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' MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56 and Local Rule 7.1, and for the reasons set forth in the attached Brief in Support of Defendants' Motion for Summary Judgment, Defendants hereby move this Court for the entry of summary judgment.

As set forth fully in the accompanying Brief, there is no genuine dispute as to any material fact, and Defendants are entitled to judgment as a matter of law on all of Plaintiff's claims.

Pursuant to Local Rule 7.1(a) and F.R.Civ.P. 11(c)(2) Defendants sought concurrence on this motion on August 14, but concurrence was not obtained.

Defendants respectfully request this Court enter an order granting summary judgment of all claims against both Defendants under F.R.Civ.P 56 and grant such other relief as the Court deems appropriate.

Respectfully Submitted,

BERRY MOORMAN P.C.

Dated: August 14, 2014

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Defendants.

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ISSUES PRESENTED

1. Whether Plaintiff's Establishment Clause claims are barred by the applicable statute of limitations.

   Defendant answers "yes".

   Most appropriate authority.

   Owens v. Okure, 488 U.S. 235, 249 (1989)

   Mich. Comp. Laws 600.5805(10)

2. Whether Plaintiff's claims are barred by the doctrine of collateral estoppel where this Court and the Sixth Circuit have, by a valid and final judgment between the parties to this litigation, made determinations that the City's atrium is a limited public forum and that Defendants reasons for excluding Plaintiff's proposed speech are Constitutionally permissible.

   Defendant answers "yes".

   Most appropriate authority.

   Heyliger v. State Univ. & Community College Sys., 126 F.3d 849 (6th Cir. 1997)

3. Whether Defendants are entitled to a Rule 56 summary judgment as to Plaintiff's claim alleging that Defendants violated the Free Speech Clause of the First Amendment of the Constitution by imposing a content and viewpoint based restrictions on Plaintiff's speech where Defendants reason for the exclusion of plaintiff's proposed speech was Constitutionally permitted.

   Defendant answers "yes".

   Most appropriate authority:

   Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)

   Greer v. Spock, 424 U.S. 828 (1976)

Cornelius v. NAACP Legal Defense, 473 U.S. 788 (1985)

Freedom from Religion Foundation and Marshall v. City of Warren, et al, 707 F.3d 686 (6th Cir. 2013)

4. Whether Defendants are entitled to a Rule 56 summary judgment as to Plaintiff's claim alleging that Defendants violated the Establishment Clause of the First Amendment of the Constitution by allowing a prayer station to be placed in the atrium of the City of Warren's City Hall where Defendants reason allowing the prayer station was Constitutionally permitted. .

Defendant answers "yes".

Most appropriate authority:

Lemon v. Kurtzman, 403 U.S. 602 (1971)

McCreary Cnty. v. ACLU, 545 U.S. 844 (2005)

Bd. of Educ. Of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990)

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I. INTRODUCTION

> For many Americans, prayer is an essential act of worship and a daily discipline. Today and every day, prayers will be said for comfort for those who mourn, healing for those who are sick, protection for those who are in harm's way, and strength for those who lead. … Across our country, Americans give thanks for our many blessings, including the freedom to pray as our consciences dictate. [L]et us carry forward our Nation's tradition of religious liberty, which protects Americans' rights to pray and to practice our faiths as we see fit. [Presidential Proclamation – National Day of Prayer, 2014.] 3 C.F.R. Proclamation 9117.

Douglas J. Marshall ("Plaintiff"), who is a member of Freedom from Religion Foundation, Inc. ("FFRF") claims that the City of Warren ("City") and James R. Fouts, its Mayor, ("Mayor")(collectively "Defendants") violated the First Amendment by denying him permission to place a "reason station" in the interior atrium of City Hall ("atrium"). Plaintiff requested to use the reason station in the atrium as the pulpit from which he will espouse his belief that there is no God. Plaintiff wants to "reason with" believers and have "philosophical discussions" with passersby in the atrium. **[See Dkt. 1, ¶ 30].** Plaintiff also seeks to distribute information provided by the FFRF to advance its atheist message. *Id*. ¶ 31.

This is not the first time Plaintiff has sued Defendants in regard to its use and control over the atrium which is the living room of the City's home. In 2011, Marshall (with the FFRF as co-Plaintiff) challenged the City's right to have a holiday display in the atrium. In that action, *Freedom from Religion*

Foundation, Inc., et al v. City of Warren, et al, 707 F.3d 686 (6th Cir 2013)("*Marshall I")*, the Plaintiff's claims were, as here, based on the freedom-from-establishment and free-speech guarantees of the First Amendment and followed the Defendants' rejection of his request that the City modify a holiday display in the atrium. The holiday display included a range of secular and religious symbols and Plaintiff asked that a sign with the following message be added:

At this season of
THE WINTER SOLSTICE
may reason prevail.
There are no gods,
No devils, no angels,
No heaven or hell.
There is only our natural world,
Religion is but
Myth and superstition
That hardens hearts
And enslaves minds.

Placed by the Freedom From Religion Foundation
On Behalf of its State Members
Ffrf.org

State/Church
KEEP THEM SEPARATE

Both the trial court[1] and Sixth Circuit rejected Plaintiffs' claims. Because the City included both secular and seasonal symbols in the holiday scene, the display in the atrium did not "amount to an establishment of religion or for that

[1] *Freedom from Religion Foundation and Marshall v. City of Warren, et al,* 873 F. Supp.2d 850 (E.D. Mich. 2012).

matter an impermissible endorsement of it." 707 F.3d at 690. The Court also found that the display was "government speech;" and, that the First Amendment does not prohibit a government from making content or viewpoint distinctions when it comes to its own speech. Thus, the City did not violate the Plaintiffs' free-speech rights by refusing to add the sign. *Id.*

In reaching its decision, the Sixth Circuit specifically found that the atrium is a limited public forum. 707 F.3d at 861-62. Because this determination emanates out of litigation between the same parties as the present case, and determination of the nature of the atrium was a lynchpin of the Court's decision in *Marshall I*, this issue has been conclusively established and the doctrine of collateral estoppel should result in dismissal of Plaintiff's Complaint.

II. STATEMENT OF RELEVANT FACTS NOT IN DISPUTE

The Atrium. The City's primary municipal building ("City Hall") is owned by the City's Downtown Development Authority ("DDA"). City Hall's atrium is a large open area located on the first floor. The atrium's ceiling is approximately 40 feet high. Counters at which employees of the City assist citizens and others at City offices such as the Mayor's office, the Treasurer's office, the Clerk's office and the Planning Department are open to the atrium during all business hours. City Hall is a municipal workplace for approximately 700 City employees. All use of the atrium must be approved by the Downtown

Development Authority Director ("DDAD"). **[Exhibit 1]** This Court and the Sixth Circuit have already determined that the atrium is a limited public forum. *Marshall I*, 707 F.3d 861-862.

The atrium is used for a variety of events which aid the welfare of the community. Those uses include a temporary County Clerk mobile office, a senior citizen tax help event sponsored by the American Association of Retired Persons, a college fair, an annual Relay for Life event sponsored by the American Cancer Society, and an event celebrating Foster Care Awareness Month sponsored by the Macomb County Department of Human Services. *Id.* The City sponsors various cultural events and festivals in the atrium, including a Summerfest auction and Tastefest (featuring food from local restaurants), a Middle Eastern American Cultural and Music Festival, and a Martin Luther King Day Ceremony. Because of noise and disruption considerations, some events are scheduled only in non-business hours. *Id.*

The City also celebrates the annual National Day of Prayer in the City Hall atrium. *Id.* In 1952, Congress codified the National Day of Prayer, a practice started by the founding fathers. *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 804-805 (7th Cir. 2011). The law provides that the President shall issue a "proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and

meditation." 36 U.S.C. § 119. The National Day of Prayer is a day encouraging nonsectarian prayer, which is celebrated by civil leaders in government buildings across the country. In 2011, the FFRF unsuccessfully brought, and lost, a First Amendment challenge to the law. 641 F.3d at 803.

Rules Governing Use of the Atrium. The City regulates all use of the atrium. Applicants for use are required to submit a Rental Application, and, if applicable, pay fees and make deposits. [**Exhibit 1].** Applying the Civic Center Facilities Rental Policy and Rules ("Rental Policies") the DDAD uses the following criteria to grant or refuse permission to use the atrium: (1) the nature of the event; (2) whether the group is open to all persons without regard to race, color, sex, religion, or physical handicap; (3) whether the event will interfere with the rights of the general public, or proprietary functions of the DDA; and (4) whether the applicant is at least 21 years old and willing to take responsibility for any damages caused by the event. *Id*.

The Prayer Station. In January of 2009, Darius Walden, a well-respected senior pastor from The Tabernacle Church of Warren, submitted an application to place a small table in the atrium. The 3 x 5' table with a few folding chairs would be used as a "prayer station" three days a week during specified business hours. [**Dkt. 1-4, p. 2]**. Walden submitted all information and documents required by the DDA and his application to use the atrium was approved. [**Ex. 1]**.

The prayer station is nondenominational. To the knowledge of Defendants, volunteers manning the station have not violated any rules or regulations pertaining to use of the atrium. [**Ex. 1]**. The volunteers at the prayer station only speak with individuals who approach the table. They do not seek to have theological or philosophical conversations with passers-by. If an individual who approaches the table makes a request, the volunteers will write down the person's prayer request and the reason for the prayer. The volunteers either pray with and/or for the citizen or will add the prayer request to a list that is distributed to local places of worship. The prayer station receives anywhere from 50 to 100 prayer requests each week. Volunteers at the prayer station do not solicit donations and they do not hand out information about any particular place of worship unless specifically asked. **[Exhibits 2 and 4]**. To Defendants' knowledge, no volunteer at the prayer station has spoken ill of other belief systems or others who are not believers. **[Ex. 1]**.

Plaintiff's Provocations and Actions Regarding the Prayer Station. Since its first use in 2009, Plaintiff has demonstrated an antagonistic attitude toward the prayer station. He visits it in order to harass and insult the volunteers. He has been aggressive towards them and has insulted and made rude comments at them. On one occasion, Plaintiff approached the prayer station, slammed something down on the table and aggressively asked the volunteer what right she had to be there. The volunteer felt intimidated and threatened by Plaintiff's behavior. **[Exhibit 4]**.

In another clear act of provocation, following Plaintiff's loss in *Marshall I*, he filed an application to be allowed to use the atrium for a "reason station." [**Dkt. 1-6]**. Plaintiff sought to place the reason station in the atrium only on days and times that the prayer station is also occupied in the atrium. [Compare **Dkt. 1-6** and **Dkt. 1-4**]. The proposed reason station, like Plaintiff's other actions, appears to be intended simply to disrupt the citizens of Warren's "freedom to pray as [their] consciences dictate." 3 C.F.R. Proclamation 9117 (2014).

Plaintiff did not submit the required deposit or proof of insurance with his application. [**Ex. 9].** On April 15, 2014, the Plaintiff's request for installation of the reason station in juxtaposition to the prayer station was denied in a letter from the Mayor. **[Dkt. 1-7].** The Mayor stated that Plaintiff's "group is strictly an anti-religious group intending to deprive all organized religions of their constitutional freedoms or at least discourage the practice of religions." The Mayor also stated that he "believe[ed] it [was Plaintiff's] group's intention to disrupt those who participate in the Prayer Station." *Id.*

The decision not to allow the so-called reason station was based on the common-sense extrapolation that given the history of the Plaintiff and the FFRF's prior contacts with the City, their known vocal hostility toward all religions and the fact that Plaintiff only requested the reason station as a response to the prayer station, and only intended to man it when the prayer station was present, that

Plaintiff, as a tool for the FFRF[2] seeks to disrupt or intimidate those who use or might approach the prayer station. Clearly, Plaintiff intended to create a forum for debate about religion and nontheism in the atrium of City Hall.

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. For example, see the content of the sign it wanted to exhibit in *Marshall I,* p. 2, supra, and documents available www.Ffrf.org. One example is a "DeBaptismal Certificate"

> Still smarting over having been dunked in a church baptismal tub at age 12? Indignant that a congregation still claims you as a believer based on baptismal records? Wishing you could formally renounce a religion that was imposed on you as a helpless babe in swaddling clothes? …. The Freedom From Religion Foundation has the answer: a genuine "DeBaptismal Certificate." … [reading] "I, having been subjected to a Christian baptism before reaching an age of consent, … hereby officially renounce that primitive rite and the Church that imposed it. I categorically reject the creeds, dogmas, and superstitions of my former religion, particularly the pernicious doctrines of 'Original Sin' and must be cleansed of it by baptism…. We would like to remind the public that people have been killed, schisms fostered and 'holy' wars sparked over debates on when to baptize and how to 'sprinkle' babies. Childhoods and peace of mind are still being blighted today by ignorant and vicious sermons promising hell and damnation as a punishment for not being baptized. "DeBaptismal Certificate". *Freedom from Religion Foundation,* n.p,n.d web 8 August 2014 (http://ffrf.org/publications/debaptism-certificate **[Exhibit 5])**

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[2] The FFRF is funding the Plaintiff's lawsuit against the City. See, Freedom from Religion Foundation, n.p., n.d. 11 August 2014, http://ffrf.org/legal/challenges/ongoing-lawsuits/item/21030 **[Exhibit 6]**.

The FFRF circulates its mocking and derisive message through Plaintiff and other like-minded folks and by the publications distributed by the FFRF including: *An X-Rated Book: Sex & Obscenity in the Bible," "Cookie Cutter Christs, Origins of the Jesus Myth"* and "*Dear Believer*, Holy Bible, *Warning: Literal Belief in this Book May Endanger Your Health and Life." Freedom from Religion Foundation,* n.p.n.d web August 2014 (http://ffrf.org/?Itemid=299). **[Exhibit 7]**.

III. LAW AND ARGUMENT

A. STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 56(b), a motion for summary judgment shall be granted if the evidence indicates that no genuine issue of material facts exists. In order to avoid summary judgment, the opposing party must have set out sufficient evidence in the record to allow a reasonable jury to find for him or her at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248. (1986). The sufficiency of the evidence is to be tested against the substantive standard of proof that would control at trial. *Id.* The moving party has the burden of showing that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "[A] party opposing a properly supported motion for summary judgment may not rest on the mere allegations or denials of the pleadings, but must set forth specific acts showing that there is a genuine issue for trial. *Anderson*, at 256. Irrelevant or unnecessary factual disputes do not create

genuine issues of material fact. *St. Francis Health Care Center v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000).

B. PLAINTIFF'S ESTABLISHMENT CLAUSE VIOLATIONS ARE BARRED BY THE STATUTE OF LIMITATIONS

As a preliminary matter, Plaintiff's two claims alleging Establishment Clause violations pursuant to 42 U.S.C. 1983, are barred by the statute of limitations. Plaintiff alleges civil rights violations pursuant to 42 U.S.C. 1983. Deprivation of civil rights claims brought pursuant to 42 U.S.C. 1983 are bound by the general personal injury statute of limitations. *Owens v. Okure*, 488 U.S. 235, 249 (1989). Pursuant to Mich. Comp. Laws 600.5805(10), the general statute of limitations for personal injury is three years. The alleged Establishment Clause violation arose sometime in 2009 when the prayer station application was approved. Plaintiff clearly had knowledge of the prayer station's existence at least as early as August of 2009 when the City received a Freedom of Information request for information concerning the prayer station. **[Exhibit 8]**. Plaintiff filed this lawsuit in 2014.

This is not a continuing violation. "'[A] 'continuous violation' exists if: (1) the defendants engage in continuing wrongful conduct; (2) injury to the plaintiffs accrues continuously; and (3) had the defendants at any time ceased their wrongful conduct, further injury would have been avoided.' *Hensley v. City of Columbus*, 557 F.3d 693, 697 (6th Cir. 2009) (citations omitted). 'A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original

violation.'" *Broom v. Strickland*, 579 F.3d 553, 555 (6th Cir. 2009). At the very least, Plaintiff has not suffered alleged government-caused injury since the date the City granted permission for placement of the prayer station in 2009.

C. THE PLAINTIFF'S FIRST AMENDMENT-FREE SPEECH CLAIM FAILS AS EXCLUSION OF THE REASON STATION WAS CONSTITUTIONALLY PERMITTED.

The First Amendment prohibits laws abridging the freedom of speech which "means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). However, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981). "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. *Cox v. State of La.*, 379 U.S. 536, 554 (1965). In particular, expressive religious "[c]onduct remains subject to regulation for the protection of society." *Cantwell v. Conn.*, 310 U.S. 296, 304 (1940).

1. The Doctrine of Collateral Estoppel Bar Plaintiffs' Claims.

Issue preclusion, or collateral estoppel, mandates that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and

the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Heyliger v. State Univ. & Community College Sys*., 126 F.3d 849, 852 (6th Cir. 1997). The obvious purpose of claim and issue preclusion are to conserve judicial resources and to protect parties from the cost of repetitive and duplicative litigation. See, e.g., *Allen v. McCurry*, 449 U.S. 90 (1980).

In this case, 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. 873 F. Supp. 2d 864. In reaching its conclusion, which was upheld by the Court of Appeals, this Court determined that it was reasonable for the City to exclude Plaintiff's anti-religion messages to avoid disruption of City business and intimidation of persons accessing the facility. 873 F. Supp. 2d at 862 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 805 (1985) and *Kincaid v. Gibson*, 236 F.3d 342, 348 (6th Cir. 2001)). Although this case presents a challenge to another long-standing activity within the atrium, this Court's ruling in *Marshall I* that the atrium is a limited public forum is dispositive of Plaintiff's virtually identical First Amendment claims in this case. Regardless of whether it is the proposed sign in *Marshall I* or the staffed reason station proposed here for the same purpose, the City may properly restrict the use

of the atrium to avoid disrupting City business and to also prevent intimidation of those who wish to make use of the prayer station. See also *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (a speaker may properly be excluded from a limited public forum because he wishes to address a topic not encompassed within the purpose of the forum). Collateral estoppel compels dismissal of the Complaint.

2. The Atrium is a Non-Public Forum.

Even if the Plaintiff was not collaterally stopped from arguing that the atrium is anything other than a limited public forum, the Court must still find that it is either that or a non-public space. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock*, 424 U.S. 828, 836 (1976). To this end, it is "well settled that the government need not permit all forms of speech on property that it owns and controls." *Postal Service v. Council of Greenburg Civic Assoc.*, 453 U.S. 114, 129 (1981). The mere fact that "members of the public are permitted freely to visit a place owned or operated by the Government" does not transform that public place into a "public forum" for purposes of the First Amendment. Instead, the public forum doctrine recognizes four types of fora: (1) the traditional public forum; (2) the designated public forum; (3) the limited public forum; and (4) the nonpublic forum." *Cornelius v. NAACP Legal Defense*, 473 U.S. 788, 802 (1985).

The traditional public forum consists of government property that has traditionally been available for public expression," such as public streets and parks. *Id.* 473 U.S. at 802. The designated public forum exists when public property that is not a traditional location of public debate or assembly has been opened "for expressive activity by part or all of the public." *International Soc. for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 678 (1992). The limited public forum is created when public property that is not a traditional location of public debate or assembly is opened for public speech or assembly, but such speech or assembly is subject to approval of the government. *Good News Club v. Milford Central,* 533 U.S. 98, 102-3 (2001). Non-public forums consist of all remaining publicly owned property that is not by tradition or governmental designation open to public speech. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*,460 U.S. 37, 46 (1983). Property that the government owns and does not ordinarily open to the public is a non-public forum. "The inside of a government building, used as office space, would fall in this category." *Satawa v. Macomb County Road Comm.,* 689 F.3d 506, 518 (6th Cir., 2012).

"Selective access does not transform government property into a public forum." *Perry*, 460 U.S. at 47. The key distinction to recognizing a limited or non-public forum is that there must be permission granted before the public may access the property. *Perry*, 460 U.S. at 46-7. In *United Food & Commercial*

Workers Union v. Southwest Ohio Regional Transit Authority, 163 F.3d 341, 350 (6th Cir., 1998), this Court held:

> The courts will infer an intent to designate property a public forum where the government makes the property "'generally available' to a class of speakers"; or grants permission "as a matter of course." In contrast, the government indicates that the property is to remain a nonpublic forum "when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it." *Thus, the Supreme Court has been reluctant to hold that the government intended to create a designated public forum when it followed a policy of selective access for individual speakers rather than allowing general access for an entire class of speakers.* (citations omitted; emphasis added).

In this case, the atrium is a limited public forum under *Good News* or non-public forum under *Satawa* given that it is within a public building where access is expressly restricted to instances where *permission* is granted by the City.[3] In fact, the Rental Policy provides for a written application process for anyone desiring to use the atrium. Access to the atrium is dependent upon analysis of four viewpoint neutral factors set forth in the Rental Policy including "whether group membership of the requesting organization is open to all persons without regard to race, color, sex, religion or physical handicap." **[Ex. 1**]. The Rental Policy strictly prohibits advertisements or solicitation of any type in the atrium. ***Id***.

After selective access has established a limited public forum a second step in

[3] See, *Marshall I,* 873 F.3d 861-62.

the analysis of whether speech may be restricted takes account of nature of the forum and whether the excluded speech is compatible with the forum's purposes. United Food, 163 F.3d at 351. In this step, the finding that government property is a non-public forum is strengthened where the property at issue is a government workplace. "In cases where the principal function of the property would be disrupted by expressive activity, the Court [has been] particularly reluctant to hold that the government intended to designate a public forum." Cornelius, 473 U.S. at 804-5. Here, City Hall is a government workplace. The atrium fronts each of the municipal offices from which City business is transacted. Employee workspaces are located within these offices and the public-service counters and they open directly to the atrium. The criteria of the Rental Policies that require that the use of the atrium is only appropriate if the "activity will [not] interfere with the rights of the general public or proprietary functions of [the City] suggests that the City operated the atrium as a nonpublic forum. Cornelius at 805-06. Given the foregoing, exclusion of the proposed reason station was compatible with the purpose of the atrium—as the entrance to and egress from City offices and workplaces of its employees.

The reason station was rejected because it presents the purpose of attacking the prayer station, belittling those who may have religious beliefs, and intimidating others from approaching the prayer station; and Plaintiff was overtly attempting to

open the atrium for a public debate between believers and non-believers. It is noteworthy here that Plaintiff only sought to man the reason station on dates and times that overlap with the dates and time the prayer station is manned. Indeed, the Mayor expressed that he understood the intent of Plaintiff (and the FFRF) to disrupt those who might approach the prayer station, making the atrium into an area for debate of issues, as opposed to the workplace of its employees.

In *Marshall I*, this Court concluded that the atrium is a limited public forum. Defendants believe that the atrium is non-public forum. But, even as a limited public forum, the Defendants did not violate any Constitutional right of Plaintiff when it rejected his application for the reason station. All access to the atrium is based on the established, content-neutral criterion of the written Rental Policies. Accordingly, Plaintiff's First Amendment-Free Speech claim should be dismissed on summary judgment.

3. The Exclusion of Plaintiff's Proposed Reason Station Was Reasonable and Viewpoint Neutral.

"Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius,* 473 U.S. at 800. "Control over access to a nonpublic forum can be based on subject matter and speaker identity so

long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius,* 473 U.S. at 806 (*citing Perry,* 460 U.S. at 49); *Kincaid v. Gibson,* 236 F.3d 342 (6th Cir., 2001). In this regard, the government has the right to exercise control over access to its workplace(s) in order to avoid interruptions to the performance of the duties of its employees. *Cornelius,* 473 U.S. at 805. After all, the government "workplace, like any place of employment, exists to accomplish the business of the employer." *Id.* 473 U.S. at 805. The avoidance of controversy is also a reasonable basis for excluding a speaker from a non-public forum. *Cornelius,* 473 U.S. at 811. Finally, a government may properly limit speech in a non-public forum to only messages that further good morale and the purpose of business occurring within the forum. *Greer v. Spock,* 424 U.S. 828 (1976).[4]

In this case, Plaintiff was denied permission to place the reason station because Plaintiff sought to mount a direct attack on the prayer station which had already been operating in the atrium; the FFRF is antagonistic to all religions; and, the proposed reason station alongside the prayer station would serve no purpose other than to provoke controversy in the atrium. Plaintiff sought to establish a platform to debate religion versus non-religion. And,

[4] In *Greer*, a "regulation governing distribution of literature on federal military reservation [that] only allowed military commander to disapprove those publications that he perceived as clearly endangering loyalty, discipline or morale of troops on reservation" was deemed constitutional.

the place he chose to carry on this debate was in the living room of the City's home. The point:counter-point atmosphere Plaintiff sought to establish would create disturbances in the atrium, its adjoining government workspaces and public service counters—all reasonable bases for exclusion of a speaker from a non-public forum.

Defendants have never allowed the atrium to be opened up for public debate on controversial topics. They have, however, opened the atrium to many groups and interests as set forth in Exhibit 1. In the letter rejecting the Plaintiff's request, the Mayor indicated that the City would not allow the atrium to be used to "deprive all organized religions of their constitutional freedoms or [to] discourage the practice of religion" nor would Plaintiff and his sponsor be allowed because they "[intend] to disrupt those who participate in the Prayer Station." A municipality has a right to avoid the cacophony of allowing simultaneous use of space by persons of divergent views based upon uses of space – even in a public forum.[5] The Plaintiff's message, which he sought to bring forward in the atrium

[5] A policy of access that attempts to strike a balance between the right of expression and the need to avoid controversy and disturbances in a government workplace is reasonable despite any incidental effect of excluding some speech in the forum. *Christian Legal Society v. Martinez*, 130 S.Ct. 2971, 2988-2990 (2010). See also, *Foster v. City of Southfield*, 106 F.3d 400 (6th Cir., 1996) holding that "the *potential disruptiveness* of the speech" is enough to defeat a First Amendment claim. Following *Waters v. Churchill*, 511 U.S. 661 (1994) and *Connick v. Myers*, 461 U.S. 138 (1983) where the Supreme Court recognized that a government employer is not required "to allow events to unfold to the extent that the

only when the prayer station was also manned, was properly excluded on this basis under *Schwitzgebel v. City of Strongsville,* 898 F.Supp. 1208 (N.D.Ohio 1995) which affirmed dismissal of a First Amendment challenge where the plaintiff's proposed speech physically intruded upon and interfered with a previously permitted speaker's message.

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. **[Dkt. 1, ¶ 31]**. Exclusion of such an overtly antagonistic message on public property is appropriate as the First Amendment cannot be used to force a municipality to display persuasive speech "or other distractions" that are principally aimed at competing for the potential observers' attention. *Cornelius,* 473 U.S. at 799 (1985); *See also ACLU v. Schundler,* 168 F.3d 92, 97 (3rd Cir., 1999).

Given the indisputable facts in this case, the Defendants' expressed reasons for excluding the reason station from the atrium fall squarely within the constitutionally permissible limits on speech in a non-public forum set forth by *Cornelius, Perry* and *Lehman.* The Plaintiff may not avoid this finding by merely speculating about the assumed viewpoints of the Defendants. *Big Dipper*

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disruption of the office and the destruction of working relationships is manifest before taking action."

Entertainment, L.L.C. v. City of Warren, 641 F.3d 715, 717 (6th Cir. 2011), *quoting United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("[A] familiar principle of constitutional law that [Courts] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). Summary judgment as to the entirety of Plaintiff's Complaint is appropriate.

D. PLAINTIFF'S CLAIM FOR VIOLATION OF THE ESTABLISHMENT CLAUSE FAILS AS THE PRAYER STATION WITHIN THE CITY'S ATRIUM IS CONSTITUTIONALLY PERMISSIBLE.

Plaintiff brings Count II for Violation of the Establishment Clause alleging Defendants' rejection of his request to place the reason station in its atrium is unconstitutional is without merit as set forth in Argument C, the Defendants had a legitimate and constitutionally permitted reason to reject his request to use the atrium. Plaintiff's next claim, that the Defendants violated the Establishment Clause by allowing the prayer station is similarly meritless.

The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion." *U.S. Const. Amend. I, cl. 1.* Historically, claims of violations of the Establishment Clause were made under the three prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See, *ACLU v. McCreary Cnty.*, 607 F.3d 439, 445 (6th Cir. 2010). Under *Lemon*, a state government's actions violated the Establishment Clause if (1) it did not have a secular purpose; (2) its

primary effect was to advance or inhibit religion; or (3) it fostered excessive government entanglement with religion. 403 U.S. at 612; *Lynch*, 465 U.S. at 679.

Since *Lemon*, the Supreme Court has refined two prongs of the test. The first prong now examines the predominant purpose of the action. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 901 (2005); *ACLU v. Mercer Cnty.*, 432 F.3d 624, 635 (6th Cir. 2005). The second prong has been refined to ask "whether the government action has the purpose or effect of endorsing religion." *Id.*

To prevent disturbances to the functioning of the City's government, the City has restricted access to the atrium and effected the Rental Policies. The Rental Policies limit access based on four viewpoint-neutral factors for deciding whether a particular use of the atrium will be permitted. A primary factor is whether the use would cause an interference with the rights of the general public or a disruption of the proprietary functions of the City.

The predominant purposes of effecting the Rental Policies is to allow the effective operation of the City from its home, to assure that City property is not used by organizations which would discriminate against any person or entity based on protected classifications, and to forestall interference with the rights of the general public, its workspaces and its employees. The predominate purpose of rejecting the reason station was to forestall Plaintiff's attempt to (1) open the atrium to public debate, (2) disrupt others in following their beliefs, (3) prohibit

Plaintiff from belittling, haranguing, and intimidating others, and (4) invade the space of the first-comer. The rejection of Plaintiff's request to install a reason station was consistent with these predominate purposes.

The City's rejection of the reason booth did not have the purpose or effect of endorsing religion, or endorsing one religion (or atheism) over others. Instead the facts show that the City made the atrium available to many individuals and organizations under the Rental Policies. The overwhelmingly secular uses of the atrium, together with the fact that the prayer station is not sponsored by or labeled as endorsed by the City negates any argument that the City is "endorsing" religion by allowing the prayer booth and other secular uses of its atrium.

Whether a particular state action endorses religion depends upon how a reasonable observer would interpret the action. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) ("No reasonable observer would think a neutral program of private choice . . . carries with it the imprimatur of government endorsement."); *Lynch v. Donnelly*, 465 U.S. 668, 686, (1984) (holding that a reasonable observer would interpret the inclusion of a nativity scene in a public holiday display to be acknowledging, rather than promoting, religion). *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 419-424 (6th Cir. 2004).

Since at least 2009, the City has allowed both religious and nonreligious community use of the atrium. The community, including the Plaintiff, must be deemed aware that the City allows such use because "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context underlying a challenged program." See, *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002)(internal quotation marks omitted).

Given this awareness, no reasonable observer could conclude that by allowing the prayer station in the atrium, the City is endorsing religion. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (rejecting anticipated Establishment Clause challenge to policy concerning use of school facilities and ruling that because religious and secular organizations would have equal access, "there would have been no realistic danger that the community would think that the [School] District was endorsing religion or any particular creed"). Accord, *Rusk.*

If the City refused the prayer station, while allowing other secular uses, the argument could be made that the City disapproves of religion, and discriminates against people and organizations that espouse religious beliefs. "If a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Bd. Of Educ. Of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990). See also, *Good News Club v. Milford Cent. Sch*,

533 U.S. 98 (2001)(reasoning that student would be just as likely to infer hostility toward religion from the school's refusal to include religious clubs access to property as they would be to infer favoritism from the school's including it. *Id*. at 118; *Rusk* at 422-23.

Here, the City's practice--which is neutral toward religion--does not send a message of disfavor to persons who are not religious. "A State has not made religion relevant to standing in the community simply because a particular viewer of [the challenged action] might feel uncomfortable." *Capitol Square Review & Advisory Bd.,* 515 U.S. at 780 (O'Connor, J., concurring).

The City does not endorse religion by allowing non-secular organizations to use the atrium if it otherwise meets the Rental Policies criteria. In *Daugherty v. Vanguard Charter School Academy*, the district court for the Western District of Michigan held that a public elementary school did not violate the Establishment Clause when, as part of a general policy of distributing materials from various community groups, the school distributed flyers advertising religious activities. 116 F. Supp. 2d 897, 911-12 (W.D. Mich. 2000). Recognizing the school's neutrality toward religion, the district court explained: If defendants manipulated the facially neutral policy so as to give preferential access to religious literature or certain religious literature then an Establishment Clause violation might be made out. *Id.* (citations omitted)

Clearly, too, allowing the prayer station to follow the same procedure to apply for use of the atrium as other secular uses – without endorsement, participation, or sponsorship by the City, does not evince excessive government entanglement with religion.

Plaintiff's claim of violation of the Establishment Clause fails and should be dismissed.

E. THE CLAIMS OF PLAINTIFF FAIL AS A MATTER OF LAW UNDER THE GOVERNMENT SPEECH DOCTRINE

Similar to the argument of Plaintiff in *Marshall I,* the Plaintiff argues that the City violated its his free-speech rights when it refused to allow him to place a reason station in the atrium. As the issue was captured by the Sixth Circuit, the Court stated that, "as [Plaintiffs] reads the First Amendment, it requires the City, having opted to create a holiday display, to include competing messages and viewpoints." *Marshall I,* 707 F.3d at 695. The Court summarily rejected the premise with the statement: "As we read the First Amendment, it does not." *Id.*

The Sixth Circuit determined that because (1) the City maintained final authority over every aspect of the approval process and it was selective in deciding which displays would be allowed (regardless of whether the City paid for displays itself or accepted them from others); and (2) the display was located on City property, the display was government, not private, speech. "By 'effectively control[ing]' the message being sent in these ways, it was the government, not the

donors of the [displays] or anyone else, that spoke." *Id.* at 695-96 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)).

As determined by the Court in *Marshall I*, the City's control of the display on its own property—in its living room, as it were—makes the speech that occurs there government speech. And, since "the First Amendment prohibits governments from making any law 'abridging the freedom of speech' [but does not] empower individuals to abridge the speech of government," the First Amendment does "not regulate government speech." *Marshall I*, 707 F.3d at 695 (citing *Summum*, 555 U.S. at 467). Elaborating, the Court stated:

> When the government speaks, "it is entitled to say what it wishes," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and "to favor and disfavor" all kinds of policies and points of view, *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment). That is why, as a general rule, "the government's own speech . . . is exempt from First Amendment scrutiny." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005).

The Court analogized the City's atrium use and display process to those in *Summum* where the city of Pleasant Grove maintained a public park displays that portrayed the heritage of the town. 555 U.S. at 464. At least eleven of the objects had been proposed and donated by private groups, but all had been approved by the city, and all had been placed on city property. *Id.* Summum, a Gnostic Christian sect, requested permission to erect a stone monument containing the Seven

Aphorisms of its faith. *Id*. Pleasant Grove denied the request, and Summum went to court invoking the free-speech guarantee. *Id*. at 465-66.

As in *Summun,* the Sixth Circuit in *Marshall I* held that the displays were government, not private, speech because of the maintenance of every aspect of the approval process and location of the displays on City property.[6] The Court noted that the finding that the City was engaged in governmental speech supported a premise of the Plaintiffs' Establishment Clause argument—that the display communicated the government's views. The Court found that since the display in the atrium was government space, the City could

> choose to include a "Winter Welcome" sign. And it could choose to add a nativity scene (so long as it did not violate the Establishment Clause). It could choose to add an angel. And it could choose to keep out a devil. It could choose to add a Santa. And it could choose to deny a sign saying, "There is no Santa." It could choose to incorporate a message about Ramadan. **And it could choose to deny a message disparaging any one religion or religion in general.** Just as Congress's creation of a National Day of Prayer on the first Thursday of May does not compel the legislature to recognize a National Day of Non-Prayer each year, so too the City of Warren could opt to have a holiday display without a Winter Solstice sign. *Marshall I,* 707 F.3d at 696.

[6] As referenced in *Marshall I, Summum* does not stand alone. See, *Johanns v. Livestock Mkg. Ass'n*, 544 U.S. 550, 553 (2005) *Rust v. Sullivan*, 500 U.S. 173, 178-83 (1991); *ACLU v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006); *Kidwell v. City of Union*, 462 F.3d 620, 624 (6th Cir. 2006); see also *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Sch. Dist*., 624 F.3d 332, 340-42 (6th Cir. 2010)

Summum and *Marshall I,* make it clear that when a government is speaking for itself, it is allowed to have a viewpoint.

> If strict neutrality were the order of the day when the government speaks for itself, as opposed to regulating the speech of others, the United States Postal Service would need to add all kinds of stamps, religious and nonreligious alike, to its December collection. Veterans' Day would lead to Pacifism Day, the Fourth of July to Non-Patriots Day, and so on. Beyond ways to commemorate this or that important event, the government would face even greater problems in promoting its own policies. Could it urge people to "Register and Vote," "Win the War," "Buy U.S. Bonds" or "Spay or Neuter Your Pets" without incurring an obligation to sponsor opposing messages? Doubtful. Bredesen, 441 F.3d at 379. "Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist." *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000).

The Court also found that the "forum approach" does not properly apply when it is the government speaking and when the sought-after space is finite. "The atrium has limited floor space, meaning that, even if the City wanted to accommodate all manner of seasonal symbols and messages, it could not do so." *Marshall I,* 707 F.3d at 698.

Accordingly, the Plaintiffs' Complaint fails in its entirety.

IV. CONCLUSION AND RELIEF REQUESTED

Defendants respectfully request this Court enter an order granting summary judgment and grant such other relief as the Court deems appropriate.

Respectfully Submitted,

BERRY MOORMAN P.C.

Dated: August 14, 2014

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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: 2:14-cv-12872-MOB-MJH

Hon: Marianne O. Battani

Magistrate Judge: Michael J. Hluchaniuk

NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendants' Motion for Summary Judgment will be brought for hearing before the Honorable Marianne O. Battani on a date and time to be set by the Court.

Respectfully Submitted,

BERRY MOORMAN P.C.

Dated: August 14, 2014

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Capacity and in his official capacity
as Mayor of Warren,

Hon: Marianne O. Battani

Magistrate Judge: Michael J. Hluchaniuk

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2014, I electronically filed DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, NOTICE OF HEARING 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).

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