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

DOUGLAS MARSHALL,

Plaintiff,

v.

Case No: 2:14-cv-12872-MOB-MJH

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

Hon: Marianne O. Battani

Magistrate Judge: Michael J. Hluchaniuk

Defendants.

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

Summary judgment must be granted because Defendants' use of the finite atrium space amounts to government speech. Alternatively, even if the speech is not government speech, the use is still constitutionally permissible as an exclusion of speech in a limited public or nonpublic forum.

The guidance of the Sixth Circuit in *Freedom from Religion Found. Inc. v. City of Warren,* 707 F.3d 686 (6th Cir. 2013) (*"Marshall II")* and the Supreme Court's decision in *Pleasant Grove City v. Summum,* 555 U.S. 460 (2009) lead to the conclusion that the display placed in the atrium amounts to government speech.

> [The City] maintained final approval authority over every aspect of the approval process; it was selective in deciding which [displays] to add to the [atrium]; and it located all of the [displays] on city property. By "effectively controll[ing]" the message being sent in these ways, it was the government, not the donors of the [displays] or anyone else, that spoke. *Marshall II,* 707 F.3d at 695.

In his Brief in Opposition to Defendants' Motion for Summary Judgment, [Dkt. 20] ("Response Brief"), Plaintiff alleges that the prayer station cannot be the City's own message because it is provided by a private applicant. However, it does not matter that the prayer booth is paid for or operated by the applicant instead of the City. *Marshall II* stated that "[w]hether it paid for components of the display… or accepted donations from private organizations… the City retained authority over what to include." *Marshall II*, 707 F.3d at 696. And by accepting, "a government entity does not necessarily endorse the specific meaning that any particular donor

sees in" it. *Summons*, 555 U.S. at 476-77. Furthermore, "the mere existence of private speakers in a particular space does not transform all speech in all parts of the space into private speech." *Marshall II*, 707 F.3d at 697. Other jurisdictions have stated that "even ordinarily impermissible viewpoint-based distinctions drawn by the government may be sustained where the government itself speaks or where it uses private speakers to transmit its message." *Page v. Lexington County Sch. Dist. One*, 2007 U.S. Dist. LEXIS 3886 (D.S.C. Jan. 17, 2007)(citing *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles,* 288 F.3d 610, 617 (4th Cir. 2002)).

Here, Defendants' maintained final authority over the selection of booths placed on city property—those that submitted a rental application, paid fees, supplied proof of insurance, and followed the rules governing the use of the atrium. Defendants' control over the message constituted government speech.

As government speech, selecting the prayer station for the atrium does not violate the Establishment Clause. Justice Scalia's concurrence in *Summons* discussed that the Establishment Clause argument has been rejected when monuments "'have an undeniable historical meaning' in addition to their 'religious significance,'" or "conveyed a permissible secular message, as evidenced by its location in a park that contained multiple monuments." *Summons*, 555 U.S. at 483.

Here, the prayer station has historical significance as an acknowledgment of religion in American life, and is part of a secular message. Defendants' have used the atrium for hosting a variety of events and organizations that aid the community including: County Clerk mobile office services, senior citizen tax events, college fairs, Relay for Life, and foster care awareness events.

Alternatively, if the Court does not find the use of the atrium to be government speech, the use of the atrium is still constitutionally permissible. In addition, Defendants' decision to allow a prayer station along with other secular uses, and to deny permission to an applicant—who failed to make the proper payment with the application and failed to provide evidence of insurance as required, and wishes to disturb the peace of a government workplace—is reasonable in light of the forum's purpose. As either a limited public forum or nonpublic forum, for access to the atrium, it is "recognize[d] that a governmental entity, in regulating property in its charge, may impose restrictions on speech that are reasonable in light of the purposes of the forum and viewpoint neutral, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700." *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010). In *Cornelius*, the Court found that the "exclusion of [a charity from a charity drive aimed at federal employees] may reasonably be considered a means of 'insuring peace' in the federal workplace…. [and] the

Government need not wait until havoc is wreaked to restrict access to a nonpublic forum." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 810 (1985). Similarly, in a government office setting, a resident imposing a "sit-in" in the reception area of County offices did so in a space "not conducive to unlimited public expressive activity." *Helms v. Zubaty*, 2006 U.S. Dist. LEXIS 72052 (E.D. Ky. Oct. 2, 2006).

Here, the atrium is open to all City offices and "contains a five-story vaulted ceiling, with offices located on each floor. The front of each office is adjacent to the Atrium, and there is nothing to insulate the offices from any noise or altercation that may emanate." *Freedom from Religion Foundation, Inc. v. City of Warren,* 873 F. Supp. 2d 850 (E.D. Mich. 2012) (*"Marshall I").* Plaintiff does not dispute that the offices of the City open directly to the atrium and that there are not walls or other insulation to keep out noise from the atrium. Therefore, it would be reasonable for Defendant to protect its offices, which are not insulated from noise in the atrium, from disruptions in the atrium and to insure peace in the workplace.

Plaintiff's allegation that the City does not have rules that proscribe debate in the Atrium is specious, at best. The Policies provide that one of the criteria for granting permission to use facilities is determining if the "content of the meeting/activity [would] interfere with… proprietary functions of the Warren Downtown Development Authority or the City of Warren?" [Dkt. 1, Exhibit A]. In

his Response Brief, Plaintiff concedes that he does not seek the "reason station" to promote his message of atheism in the absence of the "prayer station." Instead, he seeks to "share his philosophical views as an alternative to those expressed through the prayer station." [Dkt. 20, p. 1] He seeks to cause a disturbance in the living room of the City, where 700 city employees report to work and where City government offices are open daily.

Furthermore, Plaintiff's history with the prayer station demonstrates that he is seeking more than an "alternative" to the philosophical views of the prayer station. He is antagonistic toward the prayer station. He harasses and insulted the volunteers. He acts aggressively in the atrium. Plaintiff envisions what Defendants have prohibited: an area adjacent to City government offices where persons can clash and contradict each other. It is this cacophony of argument and contention that the City finds would be too disruptive to its workplace and would not insure peace. Where the atrium opens up to all the offices of City Hall, and there is no insulation to cancel out the noise, it is reasonable for Defendant to prevent havoc before it is wreaked, insure peace in its workplace, and restrict access when necessary.

Even assuming, arguendo, that Plaintiff's challenges are properly asserted, his challenge was not ripe because he failed to file a complete application for atrium space. Contrary to Plaintiff's contention, his application for space in the

atrium is not similarly situated or "identical" to the prayer station. [Dkt. 1, ¶ 37]. Plaintiff never paid the deposit, fees, or provided proof of insurance with his application, as required by the Civic Center Facilities Rental Policies and Rules and Reservation Fee Schedule. [See Dkt. 1, Exhibit A; Dkt. 11, Exhibit 9]. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Tex. v. United States*, 523 U.S. 296, 300 (1998); *See also First Chicago Bank v. Elmhurst*, 1991 U.S. Dist. LEXIS 11334 (N.D. Ill. Aug. 14, 1991)("Until Elmhurst has the opportunity to act on a complete application, Marchese's claims are not ripe for adjudication."); *Town of Manhattan v. Dep't of Natural Res. & Conservation of Mont.,* 2012 MT 81, P11 (Mont. 2012)("Unless the Town submits a correct and complete application for approval of its proposed changes, and the DNRC makes a decision on the application, these issues are not ripe for a decision from this Court."). Therefore, in compliance with the Civic Center Facilities Rental Policies and Rules and Reservation Fee Schedule, Plaintiff's claim is not ripe as he failed to file a complete application.

In conclusion, Defendants' motion for summary judgment should be granted. Plaintiff has failed to show a material issue of fact and his Complaint fails in its entirety.

Respectfully Submitted,

BERRY MOORMAN P.C.

Dated: October 28, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2014, I electronically filed DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and this CERTIFICATE OF SERVICE with the Clerk of the Court using the ECF system which will send notification of such filing to the following: DANIEL S. KOROBKIN (P72842), MICHAEL J. STEINBERG (P43085), KARY L. MOSS (P49759), WILLIAM A. WERTHEIMER (P26275), DAVID L. GRIEM (P23187) and CAITLIN CREED MURPHY (75741).

By: /s/ Sheryl A. Laughren

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