congress acting in their official capacities. JA__[Dkt.11-1@52].

As plaintiffs recognize, in selecting the works that will represent their districts in the exhibition, Members are authorized to exercise much of the same discretion the government enjoys when selecting artwork that will be displayed in a government building. *See* Pls. Br. 4-5, 32 (noting "there is no required procedure for how Members may select winning entries" and that Members employ "untold criteria" in making selections). Members are free to use criteria that would be impermissible in a

forum that was subject to First Amendment constraints. They may choose to weigh considerations unrelated to the content or artistic merit of a work, for example, to honor an artist from a Gold Star or other military family, to showcase the work of a developmentally disabled artist, or to highlight the achievement of a student from an under-resourced school. Correspondingly, Members can—like Congress itself—consider the content and viewpoint of a work in making their selections. For example, no First Amendment issue was raised by the fact that Representative Clay endorsed *Untitled #1* based not on its abstract aesthetic merits, but rather its viewpoint. JA__[Dkt.7-20@2] (praising *Untitled #1* for its depiction of "social injustice, the tragic events in Ferguson, Missouri and the lingering elements of inequality in modern American society").[1]

The Competition rules also make clear that in authorizing Members to select works for display in the Cannon Tunnel, the House Building Commission did not relinquish its ultimate authority to decide which art is appropriate for display on the walls of the Capitol. The approval of the Competition was conditioned on a mechanism allowing "professional juries [to] screen the exhibits on behalf of the House Office Building Commission." JA__[Dkt.11-1@50]. Accordingly, the 2016 rules unambiguously reserved oversight authority, specifying that the "decision

[1] Representative Clay relied on an outside committee to select the work that would represent his district (JA__[Dkt.7-5@3]), but it was his ultimate choice to approve the selection by signing a form attesting that he was "supporting th[e] artwork" and "approve[d] of its content." JA__[Dkt.7-19@3].

regarding the suitability of all artwork for the 2016 Congressional Art Competition exhibition in the Capitol will be made by a panel of qualified persons chaired by the Architect of that Capitol." JA__[Dkt.11-1@68-69]; *see also* 2 U.S.C. § 2001 (providing that the Architect acts under the House Building Commission). This limitation was expressly disclosed to Competition participants. JA___[Dkt.11-1@73]. Indeed, it was deemed so significant that the release form required from participating artists included an acknowledgment that the "decision regarding the suitability of an art entry to be displayed in the Capitol will be made by a House panel chaired by the Architect of the Capitol." JA__[Dkt.11-1@77].

Because the Competition is merely a specific exercise of the government's general authority to select the art to be displayed in a government building, it is legally irrelevant whether the Pulphus painting was removed from the exhibition because of its viewpoint. The First Amendment has no application to this situation. *See Gittens*, 414 F.3d at 28 ("The curator of a stateowned museum, for example, may decide to display only busts of Union Army generals of the Civil War, or the curator may decide to exhibit only busts of Confederate generals. The First Amendment has nothing to do with such choices."); *cf. Newton v. LePage,* 700 F.3d 595, 603 (1st Cir. 2012) ("Circuit courts have routinely rejected First Amendment claims brought against government officials who have chosen to remove art works, offensive to some but not others, from the walls of working government institutions on the grounds they were inappropriate to that location.").

Nor is the analysis altered by the fact that a government actor (Representative Clay) initially selected the painting for display, or that Representative Clay is a co-plaintiff in this action. The Competition rules specified that the selection decisions by individual Members would be subject to review by a committee chaired by the Architect. As the district court recognized, Representative Clay "is a government actor whose decision in this case has been overturned by another government actor with greater decision-making authority on this particular issue." JA__[Dkt.16@23]. There is no First Amendment significance to a dispute between government actors with differing levels of decisionmaking authority as to whether a particular painting is suitable for display; rather, this "is an internal matter for the members to resolve amongst themselves." *Id.*; *cf. Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

2. The District Court Correctly Applied Government Speech Precedents

As the district court correctly concluded, analysis of the factors considered by the Supreme Court in *Summum*, *supra*, confirms that the Cannon Tunnel exhibition is a form of government speech. In *Summum*, the Supreme Court held that the government speech doctrine barred a First Amendment challenge to a municipal government's decisions as to which privately donated monuments to install in a public park. *See* 555 U.S. at 481. In finding government speech doctrine applicable, the *Summum* court considered three factors: (1) the government's history of using the medium to communicate with the public; (2) whether observers would reasonably

perceive the speech as that of the government; and (3) whether the government has maintained editorial control. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2247 (2015) (describing *Summum*). Application of these factors here shows that the selection of art for exhibition in the Cannon Tunnel constitutes government speech, and hence plaintiffs have no First Amendment right to challenge the Architect's decision to remove *Untitled #1* from the exhibition.

a. Governments Historically Communicate Through Their Selection Of Artwork

As to the first *Summum* factor, the paintings selected for inclusion in the Cannon Tunnel exhibition are hung on the walls of a non-public area within a government building. The government has historically controlled the art on the walls of government buildings, especially in those portions where public access is restricted. Congress has imposed numerous statutory restrictions on the display of art within the Capitol and the House and Senate office buildings. *See supra* pp. 5-6; *see also* 2 U.S.C. § 2134 (prohibiting exhibition of privately owned art in many areas of the Capitol). Congress has also exercised control over the House Office Buildings by vesting general management responsibility in the Architect, subject to the oversight of the House Building Commission. *See* 2 U.S.C. § 2001. Plaintiffs argue that *other* spaces within the Capitol grounds have historically been open to the public for *other* types of expression. *See* Pls. Br. 29-30. But the fact that the grounds surrounding the Capitol have been held to be a public forum open to protests—because those grounds have

been "traditionally been open to the public, and their intended use is consistent with public expression," *Lederman v. United States*, 291 F.3d 36, 41 (D.C. Cir. 2002)—does nothing to establish a historical precedent for privately controlled art displays within the Cannon Tunnel. Plaintiffs cite no authority that post-dates the Supreme Court's recognition of the government speech doctrine that suggests that all areas of the Capitol, including areas where public access is restricted, are forums open for public expression.

Plaintiffs argue that the relevant inquiry focuses not on the Cannon Tunnel, but rather on a "metaphysical" space called the "Competition." Pls. Br. 20, 25. It is doubtful at best whether this "metaphysical" approach to the communications medium is correct. When the government selects privately created art or other expression for display on public property, the first *Summum* factor appears to call for consideration of the type of physical property where the art or expression will be displayed. Thus, in *Walker*, the Supreme Court considered whether privately-created license plate designs are government speech. In reaching the conclusion that they are, the Court focused on the government's history of using physical license plates as a means of communicating governmental messages. *Walker*, 135 S. Ct. at 2248. The Court did not analyze the issue by asking, as plaintiffs' approach here would suggest, whether the government has a history of communicating through programs in which private designs are selected for placement on license plates. Indeed, as the district court recognized, if too narrow a focus is placed on whether the government has

historically used the program at issue as a means of communicating its own message, the inquiry becomes tautological. JA__[Dkt.16@14] (recognizing that "presumably, if the competition is government speech, then it has 'traditionally' been used as a medium for that speech, and vice versa").

In any event, government displays of art and programs supporting the arts have long been treated as distinct from forums for private expression. *See Summum*, 555 U.S. at 478; *Gittens*, 414 F.3d at 30; *see also National Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998); *United States v. American Library Ass'n*, 539 U.S. 194, 205 (2003) (plurality op.). Plaintiffs distinguish *Summum* on the ground that the Cannon Tunnel exhibition is not permanent and exhibits are rotated annually, which, plaintiffs argue, means that the competition is not subject to the same space constraints as the small private park at issue in *Summum*. Pls. Br. 26-27. But the Supreme Court has rejected plaintiffs' suggestion that *Summum* turned on the size of the park at issue. *See Walker*, 135 S. Ct. at 2251 ("Of course, Texas allows many more license plate designs than the city in *Summum* allowed monuments. But our holding in *Summum* was not dependent on the precise number of monuments found within the park."). Furthermore, space in the Cannon Tunnel is certainly finite and only a limited number of exhibits can be displayed in any given annual cycle. The Competition is also quite selective. Over 650,000 students have participated over the years (JA__[Dkt.7-16@8]), and only a tiny fraction of them have been given the opportunity to display their works in the

Cannon Tunnel.[2] Thus, plaintiffs' attempts to distinguish the first *Summum* factor lack merit.

b. Reasonable Observers Would Associate The Government With The Works In The Cannon Tunnel Exhibition

As to the second *Summum* factor, there are many reasons why reasonable observers of the Cannon Tunnel exhibition would associate the exhibit with the government. The very name of the exhibition, the "*Congressional* Art Competition" (emphasis added), conveys the government's role in selecting and promoting the displayed works. The works are selected by Members of Congress, acting in their official capacities, subject to the review of the Architect, and are exhibited in a non-public area of the Capitol. Substantial government resources are devoted to reviewing the selected works and preparing them for display. Approximately twenty members of the Architect's staff, including curators, carpenters, laborers, and interns assist with the inventorying, organizing, and hanging of the works. JA__[Dkt.11-2@5], JA__[Dkt.11-2@28-29].

Moreover, the works are presented as representing not only the artist who created the work, but also the Member who selected it. In the Cannon Tunnel exhibition, works are organized by congressional district, and each selected work is

[2] If all 435 Members had chosen to participate in each of the 35 years of the Competition's existence, the total number of selectees would be about 15,000, or less than 3% of participants. The actual selection rate is far lower.

displayed with a label that lists not only the name of the artist, but also the selecting Member. JA__[Dkt.1@9-10]; *cf. Newton*, 700 F.3d at 602 (concluding that a "plaque identifying the work as being commissioned by the [government]" would lead viewers to associate art with the government). Because the pieces of art are presented as works sponsored by Members of Congress, no reasonable observer would conclude that the exhibition is merely a collection of private speech.

The conclusion that a reasonable observer would view the selected works as having received a governmental endorsement is only reinforced if the Court considers not only the physical display in the Cannon Tunnel, but also (as plaintiffs prefer) the Competition process itself. The Competition materials include a release form that Members must sign in order to complete their selection, which requires Members to attest that they "approve" of the work and that they understand that "by signing this form [they are] supporting this artwork and [are] responsible for its content." JA__[Dkt.11-1@77]; *see also* JA__[Dkt.7-19@3] (release form as signed by plaintiffs). This requirement that a government actor expressly endorse the content of the work confirms the association between the selected works and the government. It distinguishes the Competition from other art competitions discussed by plaintiffs' amici, who emphasize that in other competitions, selection of a work is understood not to connote endorsement by the judges of the work's message. Amicus Br. 4-5. This requirement also distinguishes *Matal v. Tam*, 137 S. Ct. 1744 (2017), which held that the act of trademark registration was not a form of government speech where

registration was "mandatory" when statutory criteria were satisfied, and the Patent and Trademark Office had long disclaimed that registration confers any governmental approval or imprimatur. *Id.* at 1758-59.

The association between the selected works and the government is not undermined by the fact that the Cannon Tunnel exhibition includes works that touch on a wide variety of subjects and may even present conflicting viewpoints. As the Supreme Court has recognized, the government can engage in speech when it engages in the "compilation of the speech of third parties." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998); *see also id.* ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."). Consistent with that principle, the Supreme Court found government speech precedents applicable in both *Summum* and *Walker*, even though neither case involved a coherent governmental message or theme. *See Walker*, 135 S. Ct. at 2251-52; *Summum*, 555 U.S. at 476-77. And this principle is particularly applicable when the initial curation decisions are not made by a single government official, but rather 435 members of Congress.

This Court's decision in *Gittens* is particularly on point. There, the Court held that the government was acting as a speaker through its selections of privately designed donkey and elephant sculptures for display in prominent Washington, D.C. locations. 414 F.3d at 25. The Court explained that even though no individual work would be understood to be government speech, "the government speaks through its

selection of which" works to exhibit and which "to exclude." *Id.* at 28. The same principle applies here. Even if no specific piece displayed in the Cannon Tunnel would likely be perceived as the speech of the government, the exhibition itself would be.

Plaintiffs attempt to distinguish *Gittens* on the grounds that the government there had dictated a theme for the exhibition by specifying that sculptures should be "whimsical." Pls. Br. 42. But this is hardly more specific than the theme for the Competition, which is "to encourage and recognize the rich artistic talents of young Americans." JA__[Dkt.11-1@53]. Moreover, the plaintiff in *Gittens* alleged that the government had accepted many works that were political or otherwise not "whimsical," yet this Court deemed it irrelevant whether the government had actually adhered to its stated theme. *See* 414 F.3d at 27, 30.

Plaintiffs also note that in *Gittens*, the government assumed ownership of the submitted sculptures. Pls. Br. 42. But here, though the government does not take ownership, it assumes control over the exhibited works for the duration of the exhibition and obtains the right to reproduce the art for non-commercial purposes. JA__[Dkt.11-1@77]. This, too, confirms that a reasonable observer would associate the exhibition with the government.

c. The Government Exercises Editorial Control

The third *Summum* factor, the exercise of editorial control by the government, also supports the conclusion that the Cannon Tunnel exhibition is government

speech. The government exercises editorial control over the content of the exhibit through two sets of governmental actors. First, each participating Member culls the submissions from the Member's district in choosing the single piece from that district that will be displayed in the Cannon Tunnel. Second, the Architect reviews the submissions and serves as the arbiter of whether the selected works satisfy the criteria for display, including the Suitability Guidelines.

There is no dispute that Members of Congress exercise significant editorial discretion in choosing the works to be displayed in the Cannon Tunnel. For example, in selecting *Untitled #1* to represent his district in the 2016 Competition, Representative Clay excluded 36 other submissions. JA__[Supp.Clay.Decl.@3] (noting that Representative Clay received 37 submissions in 2016). As the district court correctly recognized, this selection process "is not private activity, but rather activity carried out in a member's official capacity." JA__[Dkt.16@22].

Although the district court relied in part on Representative Clay's own exercise of editorial discretion in concluding that the Cannon Tunnel exhibition is government speech, plaintiffs almost completely ignore Representative Clay's role, addressing the point only in a single footnote. Pls. Br. 41 n.7. Plaintiffs assert that focusing on Representative Clay "begs the ultimate question in this case," which is "whether the [Architect]'s 'overruling' of Clay's choice" violated the First Amendment. *Id.* But Plaintiffs cannot skip to what they term the "ultimate" question in the case without first grappling with the antecedent question of whether the Cannon Tunnel exhibition

is government speech. The role of Members of Congress in the selection process, including Representative Clay, shows that government actors exercise editorial control over the Competition and, thus, that the Architect's decision could not have impinged on any rights protected by the First Amendment.

Plaintiffs also deny that Representative Clay's selection of Pulphus's painting constituted a selection by the "government" because a single Member of Congress is not "Congress." Pls Br. 41 n.7. But the relevant question is whether Representative Clay was acting in his official capacity and exercising delegated governmental authority. Plaintiffs do not and cannot deny that Representative Clay made the selection in his official capacity. *See* Pls. D. Ct. Reply Br., Dkt. 13, at 3 (acknowledging that Representative Clay's alleged injury "flow[s] from his role as a U.S. Representative" and involves "his official duties as a representative of his constituents") (quotation marks omitted). Plaintiffs also assert that there can be no unreviewable discretion where First Amendment rights are implicated (Pls. Br. 41 n.7), but this argument simply assumes the conclusion that the Competition implicates any First Amendment right at all.

In any case, the district court was correct to recognize that the Architect's own retention of editorial control over the Cannon Tunnel exhibition is sufficient to establish that the exhibition is government speech. JA__[Dkt.16@23]. The Competition rules are pellucid that works will only be displayed if they adhere to the Suitability Guidelines, and that the Architect is charged with responsibility for

determining whether a particular work is suitable. JA__[Dkt.11-1@68-69]; *see Gittens*, 414 F.3d at 30 (emphasizing that the government "reserved the right to reject designs"). The Architect has not abandoned that review function, and each year, "the Architect's review panel convened and conducted reviews of all Competition submissions in accordance with the applicable suitability guidelines." JA__[Dkt.11-3@2]. In 2016, the Architect's staff flagged at least two works as potentially unsuitable. JA__[Dkt.11-2@3-4].

Plaintiffs emphasize that while the Architect's staff flags potentially unsuitable works, the Architect's practice has nonetheless been to defer to the Member's judgment as to whether even a flagged work should ultimately be included in the exhibit. Pls. Br. 39. But as *Gittens* establishes, when the government curates private speech, it is under no obligation to enforce participation standards neutrally or consistently. *See* 414 F.3d at 30. Anyway, the Architect's past deference does not mean that the Architect had abdicated his role as the ultimate arbiter of suitability. Sometimes, when the Architect's staff flag a work as potentially unsuitable, the Member agrees to withdraw the submission. JA__[Dkt.11-3@3-4]. Moreover, while the Architect has chosen in the past to respect the preference of the sponsoring Member, he has never disclaimed or surrendered overriding authority to exclude unsuitable works. JA__[Dkt.11-1@8] (noting the Architect "generally relied on the sponsoring Member to ensure that the winning work satisfies . . . the suitability guidelines" but the Architect "retains authority to make further suitability

determinations as necessary"). Certainly, plaintiffs do not identify any precedent for the Architect deferring to the decision of the sponsoring Member even when the suitability of a work has been directly challenged by other Members.

It is also misleading to focus only on the number of occasions that the Architect has directed the exclusion of a work selected by a Member over that Member's objection. Much of the work of screening out unsuitable submissions occurs in advance of the Architect's formal review process. Members themselves likely have strong political and personal incentives not to select grossly inappropriate works, such as sexually explicit images. Moreover, the Competition rules put Members on notice that works that are deemed unsuitable will be excluded from the exhibition, and Members are encouraged to "contact the [Architect] Curator's office for guidance on whether entries they receive would be acceptable." JA__[Dkt.11-1@69]; *see* JA__[Dkt.7-16@22] (checklist for Members explaining that Members with "questions about the winning artwork's suitability" should "consult with the Curator of the Architect of the Capitol"). Members take advantage of this process and obtain informal input from the Architect's staff before any selection is made. JA__[Dkt.11-3@3] (declaration from the Curator for the Architect of the Capitol, explaining that "[i]n recent years, especially with the advent of e-mail allowing images to be sent in advance, I responded to questions from district offices who had concerns about . . . content and was able to encourage them to select work that would fit the guidelines"). This pro-active exercise of editorial control, which is designed to avoid circumstances

where objections are "raised after the work got to Washington and the student had already been invited to come" (*id.*), is less visible than after-the-fact intervention, but it too is a way in which the Architect exercises editorial discretion by guiding the selection process.

d. There Is No Significance To The Fact That The Architect Directed The Removal Of *Untitled #1* After It Had Already Been Hung

Plaintiffs put substantial emphasis on the fact that *Untitled #1* was removed "retroactively" after it had been hanging in the Cannon Tunnel for seven months (Pls. Br. 44-47), but there is no reason why the timing of the decision to exclude *Untitled #1* from the exhibition should have any relevance to the government speech analysis. Certainly, the act of removing a monument can be as expressive as the decision to accept one. It is hard to fathom a doctrinal framework that would allow the Architect to reject a submission at the outset under the government speech doctrine, but would then prohibit him from subsequently reassessing his decision to accept that work when its questionable suitability was later called to his attention.

Plaintiffs' complaint is particularly misplaced here because evidence in the record shows that the Architect's staff did not actually make a judgment about the suitability of *Untitled #1* before it was hung. Rather, *Untitled #1* was initially set aside (along with several other works) because it did not comply with the exhibit's framing requirement. JA__[Dkt.11-2@3]; *but see* JA__[Dkt.7-42@2]. When it was resubmitted without the improper frame, it was hung without the Architect's staff

reviewing its content for compliance with the Suitability Guidelines. JA__[Dkt.11-2@5].

Plaintiffs insist that the timing of the decision betrays that the Architect was responding to political pressure rather than making an aesthetic judgment. Pls. Br. 45. But it is eminently sensible to reassess whether a work conforms to Suitability Guidelines designed to exclude subjects of "controversy" (JA__[Dkt.11-1@69]), when actual experience demonstrates that the work is perceived as controversial. In any case, even if plaintiffs were correct in their assertion, the government speech doctrine protects not only aesthetic decisions, but also viewpoint-based ones. *See Gittens*, 414 F.3d at 30 (recognizing "as a patron of the arts, the government is free to communicate some viewpoints while disfavoring others"). And plaintiffs' allegation that the Architect bowed to political pressure is particularly odd given plaintiffs' extended argument that the Architect's judgments as to which paintings are suitable are insufficiently responsive to political pressure. Pls. Br. 47-49.

Plaintiffs argue that no established Competition procedure allowed for a "re-review" of a painting. Pls. Br. 22. But this procedural objection is of no relevance to the government speech analysis. In any case, the Competition rules do not expressly foreclose such review (JA__[Dkt.11-1@68-69), and there is precedent for the Architect removing a work that was hung, but later found to be ineligible (JA__[Dkt.11-1@8, JA__[Dkt.11-1@79]). Moreover, authority to re-review a painting is a natural incident of the Architect's general authority over the House

Office Building. *See* 2 U.S.C. § 2001. In sum, nothing in the timing of the Architect's decision undermines the conclusion that the Cannon Tunnel exhibition is an exercise of government speech.

e. The Competition Is Not A Forum For Speech By Either Pulphus Or Representative Clay

There is no viable alternative First Amendment framework to the government speech doctrine in this case. Plaintiffs insist that the Competition should be treated as a limited or nonpublic forum for private speech (Pls. Br. 20), yet they are vague as to *whose* private speech the forum is alleged to have been opened. Instead, they invoke their alleged rights collectively. *See* Pls. Br. 21 ("Appellants seek access to the Competition[.]"). But this imprecision masks the fact that plaintiffs' reliance on forum precedents cannot withstand parsing. The Competition cannot plausibly be described as a forum for speech by either Pulphus or Representative Clay.

The Competition was not a forum open to Pulphus 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. As plaintiffs acknowledge, Representative Clay, like all Members, was entitled to administer the Competition in his district using any procedures or criteria of his choosing. *See* Pls. Br. 4-5, 32. Plaintiffs do not appear to challenge this aspect of the Competition. This selection process bears no resemblance to a speech forum where, as plaintiffs' acknowledge, there must be "neutral policies established in advance to govern speech." Pls. Br. 22.

Congress's decision to empower Members to serve as absolute gatekeepers with respect to the Cannon Tunnel exhibition is completely incompatible with the notion that the government intended to create an open forum for speech by student artists.

Yet, the display in the Cannon Tunnel was surely not established as a forum for speech by Members of Congress either. On plaintiffs' own telling, the purpose of the Competition is to "encourage nationwide artistic creativity by high school students." Pls. Br. 1 (quotation marks omitted). There is no indication that Congress was creating a forum for speech by Members. Representative Clay's act of selecting Pulphus's painting was taken in his official capacity, acting on behalf of the Architect and the House pursuant to delegated selection authority, and is not "private speech" protected by the First Amendment. *Cf. Garcetti*, 547 U.S. at 421 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.").

In short, plaintiffs are unable to provide a plausible alternative to the government speech framework. That is dispositive, because plaintiffs do not deny that they cannot prevail if the government speech doctrine controls.

3. Plaintiffs' Vagueness Argument Fails

Plaintiffs also briefly argue that the Suitability Guidelines are unconstitutionally vague. Pls. Br. 49-51. But Plaintiffs properly do not take issue with the district court's holding that if the government speech doctrine applies, the vagueness challenge must fail as well because even "utter arbitrariness" is permissible when the

government acts as a speaker. JA__[Dkt.16@25] (quoting *Gittens*, 414 F.3d at 30). In fact, even outside the government speech context, the Supreme Court has indicated that vagueness is constitutionally tolerable when the government is promoting the arts. *See Finley*, 524 U.S. at 590 (upholding rule adding "imprecise considerations to an already subjective selection process"). Thus, plaintiffs' vagueness challenge fares no better than their First Amendment challenge.

B. Plaintiffs Fail To Show That They Will Suffer Irreparable Harm In The Absence Of An Injunction

Plaintiffs' appeal should also be rejected for the independent reason that plaintiffs have failed to demonstrate that they will suffer the requisite irreparable injury in the absence of a preliminary injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasizing that Supreme Court precedent requires "plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction"). A plaintiff must demonstrate an injury that is "certain and great," "actual and not theoretical," and so "imminen[t] that there is a clear and present need for equitable relief to prevent irreparable harm." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (alteration in original). Even if plaintiffs continue to have cognizable injuries sufficient to save this appeal from mootness, *but see supra* Part I, those injuries are not irreparable for purposes of the preliminary injunction analysis. And while plaintiffs emphasize that the government bears the burden of proving mootness (Pls. Br. 53), it is plaintiffs who bear the

burden of establishing irreparable harm. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

Plaintiffs devote only a paragraph of their brief to the subject of irreparable harm, making only the cursory argument that even a temporary loss of First Amendment rights constitutes an irreparable injury. Pls. Br. 51-52. But now that plaintiffs concede that *Untitled #1* is no longer eligible for display in the Cannon Tunnel, and there is thus no ongoing exclusion from any alleged governmental forum, they fail to allege an ongoing violation of their First Amendment rights, let alone an irreparable harm that would be redressed by the preliminary injunction they have sought.

The closest plaintiffs come to describing an ongoing restriction on their First Amendment rights is their assertion, made only with regards to mootness, that a reversal of the Architect's decision disqualifying *Untitled #1* could potentially lead the Congressional Institute to display *Untitled #1* on its website. Pls. Br. 55. The Congressional Institute is a private entity and is thus (absent an unusual showing that plaintiffs do not even attempt) not subject to the First Amendment. *See Johnson*, 869 F.3d at 983. Plaintiffs fail to explain how the exclusion of their work from a private website constitutes any First Amendment violation, let alone the sort that is presumed to constitute irreparable injury. In any case, as noted above, *see supra* p. 21, it is entirely speculative whether the Congressional Institute would choose to add *Untitled #1* to its website in response to a preliminary injunction.

Nor is *Elrod v. Burns*, 427 U.S. 347 (1976), to the contrary. In *Elrod*, the Supreme Court analyzed a claim of irreparable harm based on the facts as they stood at the time that a preliminary injunction was first sought in district court. *Id.* at 373 (plurality op.). But *Elrod* did not suggest that it would be appropriate for a court of appeals to grant a preliminary injunction in a circumstance where, by the time the litigation reached the court of appeals, the plaintiff was no longer facing any imminent risk of irreparable harm. Indeed, the Second Circuit has even overturned the grant of a preliminary injunction in a case involving a First Amendment challenge where developments that post-dated the district court's ruling obviated plaintiffs' asserted irreparable harm. *See Latino Officers Ass'n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999); *see also Matos ex rel. Matos v. Clinton Sch. Dist.*, 367 F.3d 68, 72-74 (1st Cir. 2004) (upholding denial of preliminary injunction where plaintiff's alleged irreparable harms had become moot during the litigation and her remaining alleged injuries were not irreparable).

While plaintiffs also assert reputational injuries in the context of their mootness argument (Pls. Br. 56-59), they properly do not rely on these alleged injuries—which were raised for the first time on appeal—as a basis for arguing that they have demonstrated irreparable harm. *See Sampson*, 415 U.S. at 91-92.

Because plaintiffs cannot show irreparable injury, their claim for a preliminary injunction must fail.

C. The Balance Of Harms And The Public Interest Weigh Against Issuance Of An Injunction

The district court was also correct to conclude that a preliminary injunction would not serve the public interest, and that the balance of harms weighs against the grant of a preliminary injunction. JA__[Dkt.16@26]. Because plaintiffs have experienced no violation of their First Amendment rights, and because there would be harm to the government from interference with the government's ability to exercise control over the paintings hanging in the halls of the Capitol, these factors also weigh against a grant of preliminary injunctive relief.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed as moot, or in the alternative, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,693 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Joshua M. Salzman
JOSHUA M. SALZMAN

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Joshua M. Salzman
JOSHUA M. SALZMAN

ADDENDUM

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2 U.S.C. § 2001. House Office Building; control, supervision, and care

The House of Representatives Office Building, which shall hereafter be designated as the House Office Building and the employment of all service, other than the United States Capitol Police, that may be appropriated for by Congress, necessary for its protection, care, and occupancy, shall be under the control and supervision of the Architect of the Capitol, subject to the approval and direction of a commission consisting of the Speaker of the House of Representatives and two Representatives in Congress, to be appointed by the Speaker. Vacancies occurring by resignation, termination of service as Representatives in Congress, or otherwise in the membership of said commission shall be filled by the Speaker, and any two members of said commission shall constitute a quorum to do business. The Architect of the Capitol shall submit annually to Congress estimates in detail for all services, other than the United States Capitol Police, and for all other expenses in connection with said office building and necessary for its protection, care, and occupancy; and said commission herein referred to shall from time to time prescribe rules and regulations to govern said architect in making all such employments, together with rules and regulations governing the use and occupancy of all rooms and space in said building.

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2 U.S.C. § 2121. House of Representatives Fine Arts Board

(a) Establishment and authority

There is established in the House of Representatives a Fine Arts Board (hereafter in sections 2121 and 2122 of this title referred to as the "Board"), comprised of the House of Representatives members of the Joint Committee on the Library. The chairman of the Committee on House Oversight of the House of Representatives shall be the chairman of the Board. The Board, in consultation with the House Office Building Commission, shall have authority over all works of fine art, historical objects, and similar property that are the property of the Congress and are for display or other use in the House of Representatives wing of the Capitol, the House of Representatives Office Buildings, or any other location under the control of the House of Representatives.

(b) Clerk of the House of Representatives

Under the supervision and direction of the Board, the Clerk of the House of Representatives shall be responsible for the administration, maintenance, and display of the works of fine art and other property referred to in subsection (a).

(c) Architect of the Capitol

The Architect of the Capitol shall provide assistance to the Board and to the Clerk of the House of Representatives in the carrying out of their responsibilities under sections 2121 and 2122 of this title.

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2 U.S.C. § 2122. Acceptance of gifts on behalf of the House of Representatives

The Board is authorized to accept, on behalf of the House of Representatives, gifts of works of fine art, historical objects, and similar property, including transfers from the United States Capitol Preservation Commission under section 2082 of this title, for display or other use in the House of Representatives wing of the Capitol, the House of Representatives Office Buildings, or any other location under the control of the House of Representatives.

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2 U.S.C. § 2134. Art exhibits

No work of art or manufacture other than the property of the United States shall be exhibited in the National Statuary Hall, the Rotunda, Emancipation Hall of the Capitol Visitor Center, or the corridors of the Capitol.