IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOUGLAS MARSHALL,

Plaintiff,

Case No. 14-cv-12872

v.

Hon. Marianne O. Battani

CITY OF WARREN and
JAMES R. FOUTS, in his individual capacity and in his official capacity as mayor of Warren,

Defendants.
_____/

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In opposing Plaintiff's motion for a preliminary injunction, Defendants are unable to negate one inescapable fact: Douglas Marshall is being denied access to public space because of the viewpoint of the speech he wishes to express there. Because that one fact is dispositive of Plaintiff's claims, an injunction should issue.

ARGUMENT

I. Defendants misstate the legal standard for a preliminary injunction.

As a matter of law, Defendants are incorrect in their assertion that Plaintiff faces a "substantially heightened" burden in his request for a preliminary injunction because he seeks to "alter" the status quo rather than to maintain it. (Dkt. 12 at 3-4.) Defendants' authority for this is a 1996 district court decision relying on a Tenth Circuit case that established a "heavy and compelling" standard for such injunctions because they are "mandatory" rather than "prohibitory." (Dkt. 12 at 4.) But that standard, and the very Tenth Circuit case Defendants cited in their brief, were explicitly rejected by the Sixth Circuit in 1998:

> If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury. We therefore see little consequential importance to the concept of the status quo, and conclude that the distinction between mandatory and prohibitory injunctive relief is not meaningful. Accordingly, we reject the Tenth Circuit's "heavy and compelling" standard and hold that the traditional preliminary injunctive standard—the balancing of equities—applies to motions for mandatory preliminary

> injunctive relief as well as motions for prohibitory preliminary injunctive relief.

United Food & Comm. Workers Union v. Sw. Ohio Reg'l Trans. Auth., 163 F.3d 341, 348 (6th Cir. 1998) (citations and quotations omitted). Plaintiff therefore faces no "heightened" burden here.

II. The holiday display case is not controlling because that case involved government speech and this case involves private speech.

Defendants next argue that Plaintiff's motion must be denied because he did not prevail in a previous legal challenge to Warren's holiday display in the city hall atrium. (Dkt. 12 at 2.) However, as explained by Plaintiff in his opening brief, the previous case is clearly distinguishable. (Dkt. 2 at 18-20.)

In *Freedom From Religion Foundation, Inc. v. City of Warren*, 707 F.3d 686, 695-97 (6th Cir. 2013), the Sixth Circuit held that the holiday display was government speech because it conveyed the City of Warren's own message about the holiday season. When the government speaks, it is not required to be viewpoint neutral or allow others to change its message. *Id.*

This case is different. Defendants have conceded that the prayer station is *someone else's* private speech that they have allowed into the atrium. The prayer station is thus unlike the holiday display, as it does not express the City of Warren's message. Specifically, Defendants admit that "the prayer station is not sponsored by or labeled as endorsed by the City" (Dkt. 11 at 23) and that the

prayer station exists "without endorsement, participation, or sponsorship by the City" (Dkt. 11 at 26). In other words, there can be no serious argument that the prayer station is government speech. Therefore, the Sixth Circuit's analysis in *Freedom From Religion Foundation* is not controlling here.

Instead, *Lamb's Chapel*, *Rosenberger*, and *Good News Club* (as discussed in Plaintiff's opening brief) are the relevant cases: the City's willingness to allow private religious speech into the atrium means that Defendants must allow atheist speech to be heard there as well. And viewpoint neutrality between private speakers is required regardless of the type of forum involved.

III. Plaintiff is highly likely to prevail on the merits because the record evidence demonstrates that the reason station was rejected because of his atheist views.

Turning to the merits, Defendants assert that their rejection of the reason station had nothing to do with Mr. Marshall's viewpoint, but was merely an attempt to prevent him from disrupting the prayer station, causing disturbances in city hall, and provoking public debate about a controversial topic. (Dkt. 11 at 7-8, 18-19.) This defense is meritless. Of course, once sued the government can almost always come up with some theoretically viewpoint-neutral reason for having excluded speech it does not like. But when the evidence shows that the government's proffered justification is "in reality a facade for viewpoint-based

discrimination," it must be rejected. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). That is exactly what is happening here.

Begin with the affidavits Defendants filed regarding Mr. Marshall's alleged past conduct at the prayer station. (Dkt. 11-4, 11-5.) Putting aside the fact that Mr. Marshall denies these allegations (*see* Ex. A, ¶¶ 5-10), the affidavits themselves are so riddled with subjective evaluations and conclusory statements as to be virtually useless as an evidentiary matter and certainly unreliable as a factual basis for suppressing speech. Just as importantly, Defendants present absolutely no evidence that these dubious allegations are their *actual basis* for having rejected the reason station. Defendants submitted five affidavits with their summary judgment motion, yet not a single one says who made the decision to reject the reason station and on what basis the decision was made.

Here's why: Mayor Fouts himself made the decision, and he did so because he doesn't like the ideas that Mr. Marshall advocates. According to the mayor's own letter, he would not allow Mr. Marshall to use space in the atrium because Mr. Marshall belongs to a group that is "anti-religion." (Dkt. 1-7.) As for Defendants' vague and subjective allegations about Mr. Marshall's personal conduct, they are immaterial because there is no evidence that they were the basis for the mayor's decision to reject the reason station. The record is clear: the mayor suppressed Mr. Marshall's speech based on his disagreement with Mr. Marshall's atheist message.

Mayor Fouts's public statements since this lawsuit was filed confirm that the prayer station was rejected because of Defendants' disagreement with Mr. Marshall's viewpoint. Here's what he told the Associated Press:

> "The city has certain values that I don't believe are in general agreement with having an atheist station, nor in general agreement with having a Nazi station or Ku Klux Klan station," Fouts said. "I cannot accept or will not allow a group that is disparaging of another group to have a station here."

(Ex. B.) Obviously, Mr. Marshall rejects the mayor's bizarre comparison of atheists to Nazis or the KKK. But more importantly, whether Mr. Marshall's views are mainstream or fringe does not matter: "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000). Here, Mayor Fouts evidently believes that Mr. Marshall advocates a point of view inconsistent with the city's "values." That is an unconstitutional basis for suppressing speech.

Defendants' filings with this Court further confirm that their motivation in prohibiting Mr. Marshall's speech is their dislike of his atheist message. Consider the following from their summary judgment brief:

> Literature and documents available from the FFRF show that ***its messages are not benign***. It finds religious people contemptible and religious ceremonies things to laugh at. . . . FFRF circulates its mocking and derisive message through Plaintiff and other like-minded folks . . . .

(Dkt. 11 at 8, emphasis added.)

> Plaintiff's anti-religion political purpose of mocking religious groups and people is illustrated by the FFRF's published articles. This is especially troublesome because Plaintiff admits that he intends to distribute FFRF publications at the reason station in the atrium. ***Exclusion of such an overtly antagonistic message on public property is appropriate*** . . . .

(Dkt. 11 at 20, emphasis added). It is difficult to imagine a more obvious illustration of viewpoint discrimination. The very essence of viewpoint neutrality is that the government cannot suppress speech based on its own determination that a speaker's message is unfriendly. There are many individuals and groups in this country whose messages are far from "benign," but they are all protected from viewpoint discrimination by the state. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

For similar reasons, Defendants' suggestion that they merely wish to prevent the atrium from being the site of "public debate on controversial topics" (Dkt. 11 at 19) must also be rejected. The Sixth Circuit has held that, even in a limited or nonpublic forum, a ban on "controversial" speech is unconstitutional because it "unquestionably allows for viewpoint discrimination." *United Food*, 163 F.3d at 361. This is because for any given issue, the expression of popular views about that issue would be permitted because they conform to prevailing societal norms, while the expression of unpopular views about that same issue would be rejected because

they challenge majoritarian beliefs and generate discord. *Id*. The First Amendment clearly prohibits the government from allowing the expression of one group's uncontroversial expression in a public space, and then prohibiting the expression of an opposing viewpoint under the guise of not wanting there to be a "debate."

Perhaps in part because a policy against "controversial" speech would be clearly unconstitutional under prevailing Sixth Circuit law, there is notably nothing in Warren's written policies that allows Defendants to exclude speech for that reason. This is also a critical fact, because under *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), a public official's discretion to deny someone permission to speak must be constrained by the existence of clear policies that are publicly known in advance.

> Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

Id. at 758. In other words, the government cannot wait until after someone applies for a permit to speak, and then come up with any reason to reject it. Here, that is exactly what happened. The prayer station was permitted to operate in city hall with Defendants' approval. But once the reason station was proposed, it was suddenly decided that "public debate" and "controversy" were forbidden. The First Amendment does not condone such arbitrary acts of censorship.

IV. Plaintiff is also highly likely to prevail on the merits because the denial of his application is unreasonable.

Restrictions on speech in a limited or nonpublic forum must be both reasonable and viewpoint-neutral. *United Food*, 163 F.3d at 355. As explained above, Defendants' asserted justifications for excluding the reason station from the atrium are clearly pretexts for viewpoint discrimination. However, even if they were genuine and viewpoint-neutral reasons, they would nonetheless violate the First Amendment because they are not reasonable.

The Sixth Circuit has explained that speech restrictions must be reasonable both on their face and as applied to the particular facts before the court. *Id.* at 357-58. Further, the court cannot simply defer to the state's judgment in how its policies are applied:

> The courts must remain free to engage in an independent determination of whether the government's rules ***and its application of its rules*** are reasonably related to the government's policy objectives. . . . Absent special circumstances, ***the state must prove the links in its chain of reasoning***, for example, that its rules and its application of the rules in fact serve a legitimate interest of the state. A contrary rule deferring to the unproven subjective determinations of state officials . . . would leave First Amendment rights with little protection. . . . We simply will not allow . . . speculative allegations to justify the exclusion of a speaker from government property.

Id. (citations omitted; emphases added). In this case, Defendants point to only one actual policy that they say justifies excluding the reason station from the atrium: it

"would interfere with the rights of the general public or proprietary functions of the . . . City of Warren." (Dkt. 11 at 16, quoting Civic Center Policies and Rules, Dkt. 11-2, Pg ID 232, ¶ 4c.) Although this policy is facially neutral, there are several reasons why, in this case, its application to Mr. Marshall is plainly unreasonable.

First, Defendants offer nothing but speculation that Mr. Marshall intends to "attack" the prayer station, cause disturbances, or otherwise interfere with the rights of other residents or the normal functioning of city hall. (Dkt. 11 at 16-18.) They are therefore imposing a classic form of "prior restraint" long condemned under the First Amendment. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). The Supreme Court has explained that there is a "heavy presumption" against the constitutionality of decisions by public officials to forbid citizens "the use of public places to say what they wanted to say . . . in advance of actual expression" because "it is always difficult to know in advance what an individual will say, and . . . the risks of freewheeling censorship are formidable." *Id.* at 553, 599. Mr. Marshall does not, in fact, intend to create any of the disruptions that Defendants accuse him of planning. (*See* Ex. A, ¶¶ 3-4.) And even if the vague accusations of Mr. Marshall's *past* conduct were true (which they are not), they would not justify a prior restraint on Mr. Marshall's future speech. *See, e.g.*, *Million Youth March, Inc. v. Safir*, 63 F. Supp. 2d 381, 392 (S.D.N.Y. 1999) ("The fighting words doctrine has not been used as a basis for justifying a 'prior

restraint' on future speech, and to deny plaintiff a permit this year based on comments made by the speakers at last year's rally would constitute an unlawful prior restraint on speech."). Defendants' weak excuse for censoring Mr. Marshall's speech contravenes decades of First Amendment law. *See id.* (collecting cases).[1]

Second, Defendants' repeated references to the city hall as a "government workplace" (Dkt. 11 at 16-18) makes no sense in the context of this case. Although the atrium may be part of a building where city employees happen to work, the atrium itself is not an office with cubicles or employee workstations; it is a wide open public space that can be reserved for use by private groups during regular business hours. It is disingenuous for Defendants to suggest that, although a private church group can set up a prayer station in the atrium all day long for members of the public to visit, Mr. Marshall's proposed reason station would somehow interfere with the orderly workings of city hall.

[1] Defendants cite a series of cases for the proposition that the government does not have to wait until a disruption occurs before taking action. (Dkt. 11 at 19 n.5.) However, those cases all involve First Amendment claims by government employees, where courts use the unique *Pickering* balancing test to weigh the employees' interest in expression against the interests of the state as an employer. *Waters v. Churchill*, 511 U.S. 661, 668 (1994). The Supreme Court has made clear that this balancing test is wholly inapplicable outside the context of public employment: "We have consistently given greater deference to government predictions on harm used to justify restrictions on employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Id*. at 673.

For similar reasons, it is unreasonable for Defendants to exclude Mr. Marshall's speech just because the prayer station already operates in the atrium. (Dkt. 11 at 19-20.) The atrium is approximately 9,440 square feet in size, with a ceiling that is approximately 40 feet high. (Dkt. 11-2, ¶¶ 4-5.) This wide open space clearly has room for more than one folding table with a sign.[2] This case therefore does not present a "time, place and manner" situation where one speaker may be excluded because another already occupies the space.

V. The equities favor a preliminary injunction because Plaintiff's constitutional rights are being violated.

Defendants' argument that the equities do not favor injunctive relief (Dkt. 12 at 4-6) is based entirely on their position that they did not violate Mr. Marshall's constitutional rights. As set forth above and in Plaintiff's opening brief, Defendants' actions clearly violate the First Amendment. Therefore, the remaining equities also weigh in Plaintiff's favor and preliminary injunctive relief is warranted. *See Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010).

CONCLUSION

For the reasons set forth above and in Plaintiff's opening brief, the Court should grant Plaintiff's motion for a preliminary injunction and order Defendants to allow Plaintiff to operate his proposed reason station in the Warren Civic Center

[2] The prayer station occupies a "3-5' [square foot] area." (Dkt. 1-4 at Pg ID 22; *see also* Dkt. 11-2, ¶ 15.) The reason station would be similar in size, structure and function to the prayer station. (Dkt. 2-1, ¶ 15.)

atrium on terms no less favorable than those provided to the persons and groups who operate the prayer station in that space.

Respectfully submitted,

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Attorneys for Plaintiff

Dated: September 5, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2014, I electronically filed the foregoing document and its exhibits with the Clerk of the Court using the ECF system, which will send notification of such filing to Defendants' counsel at dgriem@cityofwarren.org and slaughren@berrymoorman.com.

/s/ Daniel S. Korobkin
Daniel S. Korobkin (P72842)

INDEX OF EXHIBITS

Exhibit	Description
A	Second Declaration of Douglas Marshall
B	Associated Press Article

Exhibit A

Second Declaration of Douglas Marshall

IN THE UNITED STATES DISTRICT COURT
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Plaintiff,

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Case No. 14-cv-12872
Hon. Marianne O. Battani

CITY OF WARREN and
JAMES R. FOUTS, in his individual capacity and in his official capacity as mayor of Warren,

Defendants.
_____/

SECOND DECLARATION OF DOUGLAS MARSHALL

Douglas Marshall states as follows:

1. I am the plaintiff in this case.

2. If I am permitted to set up my reason station in the atrium of Warren City Hall, I intend to comply with all reasonable City of Warren policies regarding the use of that space, assuming such polices are applied equally to the prayer station and other similar booths in the atrium.

3. I do not intend for the reason station to interfere with the rights of the public or the proprietary functions of the City of Warren. More specifically, I do not intend to disrupt the prayer station activities in any way or cause any disturbances at City Hall.

4. I also have no intention of interacting with the individuals who are running the prayer station, nor do I intend to interfere with the ability of anyone to approach the prayer station should they choose to do so. I only wish to offer interested passersby the opportunity to learn more about atheism and freethought as an alternative to religious belief.

5. On the very limited number of occasions that I have interacted with volunteers at the prayer station in the atrium of Warren City Hall, I have done so in a polite manner.

6. I did not approach the prayer station during one of Brenda Hutchinson's shifts in 2014. Hence, I did not slam anything down on the table or otherwise communicate with Ms. Hutchinson in an angry or agitated manner.

7. I have never been asked by Max Fellsman, who has been identified as a City of Warren maintenance employee, to leave the prayer station or City Hall because of my interactions with the prayer station.

8. I have never threatened, harassed or attempted to provoke volunteers at the prayer station.

9. I have never raised my voice or tried to draw in passing citizens or publicly insulted the mayor while interacting with prayer station volunteers.

10. While in City Hall, I have never acted in an arrogant, insulting, angry, or disruptive manner towards the prayer station.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 2 day of September, 2014, in WARREN, Michigan.

Douglas Marshall

Douglas Marshall

Exhibit B

Associated Press Article

Rejected atheist booth in city hall draws lawsuit

Posted: Wednesday, July 23, 2014 5:25 pm

WARREN, Mich. (AP) — The American Civil Liberties Union in Michigan and two other groups filed a federal lawsuit Wednesday seeking an injunction against a Michigan city's ban on an atheist booth in a municipal building.

The groups said the Detroit suburb of Warren lets a church group run a "prayer station," distribute religious materials, discuss religious beliefs and pray with visitors in a City Hall atrium but refuses to let atheist Douglas Marshall use the same space.

Americans United for Separation of Church and State and the Freedom from Religion Foundation also are part of the lawsuit in U.S. District Court that says Marshall's request in April to install a "reason station" was rejected by Mayor Jim Fouts.

"Once the government opens public space for use by private groups, it cannot pick and choose who can use the space based on the content of their message or whether public officials agree with that message," said Dan Korobkin, ACLU of Michigan deputy legal director, adding "The city cannot allow speech supportive of religion and reject speech supportive of atheism."

Fouts told The Associated Press on Wednesday that Marshall's "reason station" would be diametrically opposed to prayer.

"The city has certain values that I don't believe are in general agreement with having an atheist station, nor in general agreement with having a Nazi station or Ku Klux Klan station," Fouts said. "I cannot accept or will not allow a group that is disparaging of another group to have a station here."

The city of Warren is just north of Detroit in Macomb County, and has a population of about 140,000 people.

The city doesn't endorse the "prayer station," but has allowed religious groups to set up tables in the atrium for several years, according to Fouts.

"They don't walk up to people," Fouts said. "They are just there if someone wishes to seek solace or guidance from them. The atheist station does not serve that purpose. It will not contribute to community values or helping an individual out."

In December 2011, Warren prohibited the Madison, Wisconsin-based Freedom from Religion Foundation from displaying an anti-religion sign next to a nativity scene at City Hall. A federal judge later ruled Fouts had authority to bar the poster because he felt it was antagonistic and would cause hostility.

The judge also said city officials were not excluding a religious group or a non-religious group.