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

DOUGLAS MARSHALL,

Plaintiff,

v.

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

Defendants.
_____/

Case No. 14-cv-12872

Hon. Marianne O. Battani

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Court Rule

Other Authorities

QUESTIONS PRESENTED

City officials have opened the city hall atrium to religious speech by a private church group that operates a "prayer station" but are denying Plaintiff permission to express his atheist viewpoint at a "reason station" in the same forum. Should Defendants' motion for summary judgment be denied when:

(1) Plaintiff has had no opportunity for discovery and Defendants' motion relies on factual allegations that are in dispute;

(2) Defendants assert collateral estoppel based on a previous case that involves different factual and legal issues and where the judgment of the District Court was affirmed on different grounds;

(3) Viewing the evidence in the light most favorable to Plaintiff, Defendants are restricting Plaintiff's speech based on his viewpoint;

(4) Viewing the evidence in the light most favorable to Plaintiff, Defendants are treating religious speech more favorably than non-religious speech; and

(5) Defendants seek summary judgment under the "government speech" doctrine but concede that they do not sponsor, endorse, or participate in the prayer station's activities?

AUTHORITY FOR DENYING THE RELIEF SOUGHT

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001)

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995)

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)

INTRODUCTION

When the government opens up public space for private speech, it cannot exclude some individuals based on the viewpoint of the ideas they wish to express there. In particular, religious viewpoints and non-religious viewpoints must be treated equally. These are core principles of the First Amendment, and they are being violated here by Defendants City of Warren and its mayor James R. Fouts.

The evidence of viewpoint discrimination in this case is overwhelming. Defendants currently allow a local church group to operate a "prayer station" in the public atrium of city hall. Plaintiff Douglas Marshall, a resident of Warren and an atheist, wishes to set up a "reason station" in the same large open space, so he can share his philosophical views as an alternative to those expressed through the prayer station. But Mr. Marshall has been denied access to the atrium because, according to Mayor Fouts, Mr. Marshall's belief system "is not a religion" and is not entitled to the constitutional protections guaranteed for religious belief.

Defendants' motion for summary judgment is deeply flawed at every turn. There has been no discovery, and the motion relies on disputed facts—and, in some respects, on no facts at all. Viewing the evidence in the light most favorable to Plaintiff, Defendants are excluding Mr. Marshall from the atrium on the basis of his atheist viewpoint, and favoring religion over non-religion. Defendants'

affirmative defenses, such as collateral estoppel, statute of limitations, and government speech, are meritless. Defendants' motion must therefore be denied.

FACTS

The City Hall Atrium Is Available for Public Use

The City of Warren's municipal government is housed in a building called the Warren Civic Center, also known as city hall. (Dkt. 2-1, ¶ 3.) The Civic Center contains a large atrium that is open to the public. (*Id.*, ¶ 4.) The atrium is 9,440 square feet in size, with a ceiling that is 40 feet high. (Dkt. 11-2, ¶¶ 4-5.)

Warren has written policies governing reserved use of the atrium and other space in the Civic Center. (Dkt. 1-2.) The policies provide that space in the atrium "may be reserved for most types of functions or activities." (*Id.*, ¶ 5.) Individuals and groups wishing to use space in the atrium must complete a Civic Center Facilities Rental Application. (*Id.*, ¶ 3; *see* Dkt. 1-3.)

The "Prayer Station"

Since at least 2009, Warren has allowed local church volunteers to use atrium space for a "prayer station." (Dkt. 2-1, ¶ 8; Dkt. 1-4.) Darius Walden, pastor of the Tabernacle church, submits Civic Center Facilities Rental Applications to request permission to use the atrium space for this purpose. (Dkt. 1-4.) The prayer station, which occupies a few square feet of space in the atrium, consists of a folding table with chairs, religious literature on display, and a banner that says

"PRAYER STATION." (Dkt. 2-1, ¶ 8; Dkt. 1-4 at Pg ID 22; Dkt. 1-5.) Volunteers operate the prayer station in the atrium four days per week from 9 a.m. to 3 p.m. (Dkt. 1-4.) They distribute religious pamphlets and offer to pray and discuss their religious beliefs with passersby. (Dkt. 2-1, ¶ 9.)

The Proposed "Reason Station"

Plaintiff Douglas Marshall is a resident of Warren. (Dkt. 2-1, ¶ 1.) As an atheist, Mr. Marshall does not believe in a god, and he promotes what he describes as reason and freethought as an alternative to religious belief. (*Id.*, ¶¶ 10-12.)

Mr. Marshall wishes to share his secular philosophical beliefs with interested members of the public in the city hall atrium, just as those who run the prayer station communicate a religious message. (*Id.*, ¶ 14.) Specifically, Mr. Marshall wishes to use atrium space to operate a "reason station." (*Id.*) Similar in size, structure and function to the prayer station, the reason station would consist of a folding table and chairs, an identifying sign, and atheist literature on display and available to the public. (*Id.*, ¶ 15.) Mr. Marshall would offer to have philosophical discussions with passersby who express an interest in atheism and freethought. (*Id.*) He does not intend to interfere with the existing prayer station in any way. (*Id.*, ¶ 17; Dkt. 16-2, ¶¶ 3-4.)[1]

[1] Defendants have submitted affidavits suggesting that Mr. Marshall has previously been rude and intimidating toward the prayer station volunteers. (Dkt. 11-4, 11-5.) Mr. Marshall, however, denies these allegations. (Dkt. 16-2, ¶¶ 5-10.) When there

On April 9, 2014, Mr. Marshall submitted a Civic Center Facilities Rental Application to Warren. (Dkt. 2-1, ¶ 18; Dkt. 1-6.) In all material respects, Mr. Marshall's application is identical to the applications submitted by Pastor Walden, except that where Pastor Walden's applications seek use of space in the atrium for a "prayer station," Mr. Marshall's application seeks use of space in the atrium for a "reason station." (*Compare* Dkt. 1-6 *with* Dkt. 1-4.)

Mayor Fouts Rejects the Reason Station

On or about April 17, 2014, Mr. Marshall received the following letter:

> Dear Mr. Marshall:
>
> The City of Warren through the Downtown Development Authority has received your request to use space in the atrium. It is my understanding that you are affiliated with Freedom from Religion, a group that has objected to the Nativity Scene, the Prayer Station in the atrium and the Annual Day of Prayer in front of city hall.
>
> All of these events are allowed because of the right to freedom of religion constitutional amendment. We cannot and <u>will not</u> restrict this right for <u>any</u> <u>religion</u> to use the atrium, as long as the activity is open to all religions.
>
> Freedom from Religion is not a religion. It has no tenets, no place of worship and no congregation. To my way of thinking, your group is strictly an anti-religion group intending to deprive all organized religions of their constitutional freedoms or at

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is a genuine factual dispute at the summary-judgment stage, it must be presumed for purposes of the motion that the non-moving party's version of the facts is the correct one. *See Grawey v. Drury*, 567 F.3d 302, 310 (6th Cir. 2009).

> least discourage the practice of religion. The City of Warren cannot allow this.
>
> Also, I believe it is your group's intention to disrupt those who participate in the Prayer Station which would also be a violation of the freedom of religion amendment.
>
> For these reasons, I cannot approve of your request.
>
> Sincerely,
>
> /s/ James R. Fouts
>
> James R. Fouts
> Mayor of Warren

(Dkt. 1-7, emphases in original.)

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is improper unless "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In considering a motion for summary judgment, the court must view all evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "If the record taken as a whole may lead a rational trier of fact to find for the nonmovant, summary judgment is inappropriate." *Ingram v. City of Columbus*, 185 F.3d 579, 586 (6th Cir. 1999).

ARGUMENT

I. Summary judgment must be denied because Plaintiff has had no opportunity for discovery and Defendants rely on disputed facts.

Defendants did not respond to Plaintiff's complaint with an answer or a motion to dismiss pursuant to Fed. R. Civ. P. 12. Instead, they immediately filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56, accompanied by five affidavits and numerous other exhibits. (Dkt. 11.) Given this procedural posture, granting Defendants' motion would be improper for two reasons.

First, summary judgment is premature because there has been no opportunity for discovery. "It is well-established that the plaintiff must receive a full opportunity to conduct discovery to be able to successfully defeat a motion for summary judgment." *Bell v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004). "Typically, when the parties have no opportunity for discovery, . . . ruling on a summary judgment motion is likely to be an abuse of discretion." *CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008). Additionally, "it is axiomatic that when a party files an affidavit or declaration in support of a motion for summary judgment under Fed. R. Civ. P. 56, the opposing party has the right to depose the affiant or declarant on the assertions made." *Blackwell Publ'g, Inc. v. Excel Research Group, LLC*, No. 07-12731, 2008 WL 506329 (E.D. Mich. Feb. 22, 2008). In this case, Defendants have filed numerous affidavits in support of their motion for summary judgment, and there has been *no* opportunity for discovery.

To comply with Rule 56(d), Plaintiff submits with this brief a declaration setting forth with specificity the need for discovery. (Ex. A.)

Second, summary judgment is not appropriate because Defendants' motion relies on facts that are in dispute. Specifically, Defendants allege that Mr. Marshall has been rude and intimidating toward prayer station volunteers in the past, contending that they can deny his request for a reason station because Mr. Marshall would allegedly use it as a platform to cause disruptions. (Dkt. 11 at 6-8.) However, Plaintiff denies these allegations. (*See* Dkt. 16-2.) It is black-letter law that summary judgment may be granted only on the basis of facts as to which there is no genuine dispute. Fed. R. Civ. P. 56(a).

II. The prior dispute over Warren's Christmas display does not preclude Plaintiff from pursuing his claims, because the Christmas display was held to be government speech and this case involves private speech.

The Court should reject Defendants' argument that "collateral estoppel precludes Plaintiff's relitigation of this Court's finding in *Marshall I* that the Atrium is a limited public forum, and the City had the right to exercise control over the speech in the atrium so as to avoid interference with its government function." (Dkt. 11 at 12.) Collateral estoppel, also known as issue preclusion, does not apply here. In the previous case, the "issue" actually decided was that the city's Christmas display was government speech. In this case, by contrast, the prayer station is private speech. There is nothing to "relitigate," so there is no preclusion.

To properly analyze Defendants' collateral-estoppel defense, it is necessary to unpack what was actually litigated and necessarily decided in the previous case, and by what court. When Defendants cite "*Marshall I*" in their brief, they are referring interchangeably to two different decisions by two different courts: *Freedom From Religion Foundation, Inc. v. City of Warren*, 873 F. Supp. 2d 850 (E.D. Mich. 2012) (Zatkoff, J.), and *Freedom From Religion Foundation, Inc. v. City of Warren*, 707 F.3d 686 (6th Cir. 2013). Defendants elide the differences between these two decisions, but it is important to recognize that they are distinct and rest on different grounds.

To bring more clarity to the distinction, Plaintiff will refer to the District Court's decision as *FFRF I* and the Sixth Circuit's decision as *FFRF II*. In *FFRF I*, Plaintiff challenged the holiday display that "the City erects . . . in the Atrium" each Christmas season. *FFRF I*, 873 F. Supp. 2d at 855. Mr. Marshall (and FFRF) wanted the city to place an atheist "Winter Solstice" display next to the Christmas scene. *Id*. at 856. Judge Zatkoff granted summary judgment to Defendants on the grounds that the atrium was a limited public forum and the exclusion of the Winter Solstice display was reasonable and viewpoint-neutral. *Id*. at 861-66.

On appeal, the Sixth Circuit affirmed the grant of summary judgment but on different grounds. *FFRF II*, 707 F.3d at 695-98. The Sixth Circuit did not address the issues of what kind of forum the atrium was and whether the city's restrictions

on speech in that forum were reasonable and viewpoint-neutral. Instead, the Sixth Circuit held that the Christmas display was "government speech" because it represented the city's own message. *Id.* at 696. Recognizing that "a forum approach does not properly apply when it is the government speaking" because "the government's own speech . . . is exempt from First Amendment scrutiny," the Sixth Circuit held that Defendants were not required to place the Winter Solstice display next to the city's Christmas display. *Id*. at 695, 698.

The facts and law in this case are different. Unlike the Christmas display, which was held to be government speech because it represented the city's own message, the prayer station is private speech by a church that applied to use space in the atrium just like Mr. Marshall applied to use space in the atrium. (Dkt. 1-4.) Therefore, unlike in the previous case, the "forum approach *does* . . . properly apply," and Defendants' restrictions on Mr. Marshall's private speech are *not* "exempt from First Amendment scrutiny." *Cf. FFRF II*, 707 F.3d at 695, 698. That scrutiny, in turn, must be applied to the facts of *this* case—which are different from the facts of the previous case—to determine whether Defendants rejected Mr. Marshall's reason station on the basis of his non-religious viewpoint or are favoring religion over non-religion.[2]

[2] Alternatively, even if the prayer station is government speech like the Christmas display, Plaintiff's claim that the prayer station violates the Establishment Clause

Given this procedural history, there are at least two reasons why the collateral-estoppel defense fails as a matter of law. First, "in order for collateral estoppel to apply, the same ultimate issue of the first action must be involved in the second action." *Kaufman v. BDO Seldman*, 984 F.2d 182, 184 (6th Cir. 1993). As explained above, the previous case involved different facts and different legal rules. Without identity of issues, there is no issue preclusion.

Second, collateral estoppel applies only when the previously decided issue was "essential to the judgment." *In re Markowitz*, 190 F.3d 455, 462 (6th Cir. 1999). As outlined above, any determinations Judge Zatkoff made as part of a forum analysis, including whether Defendants' restrictions were reasonable and viewpoint-neutral, were not "essential to the judgment," because the Sixth Circuit eschewed forum analysis entirely and affirmed the grant of summary judgment on different grounds—namely, by deciding that the Christmas display was government speech. "The general rule is that if a judgment is appealed, collateral estoppel only works as to those issues specifically passed upon by the appellate court." *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168 (5th Cir. 1981); *see also* Restatement (Second) of Judgments § 27 cmt. o (1982) (same); 18 Wright & Miller et al., *Federal Practice & Procedure* § 4421 (2d ed.) ("[O]nce an appellate court has affirmed on one ground and passed over another, preclusion does not

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is based on a different set of facts than his previous Establishment Clause claim regarding the Christmas display.

attach to the ground omitted from its decision."). Here, because *FFRF II* affirmed the judgment in *FFRF I* on different grounds, there is no preclusion as to the issues not decided on appeal.

III. Defendants are not entitled to summary judgment on Count I of Plaintiff's complaint because, viewing the evidence in the light most favorable to Plaintiff, Defendants are restricting Plaintiff's speech based on his viewpoint.

"When the government restricts speech, the government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). Because Defendants are moving for summary judgment, the Court must hold Defendants to that burden while also viewing the evidence in the light most favorable to Plaintiff. *Matsushita*, 475 U.S. at 587. Against those standards, Defendants' motion clearly fails.

A. Excluding atheist speech while allowing religious speech is viewpoint discrimination and therefore unconstitutional regardless of the forum.

Defendants are correct to invoke the forum doctrine (*see* Dkt. 11 at 13-15), as the question in this case is "whether a state-imposed restriction on access to public property is constitutionally permissible." *Kincaid v. Gibson*, 236 F.3d 342, 347 (6th Cir. 2001) (en banc). However, as Plaintiff explained in his preliminary-injunction brief (Dkt. 2 at 10-11), it is ultimately unnecessary to decide what kind of forum the city hall atrium is, because viewpoint discrimination is presumptively unconstitutional regardless of the forum. *Id.* at 355; *Matwyuk v. Johnson*, __ F.

Supp. 2d __, 2014 WL 2160448, at *9 (W.D. Mich. 2014) (citing cases). In this case, viewpoint discrimination is the heart of Plaintiff's free speech claim. Therefore, even assuming the atrium is a limited or nonpublic forum as Defendants contend, they are violating the First Amendment if they denied Mr. Marshall access to that space based on the viewpoint of the speech he wishes to express.

A trio of Supreme Court decisions governs the viewpoint discrimination analysis here: *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). In those three cases, the Court consistently held that when the government opens its property to non-religious speech by secular groups, it is unconstitutional viewpoint discrimination to exclude speech from a religious perspective by religious groups. In *Lamb's Chapel*, 508 U.S. at 393-94, the Court held that when a public school district opens its property to after-school use by private groups for the presentation of views about "family issues and child rearing," it cannot exclude a church group's presentations on those subjects on grounds that they are expressed "from a Christian perspective." In *Rosenberger*, 515 U.S. at 831-32, the Court held that when a public university pays for the printing of student publications, it cannot refuse to pay for the printing of some publications on the basis that they have "Christian editorial viewpoints." And in *Good News Club*, 533

U.S. at 109-112, the Court held that when a public school allows outside groups to use its facilities after hours for events "pertaining to the welfare of the community" or to promote the "development of character and morals," it cannot prohibit a Christian group from using the facilities for that purpose merely because its activities are "decidedly religious in nature."

In this case, "religious viewpoints" are already being given access to Warren's atrium, and it is Mr. Marshall's atheist viewpoint that is being excluded. Of course, the very definition of viewpoint neutrality means that the *Lamb's Chapel*, *Rosenberger* and *Good News Club* holdings are not limited to the protection of speech from a religious perspective; they must apply equally to speech from an atheist perspective. "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). Here, Defendants allow those who operate the prayer station to communicate religious views to the public in the atrium. Viewpoint neutrality requires that they also allow Mr. Marshall access to the atrium so that he may communicate his atheist views.

Viewing the evidence in the light most favorable to Plaintiff, it is clear that Mr. Marshall is being denied access to the atrium because of his viewpoint. His application to set up a "reason station" is identical in all material respects to Pastor Walden's application to set up a "prayer station." (*Compare* Dkt. 1-6 *with* Dkt. 1-

4.) And Mayor Fouts's letter in response to Mr. Marshall's application says that the City of Warren will not restrict the ability of "any religion to use the atrium." (Dkt. 1-7, emphasis in original.) The mayor's letter goes on to deny Mr. Marshall the ability to use the atrium because his belief system "is not a religion." (*Id*.) Further, Mayor Fouts explained, "To my way of thinking," Mr. Marshall is associated with an "anti-religion group" that "discourage[s] the practice of religion." (*Id*.)

Denying Mr. Marshall access to the atrium for these reasons is viewpoint discrimination. Restrictions on speech may not be imposed as part of "an effort to suppress expression merely because public officials oppose the speaker's view," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), and "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," *Rosenberger*, 515 U.S. at 829. Mayor Fouts, while allowing any religious viewpoint to be expressed in the atrium, has excluded Mr. Marshall because he dislikes Mr. Marshall's freethought perspective, which the mayor views as "anti-religious." Unquestionably, a rational trier of fact could conclude that he rejected the reason station because of Mr. Marshall's atheist views.

B. Defendants' explanations for their conduct must be rejected under well-established First Amendment rules that protect against viewpoint discrimination.

The Court should reject Defendants' attempt to justify their treatment of Mr. Marshall based on speculation that he intends to cause disruptions in city hall and interfere with the prayer station. (Dkt. 11 at 8, 16-18.) Once sued for viewpoint discrimination, the government can almost always come up with some ostensibly viewpoint-neutral explanation for why it restricted a plaintiff's speech. However, when the proffered justification is "in reality a facade for viewpoint-based discrimination," First Amendment protections do not magically evaporate. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985).

On the current record, there is overwhelming evidence that Mr. Marshall's reason station was rejected because of his viewpoint, and there is virtually no evidence that it was rejected for any of the ostensibly viewpoint-neutral reasons offered in Defendants' brief. Consider the five affidavits Defendants filed with their motion: none identifies who actually made the decision to reject the reason station, or on what basis that decision was made. This obviously leads to the following reasonable inference: Mayor Fouts made the decision, and he did so because, as stated in his letter, he disapproves of Mr. Marshall's atheist message. (*See* Dkt. 1-7.) But even if the evidence regarding Defendants' motives in rejecting the reason station were in equipoise, summary judgment would be improper. *See*

McDowell v. Krawchison, 125 F.3d 954, 958 (6th Cir. 1997). Because Defendants have moved for summary judgment, the evidence must be viewed in the light most favorable to Plaintiff. *Matsushita*, 475 U.S. at 587. Applying that standard here, Defendants clearly have not carried their "burden of proving the constitutionality of [their] actions." *Playboy Entm't Group, Inc.*, 529 U.S. at 816.

The truth is, Mr. Marshall has no intention of causing disruptions or interfering with the prayer station; as stated in his declaration, he merely wishes to share his views about atheism and freethought with interested passersby. (Dkt. 16-2.) Defendants 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 forbidding 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. Accordingly, the government is not permitted to prohibit speech based on sheer speculation that the speaker might misbehave. "A contrary rule deferring to the unproven subjective determinations of state officials . . . would leave First Amendment rights with little protection [from an] official harboring bias against a particular viewpoint . . . ." *United Food & Commercial Workers Union v. Sw. Ohio*

Reg'l Transit Auth., 163 F.3d 341, 357 (6th Cir. 1998). Here, that is exactly what Defendants are trying to do: censor Mr. Marshall's atheist viewpoint behind the facade of a speculative and unproven prediction of future disruption.[3]

The Court must also reject Defendants' argument that they are merely trying to prevent the atrium from being the site of "public debate on controversial topics." (Dkt. 11 at 19.) There are two reasons why this excuse fails as a matter of law. First, there is nothing in Warren's established policies that allows city officials to exclude speech from the atrium for that reason. As the Supreme Court held in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), a public

[3] 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.) Those cases are inapposite because they all involve lawsuits 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 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.

Additionally, Defendants' repeated references to the city hall as a "government workplace" (Dkt. 11 at 16-18) make 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 local church 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.

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 someone applies for a permit to speak, and then scramble to come up with a reason to deny it. The prayer station was permitted to operate in city hall with Defendants' approval. Now that a reason station is proposed, Defendants cannot suddenly announce that "public debate" and "controversy" are forbidden.

Second, even if there were already a policy against "controversial" speech in the atrium, such a restriction would be unconstitutional. The Sixth Circuit has held that, even in a limited or nonpublic forum, a ban on "controversial" speech is unconstitutional on its face because it "unquestionably allows for viewpoint discrimination." *United Food*, 163 F.3d at 361. This is because for any given topic, the expression of popular views about that topic would be permitted because they conform to prevailing societal norms, while the expression of unpopular views about that same topic would be rejected because they challenge majoritarian beliefs and generate discord. *Id*. The First Amendment thus prohibits the government from allowing the expression of one person's uncontroversial expression in a public

space while prohibiting the expression of an opposing or alternative viewpoint under the guise of not wanting there to be a "debate."

A recent Associated Press article about this case illustrates the point. The existing prayer station presumably offers interested members of the public an opportunity to seek "solace or guidance" from prayer and religious reflection. (*See* Dkt. 16-3, quoting Mayor Fouts.) But because Mr. Marshall wishes to offer interested members of the public an alternative method of finding meaning in life (i.e., reason, freethought and the rejection of religious dogma), Defendants propose that he can be excluded in order to avoid controversy or debate—or, in the mayor's words, because Mr. Marshall's perspective will not "contribute to community values or helping an individual out." (*Id*.) This position is not merely a "facade" for viewpoint discrimination; it *is* viewpoint discrimination.

One doesn't have to read Associated Press reports to confirm that Defendants' supposed desire to avoid disruptions and debates is nothing more than a proxy for discriminating against a message that the mayor dislikes. Consider the following excerpts from Defendants' own 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. . . .

(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*** . . . .

(*Id*. 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 thought by the majority not to be "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).

IV. Defendants are not entitled to summary judgment on Count II of Plaintiff's complaint because, viewing the evidence in the light most favorable to Plaintiff, Defendants are favoring religious speech over non-religious speech.

Viewing the evidence in the light most favorable to Plaintiff also requires the Court to deny Defendants' motion for summary judgment as to Plaintiff's Establishment Clause claim in Count II of his complaint. A rational trier of fact could find that, in addition to restricting Mr. Marshall's speech based on his viewpoint, Defendants are treating religion more favorably than non-religion.

The Supreme Court has stated time and again that the Establishment Clause "mandates governmental neutrality between religion and religion, *and between religion and nonreligion*." *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005) (emphasis added; internal quotation marks omitted). In this case, the evidence shows that Defendants are favoring the prayer station over the reason station *because* the prayer station is a religious activity and the reason station is not. (*See* Dkt. 1-7.) This type of favoritism violates the First Amendment's requirement that the government remain "neutral in its relations with groups of religious believers and non-believers." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947). "The Establishment Clause . . . forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987).

To be clear, Plaintiff is not arguing that Defendants necessarily violate the Establishment Clause by allowing a religious group to operate the prayer station on government property. Rather, Defendants violate the Establishment Clause by giving those who operate the prayer station *preferential treatment* over those who would operate the secular reason station. The point is well illustrated by *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), where the Supreme Court struck down a sales-tax exemption that was available exclusively to religious periodicals. The tax exemption violated the Establishment Clause because there were no "like

benefits for nonreligious groups" and "the exemption was intended to benefit religion alone." *Id*. at 14 n.4. Such governmental benefits, the Court held, may not be "reserved for publications dealing solely with religious issues, *let alone restricted to publications advocating rather than criticizing religious belief or activity*, without signaling an endorsement of religion that is offensive to the principles informing the Establishment Clause." *Id*. at 16 (emphasis added).

Here, there is ample evidence that Defendants are violating the Establishment Clause because the benefit of atrium access is not being made available to religious and atheist groups alike; religion is being singled out and given preferential treatment. Mayor Fouts wrote in his letter rejecting Mr. Marshall's reason station application that, "because of the right to freedom of religion," the city "will not restrict this right for any religion to use the atrium," but will not allow an atheist group with "no place of worship and no congregation" equal access to the atrium space. (Dkt. 1-7, emphasis in original.) Just as Texas's tax exemption violated the Establishment Clause insofar as it was "restricted to publications advocating *rather than criticizing* religious belief or activity," *Texas Monthly*, 489 U.S. at 16 (emphasis added), Defendants violate the Establishment Clause by allowing "any religion" to the use the atrium "because of the right to freedom of religion" but denying that privilege to Plaintiff because he is an atheist who "discourage[s] the practice of religion." (Dkt. 1-7.) Such a policy privileges

religion over atheism. Accordingly, Defendants' motion for summary judgment as to Count II must be denied.[4]

V. Defendants are not entitled to summary judgment on Count III of Plaintiff's complaint because if the prayer station is government speech, it violates the Establishment Clause.

Defendants advance an incoherent argument regarding government speech and the Establishment Clause. On the one hand, they say that Plaintiff's claims "fail as a matter of law under the government speech doctrine." (Dkt. 11 at 26.) On the other hand, they argue that the prayer station does not violate the Establishment Clause because it is "not sponsored . . . or . . . endorsed by the City." (*Id*. at 23.)

Defendants cannot have it both ways. If the prayer station is not endorsed or sponsored by the city, then it cannot be "government speech." But if the prayer station is government speech, then of course the government "endorses" it, which means that it violates the Establishment Clause. Therefore, summary judgment as to Count III of Plaintiff's complaint should be denied.

A. The prayer station is not government speech.

Defendants' government-speech defense is seemingly modeled after their victory in *FFRF II*, in which the Sixth Circuit held that Warren's Christmas

[4] Defendants assert that both of Plaintiff's Establishment Clause claims (Counts II and III of the complaint) are barred by the three-year statute of limitations for § 1983 claims in Michigan. (Dkt. 11 at 10.) Regarding Count II, this claim accrued in April 2014, when Mayor Fouts denied Mr. Marshall permission to use space in the atrium because his belief system "is not a religion." (Dkt. 1-7.) Therefore, Count II was brought well within the limitations period.

display amounted to government speech because it represented the city's own message. The viewpoint neutrality requirement of the First Amendment "restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Therefore, Warren was not required to place an atheist "Winter Solstice" sign in the atrium next to its own Christmas display. *FFRF II*, 707 F.3d at 696-97.

As previously explained, this case is different. Defendants have conceded that the prayer station is *someone else's* private speech that they allow into the atrium. Specifically, they 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" (*id.* at 26). Additionally, the evidence shows that Pastor Walden submits applications requesting the city's *permission* to use Civic Center facilities for the prayer station. (Dkt. 1-4.) And Mayor Fouts's letter confirms that the city will allow "any religion *to use* the atrium." (Dkt. 1-7, emphasis added.) The prayer station is thus unlike the Christmas display, as the prayer station does not express the city's message.

The Supreme Court has specifically recognized "the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." *Summum*, 555 U.S. at 473. And in another case involving speech by private groups in the lobby of a city hall, the

Sixth Circuit squarely rejected the city's government-speech defense, remarking that "no one can reasonably interpret a private group's rally or press conference as reflecting the government's views simply because it occurs on public property." *Miller v. City of Cincinnati*, 622 F.3d 524, 537 (6th Cir. 2010). Here, too, the government-speech defense should be rejected.

B. If the prayer station is government speech, it violates the Establishment Clause.

That being said, if Defendants intend to pursue their argument that the prayer station is government speech, then their motion for summary judgment as to Count III of Plaintiff's complaint must be denied because such speech, if it represents the City of Warren's own message, violates the Establishment Clause. "[G]overnment speech must comport with the Establishment Clause." *Summum*, 555 U.S. at 468. "There is a crucial difference between . . . private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," and "government speech endorsing religion, which the Establishment Clause forbids." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000).

The Establishment Clause prohibits "[g]overnment efforts to endorse religion." *Santa Fe*, 530 U.S. at 316; *see also Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985). Here, there is unquestionably evidence that the prayer station endorses religion. (*See* Dkt. 2-1, ¶¶ 8-9.) Additionally, a rational trier of fact could surely find that its predominant

purpose is religious, not secular (*see* Dkt. 11-3, ¶ 5); and that it fosters an excessive entanglement with religion. *See, e.g.*, *ACLU of Ohio v. DeWeese*, 633 F.3d 424, 430-31 (6th Cir. 2011) (describing the *Lemon* test for Establishment Clause claims); *N. Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (finding that courtroom prayer is "intrinsically religious" and fails all three prongs of the *Lemon* test); *see also Engel v. Vitale*, 370 U.S. 421, 424-25 (1962) (stating there can be "no doubt" that "prayer is a religious activity"); *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981) (describing prayer as an "inherently religious . . . exercise"), *aff'd*, 455 U.S. 913 (1982). Therefore, if the prayer station is government speech, it violates the Establishment Clause.

Defendants never seriously contest this point. Instead, they argue that *allowing* the prayer station in the atrium is not an endorsement of religion. (Dkt. 11 at 21-26.) Plaintiff agrees that merely *allowing* prayer on government property does not necessarily violate the Establishment Clause. (*See* Dkt. 1, ¶ 50.) However, if the prayer is "government speech" as Defendants contend (Dkt. 11 at 26-29), then it *does* violate the Establishment Clause. "While the Supreme Court has affirmed the rights of private groups to use public facilities to spread a religious message, it has specifically prohibited public bodies from acting likewise." *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1545 (6th Cir. 1992) (citations omitted).

FFRF II does not help Defendants this time around. In that case, Warren's Christmas display was found not to violate the Establishment Clause because the court determined it fit within the line of Supreme Court cases holding that a government-sponsored holiday display does not endorse religion when it includes a diverse array of religious *and* secular holiday symbols, thereby expressing the government's neutrality between the secular and religious aspects of the holiday season. *See FFRF II*, 707 F.3d at 692-93. In this case, by contrast, if the prayer station is government speech, then Defendants are not expressing a message of government neutrality between religion and non-religion; they are communicating a message that the government endorses religion.

C. Defendants' statute-of-limitations defense must be rejected because the prayer station is still operating and was most recently approved for atrium use less than three years ago.

There are three independent reasons why Plaintiff's Count III Establishment Clause claim is not barred by the statute of limitations. First, because the prayer station is still operating, it is a "continuing violation" of the First Amendment. *See Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997). Under the continuing-violation theory, "each day" that an unconstitutional policy or practice "remain[s] in effect, it inflict[s] continuing and accumulating harm." *Id*. "A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it

within [three] years of its enactment." *Id*. Here, if the prayer station is government speech, then Defendants' wrongful conduct was not, as Defendants argue, their initial 2009 decision to *allow* the prayer station to operate in the atrium. (Dkt. 11 at 11.) Government speech endorsing religion is itself a violation of the First Amendment, so each day the prayer station is operational (i.e., each day the government is "speaking") is a continuing violation.

Second, even if a limitations period began to run when the prayer station was approved by Defendants, Plaintiff's current claim need not be based on the date when the prayer station was *first* approved in 2009. "[W]hen a defendant's conduct is part of a continuing practice, an action is timely so long as the *last act* evidencing the continuing practice falls within the limitations period." *Montanez v. Sec'y Pa. Dep't of Corrs.*, __ F.3d __, 2014 WL 3953644, at *5 (3d Cir. 2014) (emphasis added). Here, the "last act" evidencing Defendants' continuing practice of allowing the prayer station occurred in 2013, when Pastor Walden's most recent application was approved. (Dkt. 1-4 at Pg ID 25.)

Third, federal courts may not adopt the state-law statute of limitations when it is "inconsistent with federal law or policy to do so." *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). The Third Circuit recently held that when an Establishment Clause claim

> is to a still-existing monument that communicates anew an allegedly unconstitutional endorsement of religion by the

> government each time it is viewed[,] [s]trict application of the statutory limitations period both serves no salutary purpose and threatens to immunize indefinitely the presence of an allegedly unconstitutional display.

Tearpock-Martini v. Borough of Shickshinny, 756 F.3d 232, 239 (3d Cir. 2014). Absent any contrary Sixth Circuit authority, this Court should find that *Tearpock-Martini* is persuasive authority for rejecting the statute-of-limitations defense here.

CONCLUSION

For the reasons set forth above, Defendants' motion for summary judgment should be denied.

Respectfully submitted,

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Attorneys for Plaintiff

Dated: September 24, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2014, I electronically filed the foregoing document and its exhibit with the Clerk of the Court using the ECF system, which will send notification of such filing to Defendants' counsel at dgriem@cityofwarren.org, cmurphy@cityofwarren.org, and slaughren@berrymoorman.com.

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

Exhibit A

Rule 56 Declaration

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

DOUGLAS MARSHALL,

Plaintiff,

v. Case No. 14-cv-12872

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

Defendants.
_____/

DECLARATION OF WILLIAM A. WERTHEIMER

William A. Wertheimer states as follows:

1. I am one of the plaintiff's attorneys in the above-captioned case. I make this declaration pursuant to Rule 56(d) of the Federal Rules of Civil Procedure.

2. Summary judgment in favor of Defendants on the current record would be premature because it is being sought based on the affidavit testimony of witnesses and the content of documents within the sole control of Defendants without any opportunity for discovery.

3. Plaintiff has had no opportunity for discovery because this case is less than 60 days old, Defendants have not yet filed an answer to Plaintiff's complaint,

and discovery is prohibited by Rule 26(d)(1) at this stage of the proceedings.

4. Once discovery is permitted and begins, Plaintiff intends to seek discovery from Defendants and other sources to support his claims and to justify his opposition to Defendants' motion for summary judgment. Some of the discovery Plaintiff intends to seek is outlined below.

5. Defendants filed five affidavits by four witnesses in support of their motion for summary judgment. These affidavits contain generalized, conclusory statements that call for further explanation and elaboration as to their foundation and their basis. Plaintiff intends to take the depositions of some or all of these witnesses to examine or test the veracity, credibility and reliability of their statements, the extent to which the statements are based on personal knowledge or an otherwise proper foundation, and the relationship, if any, between the facts alleged in the affidavits and the decision made by Defendants to restrict Plaintiff's speech in the atrium.

6. Additionally, some of the affidavits filed by Defendants in support of their motion for summary judgment refer to numerous underlying documents that were not attached to the affidavits or otherwise made available to Plaintiff. Such documents would speak for themselves and are the best evidence of the facts asserted by the affiants about them. Plaintiff intends to request that such underlying

documents be produced in discovery so that they can be compared to the affiants' statements.

7. Plaintiff also intends to seek discovery from witnesses who are likely to have personal knowledge of why Defendants have restricted Plaintiff's speech in the atrium. The most obvious example of such a witness is Mayor Fouts himself, who personally signed the letter informing Plaintiff that he would not be permitted to use space in the atrium because his belief system is not a religion.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 19th day of September, 2014, in Bingham Farms, Michigan.

William A. Wertheimer