Case No. 12-1858

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC. and
DOUGLAS J. MARSHALL,

Plaintiffs-Appellants,

v.

CITY OF WARREN,
CITY OF WARREN DOWNTOWN DEVELOPMENT AUTHORITY,
and JAMES R. FOUTS, Mayor,

Defendants-Appellees.

On appeal from the U.S. District Court for the Eastern District of Michigan
(Hon. Lawrence P. Zatkoff, U.S. District Judge)

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union of Michigan is a not-for-profit corporation with no parent corporations or publicly traded stock.

CONSENT TO FILE

The parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a).

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Rule

Other Authorities

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Michigan ("ACLU") is the Michigan affiliate of a nationwide nonpartisan organization of over 500,000 members dedicated to protecting the civil rights and civil liberties protected by the United States Constitution. This case raises important First Amendment questions regarding the rights of atheists to express their beliefs (or non-belief) on public property. As an organization that has long been committed to preserving the rights to free speech and religious liberty, the ACLU has a strong interest in the proper resolution of this case. *Amicus* therefore believes its perspective on these questions will be of value to the Court.

SUMMARY OF ARGUMENT

"[T]he central purpose of the Speech and Press Clauses [is] to assure a society in which uninhibited, robust, and wide-open public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (citations and quotations omitted). Healthy debate and healthy democracy are the ultimate goals. But to accomplish those particular aims, the First Amendment restricts government in a multiplicity of ways. Two of those ways are important here. First, the Constitution prohibits viewpoint discrimination, as necessary to prevent government censorship of private speech. And second, it requires governments interested in regulating speech to lay out objective criteria in advance. For reasons that follow, the City of Warren has breached those principles here and its action must be enjoined.

STANDARD OF REVIEW

This is an appeal of the district court's grant of summary judgment to the defendant. "This Court reviews a district court's grant of summary judgment *de novo*." *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 811 (6th Cir. 2011). "Summary judgment is appropriate if the moving party"—in this case, Warren—"shows that there is no genuine issue of material fact in dispute and [it] is entitled to judgment as a matter of law." *Yeschick v. Mineta*, 675 F.3d 622, 631-32 (6th Cir. 2012) (citing Fed. R. Civ. P. 56(a)). These established principles may be somewhat formulaic, but the fact that Warren bears the burden of showing a clear entitlement to summary judgment matters a great deal here, given the nature of this case. This is a case full of ambiguities and inferences, so it is vital to keep in mind that the Court must "resolve all ambiguities and draw all reasonable inferences" in favor of FFRF and against Warren. *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000).

ARGUMENT

I. Apart from Issues of Content and Viewpoint Discrimination in This Case, Warren Violated the First Amendment by Giving Its Mayor Unbridled Discretion To Reject Atrium Displays Based on Criteria That He Could Make Up at the Time of His Decision.

Warren's decision to exclude FFRF's display runs into a number of constitutional difficulties. But the most obvious is perhaps the most troubling. No matter how many times one examines the record in this case, it remains profoundly unclear why exactly Warren excluded FFRF's display. To be sure, Warren has a written policy about outside groups using its space. *See* Exhibit 6 to Defs.' Mot. for Summ. J. (Warren Civil Center Facilities Rental Polices and Rules) (Doc. # 18-7). That policy does a number of things—it, for example, forbids groups from using the space to solicit funds, *see id.* ¶ 1(C), and arguably bars them from excluding individuals from Warren public space on the basis of their race, religion, sex, or disability, *see id.* ¶ 4. But nothing in the record suggests that the Rental Policy was the basis for Warren excluding FFRF's atrium display.

Instead, Warren's reasons for excluding the display were entirely *post hoc*. That phrase is meant descriptively not pejoratively; it is the simple truth that Warren did not have a previously established policy that forbade FFRF's display. The Mayor rejected FFRF's display entirely on his own initiative, issuing a contemporaneous letter explaining the reasons for his decision. *See* Exhibit H to

Pls.' Resp. to Defs.' Mot. for Summ. J. (Doc. # 26-9). And by all accounts, the Mayor made up the criteria as he went along.

Moreover, the Mayor's letter simultaneously suggests so many different criteria that it is still unclear, even now, what Warren allows and what it forbids. At one point in his letter, the Mayor says that FFRF's display must be banned because it would "lead to confrontations and a disruption of city hall." Ex. H.[1] At another point, he says that he must ban all things that would "provoke controversy." *Id.* Sometimes he suggests that he is banning FFRF's display because it is critical of established religions. *Id.* (claiming that FFRF's display is "disparaging" and "attack[s] religion"). Other times he suggests that he is barring FFRF's display simply because it is atheistic. *Id.* (saying that FFRF's display is "clearly anti-religion," "highly offensive," is not part of "a recognized religion," and will cause "ill will among many people of all recognized faiths"). Sometimes it is not entirely clear what criteria the Mayor has in mind. *Id.* (arguing that

[1] "Fighting words" are, of course, constitutionally unprotected. Pursuant to a sufficiently clear and established policy, Warren could exclude them from a public forum such as the one here. But FFRF's display did not amount to fighting words. "No reasonable onlooker [could perceive FFRF's message] as a direct personal insult or an invitation to exchange fisticuffs." *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (holding that flag burning could not be prohibited under the "fighting words" exception).

FFRF's display—apparently unlike the other holiday displays—implies things that are "not provable").

Later sections of this brief examine these criteria, arguing that they establish a genuine issue of material fact regarding viewpoint discrimination. But Warren has a more fundamental problem. Even assuming these criteria would be constitutionally legitimate if made part of an established policy which was then subsequently applied to FFRF, it is constitutionally illegitimate for Warren to simply make up such criteria on the fly. The First Amendment requires objective criteria to be laid out in advance. Warren's actions here are thus constitutionally deficient, separate and apart from any issues of content and viewpoint discrimination.

A leading treatise summarizes this area of the law:

> A theme that runs through First Amendment cases prohibits the grant of unbridled administrative discretion to officials charged with the administration of laws regulating speech . . . . [T]he Court has been adamant in its insistence that laws regulating speech not vest officials with unfettered discretion to determine who may or may not speak [as] such standardless delegations of administrative discretion carry with them the risk that an official will use the administrative rule selectively, to punish unpopular causes . . . . The Court's willingness to strike down such delegations of unbridled discretion is one of the most solidly established principles in the free speech tradition.

1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH, § 6:16, at 6-28 through 6-29 (3d ed. 1996 & Supp. 2012).

A flurry of Supreme Court cases all center around this general point. Perhaps the leading one is *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). There a city ordinance gave the local mayor discretion over which various private newspapers would be sold in public news racks, based on whatever he thought would be "necessary and reasonable." *Id.* at 754. The Supreme Court held this unconstitutional:

> [T]he absence of express standards makes it difficult to distinguish . . . between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. 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; *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (striking down a county ordinance for giving unfettered discretion to an administrator in whether to award parade permits).

This principle makes obvious sense. Operating entirely after the fact, a government can always find some ostensibly viewpoint-neutral criteria to accomplish its censorious objectives, because there will always be some seemingly

"neutral" standard that can be used to separate the favored speech from the disfavored speech. In a case like this one, for example, a local government could decide to bar displays from organizations whose names begin with the letter 'F.' Of course, governments will not be that obvious. They will instead resort to more subtle maneuvers, which courts will have a harder time calling pretextual. This is the fear motivating the Supreme Court in *City of Lakewood*: If governments are only required to produce reasons after the fact, they will all too easily evade the viewpoint-neutrality requirement through cat-and-mouse games of "shifting . . . criteria" and "post hoc rationalizations." *City of Lakewood*, 486 U.S. at 758. Plaintiffs would be given the burden of having to simultaneously disprove all possible legitimate governmental motivations, which would quickly prove impossible. These fears produce the holding of *City of Lakewood*: Given the difficulties inherent in proving viewpoint-discrimination, governments that wish to restrict private speech must do so only pursuant to objective criteria established in advance.

So important is this principle that the Court has given it independent constitutional significance. Even without actual content or viewpoint discrimination, a process that has these kinds of defects is unconstitutional. *See Forsyth County*, 505 U.S. at 133 ("[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker

rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so."); *Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir. 2010) ("Because unfettered governmental discretion over the licensing of free expression 'constitutes a prior restraint and may result in censorship,' a plaintiff may bring facial challenges to statutes granting such discretion 'even if the discretion and power are never actually abused.'" (quoting *City of Lakewood*, 486 U.S. at 757)). And although this principle originated in a series of cases about public sidewalks, it applies now to all types of public forums. *See Miller*, 622 F.3d at 532 (explaining that "[t]he defendants attempt to distinguish *City of Lakewood*, arguing that it involved a discretionary speech restriction on a public sidewalk rather than inside a government building," but "[t]his distinction is irrelevant . . . because in *City of Lakewood* the Court held that an arbitrary prior restraint on protected speech provides standing regardless of the forum").

In a number of contexts, the Sixth Circuit has applied this principle to invalidate government actions substantially more legitimate than those here. In the most well-known case, an Ohio public transit company sold advertising space on the sides of its buses. But the government had a policy of refusing to accept "controversial" advertisements, and it rejected those offered by a union on that ground. *See United Food & Commercial Workers Union v. Sw. Ohio Reg'l Transit*

Auth., 163 F.3d 341 (6th Cir. 1998). Citing *City of Lakewood*, the Court began by noting that "a statute or ordinance offends the First Amendment when it grants a public official 'unbridled discretion' such that the official's decision to limit speech is not constrained by objective criteria, but may rest on ambiguous and subjective reasons." *Id.* at 359 (citations and quotations omitted). And the Court concluded that the government had breached that principle: "We have no doubt that standing alone, the term 'controversial' vests the decision-maker with an impermissible degree of discretion." *Id.* In a similar and more recent case, Cincinnati required that all groups wanting to use city hall find a city official willing to sponsor them. The Sixth Circuit struck this down as well. *See Miller*, 622 F.3d at 532 (holding the policy unconstitutional for giving "authorized officials . . . unfettered discretion in deciding whether to sponsor an event in the interior of city hall").

Both *United Food* and *Miller* involved government agencies excluding speech under the terms of some written policy. To be sure, a written policy is not necessarily required. *See, e.g.*, *Lebron v. Amtrak*, 69 F.3d 650, 658 (2d Cir. 1995) ("The fact that a policy is not committed to writing does not of itself constitute a First Amendment violation."). But any limits that Warren imposes must have been previously established *somewhere*—either in the text of the policy itself, in authoritative constructions of that policy, or at least in Warren's established past

practices. *See City of Lakewood*, 486 U.S. at 770 ("[T]he limits the city claims are implicit in its law must be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice."). Indeed, this Court has held that established past practices should only matter if they are "well-understood and uniformly applied." *Gilles v. Garland*, 281 F. App'x 501, 507 (6th Cir. 2008).

Warren has not remotely satisfied those criteria here. Warren has no written policy that would exclude FFRF's display. Nor does the record in this case contain any authoritative constructions of Warren's written policy or any established past practices. This means that Warren officials (such as the Mayor) are completely unconstrained in deciding what criteria to use, and this is constitutionally impermissible. The government "cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action." *Kunz v. New York*, 340 U.S. 290, 295 (1951).

II. Excluding FFRF's Display Because It Was Atheistic Would Amount to Unconstitutional Viewpoint Discrimination, and There Is a Genuine Issue of Material Fact as to Whether That Has Happened Here.

This Court could resolve this entire case on the above grounds and rule that FFRF's display cannot be excluded where no pre-existing, clear, and objective standards constrained the Mayor's discretion. But the actual criteria used by

Warren in deciding to exclude FFRF's display create a separate and independent constitutional problem. The Mayor's letter suggests several different criteria; this section focuses on one of them. To put it simply, there is a genuine issue of material fact here as to whether Warren excluded FFRF's display because of its atheistic viewpoint. As this section explains, that would be unconstitutional. As such, the district court below should not have granted summary judgment to the defendant and its judgment should be reversed on that basis.

The parties to this case will surely debate the exact nature of this forum, but ultimately nothing should turn on that question. Viewpoint discrimination is unconstitutional in any kind of forum. *See Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 845 (6th Cir. 2000) ("In both designated public fora and nonpublic fora, the government may not discriminate based upon the viewpoint of the speaker."); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 170 (1996) (explaining how "the Court's own precedents [establish] that viewpoint discrimination is always and everywhere unconstitutional").

Viewpoint discrimination occurs, the Supreme Court has said, when the government "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). "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." *Morse v. Frederick*, 551 U.S. 393, 436 (2007) (citations and quotations omitted). And viewpoint discrimination is still viewpoint discrimination when multiple viewpoints are excluded. The idea that "no viewpoint discrimination occurs" when governments "discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar." *Rosenberger*, 515 U.S. at 831. "If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." *Id.*

Although viewpoint discrimination is always unconstitutional, it can be hard for plaintiffs to prove even when it exists. Governments can conceal their true motivations, so courts concerned about censorship must probe beyond stated reasons. "[T]he recitation of a nondiscriminatory rationale is not sufficient standing alone because it could be a cover-up for unlawful discrimination." *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Co.*, 653 F.3d 290, 297 (3d Cir. 2011); *see also Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985) ("The existence of reasonable grounds . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination."). Courts therefore permit plaintiffs to pursue claims with only

circumstantial evidence of viewpoint discrimination. *See Pittsburgh League*, 653 F.3d at 297 (noting that "[t]he [plaintiff] coalition is not armed with direct evidence of discrimination," but that "[t]his is hardly surprising" as "[t]he government rarely flatly admits it is engaging in viewpoint discrimination").

Direct evidence of viewpoint discrimination may be rare, but the plaintiffs have it in spades here. Several parts of the Mayor's letter suggest that FFRF's display was excluded because of its atheistic viewpoint. Most of the Mayor's letter is written in plain font. But the sentence that reads, "Your non-religion is not a recognized religion," is underlined and in bold face. Ex. H (Doc. # 26-9). The Mayor reiterates the same point two sentences later: "Clearly, your proposed display in effect would create considerable ill will among many people of all *recognized* faiths." *Id.* The Mayor's message is clear. The Mayor is concerned about recognized faiths, and atheism is not a recognized faith. That is why FFRF's display is not allowed.

This is direct evidence of viewpoint discrimination, but it is not the only such evidence. A paragraph in the Mayor's letter addresses FFRF's statement that religions make false claims. The Mayor says that this is "highly offensive" and "not a provable statement." *Id.* It adds that FFRF's claim that there are no gods and no angels is similarly "not provable." *Id.* It goes without saying that the Mayor cannot create a forum for religious displays, but then limit it to the religions

whose tenets he personally believes "provable." This is enough to create a genuine issue of material fact as to whether FFRF's display was excluded because of its atheistic viewpoint.

This Court must keep in mind, of course, that multiple reasons are often given for the exclusion of speech. When both permissible and impermissible reasons are given, the issue becomes whether the government's action would have been the same in the absence of the impermissible motive. But which of the Mayor's expressed motivations happened to predominate is a question for the finder of fact, which makes any grant of summary judgment improper. *See, e.g.*, *Lowery v. Jefferson County Bd. of Educ.*, 586 F.3d 427, 435 (6th Cir. 2009) (noting that "the mixed-motive inquiry is one for the jury, not for us, to decide"); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977) (establishing the rules about mixed-motive inquiries as regards viewpoint-discrimination).

Yet at various points in the court below, Warren seemed to contend that it could legitimately create a forum specifically for religion—a place where all religious views are equally welcome, but atheistic and other nonreligious views are properly rejected. This is an argument *amicus* seeks to rebut. Ultimately, it seems premised on a misunderstanding of a public forum doctrine. Over the past thirty years, the United States Supreme Court has repeatedly confronted state and local

governments trying to exclude religious groups from public property made generally available to other groups. In every such case, the Court has struck down the exclusion as unconstitutional viewpoint discrimination. *See 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); *Widmar v. Vincent*, 454 U.S. 263 (1981).

In *Widmar v. Vincent*, for example, the University of Missouri opened up its student center on a first-come, first-served basis to student organizations but refused to let religious groups use the space for religious activities. This, the Court held, was unconstitutional viewpoint discrimination: The government cannot "discriminate[] against student groups and speakers based on their desire to . . . engage in religious worship and discussion." *Widmar*, 454 U.S. at 269. Next was *Lamb's Chapel*, where a school district allowed private groups to use school facilities after hours, but only so long as they did not use the property for religious purposes. The Court concluded this was unconstitutional—a school district cannot deny access simply because "the presentation would have been from a religious perspective." *Lamb's Chapel*, 508 U.S. at 393-94. A few years later in *Rosenberger*, the Court struck down a policy of the University of Virginia that denied funding to a Christian magazine because of its religious nature. This too was viewpoint discrimination. *See Rosenberger*, 515 U.S. at 831. And finally, in

Good News Club, a local school district excluded a Christian student club from meeting on elementary school property after school. "[T]he exclusion of the Club on the basis of its religious perspective," the Court explained, "constitutes unconstitutional viewpoint discrimination." *Good News Club*, 533 U.S. at 108 n.2.

These cases stand for a very simple principle. Religious individuals and groups cannot be denied access to government property when that property is available to nonreligious individuals and groups. That is viewpoint discrimination, pure and simple. But this coin has two sides. If preferring nonreligious groups over religious ones is viewpoint discrimination, then preferring religious groups over nonreligious ones must also be viewpoint discrimination. This is logic at its most basic—if it violates equality to treat religious speech worse than secular speech, then it also must violate equality to treat it better.[2]

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[2] Another point comes in here as well. In the *Good News* line of cases, the government frequently argued that it was not discriminating against religious viewpoints but simply excluding religion as an appropriate subject matter for the forum. Although lower courts sometimes accepted that argument, the Supreme Court always rejected it. *See Good News Club*, 533 U.S. at 104-05 (noting that the district court and Second Circuit had accepted the government's claim that this was only a subject-matter exclusion rather than viewpoint discrimination, but then rejecting it); *Rosenberger*, 515 U.S. at 831 (concluding that "viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake" even though the University had argued it was just excluding religion as a subject matter). Warren could make a similar argument here; it could argue that it has not engaged in viewpoint discrimination but simply defined the subject matter of the forum in terms of religion. But, as explained above, that still violates the

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The Supreme Court held this directly in *Capitol Square v. Pinette*, 515 U.S. 753 (1995), a case arising out of the *Good News Club* line of cases. In *Pinette*, Ohio had kept the Klan from putting up a cross on a piece of public property made generally available to other groups. Ohio excluded the Klan not because the Klan was racist, but because its cross was religious; Ohio believed that allowing it would violate the Establishment Clause. *Id.* at 759. The Supreme Court rejected that argument and gave the Klan the right to put up its cross. In his opinion for a plurality of the Court, Justice Scalia made it clear that equality was a two-way street. Equality protected religious groups from being disfavored, but it simultaneously prohibited them from being favored:

> Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). And one can conceive of a case in which a governmental entity manipulates its administration of a public forum close to the seat of government (or within a government building) in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement that is in fact accurate. But those situations, which involve governmental favoritism, do not exist here.

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central principle of the *Good News* line of cases—the government cannot define the subject matter of the forum in terms of religion, whether to exclude religion altogether or to insist that all speech in the forum be religious. It is viewpoint discrimination either way.

Pinette, 515 U.S. at 766.

Indeed, the notion that the government cannot discriminate between religious and nonreligious speakers is so fundamental that it is defended vigorously even by those who believe that the government should itself promote religion. Justice Scalia has often argued for government sponsorship of religion, usually in dissent. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting) (arguing that the government can and should put up Ten Commandments displays); *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) (arguing that the government can and should organize prayers at public school graduations). But even Justice Scalia would not hesitate to strike down what Warren has done here. *See Pinette*, *supra*; *see also Good News Club*, 533 U.S. at 121 (Scalia, J., concurring) ("Religious expression cannot violate the Establishment Clause [when it is allowed] in a limited public forum, publicly announced, *whose boundaries are not drawn to favor religious groups*.") (emphasis added).

All this fits well with what must be the basic point of the viewpoint-discrimination principle in the first place—preventing the government from skewing debate on important societal issues. "Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the

First Amendment is plainly offended." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978). In our time, the most disputed theological issue is the existence of God. Theists claim there is a God; atheists deny it. The Free Speech Clause bars Warren from setting aside a piece of public property for one side but not the other. *See Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees.").[3]

[3] Both sides here think of the plaintiff as being outside of the category called religion. Warren has created this forum for religious displays. It does not want to include FFRF's atheistic display; it must perforce insist that atheism is not a religion. On the other side, FFRF does not want to be called religious either; as its display so enthusiastically explains, FFRF sees religion as nothing but myth and superstition.

But for First Amendment purposes, the Supreme Court has made it clear that atheism must be treated as a religion. Fifty years ago, the Court decided *Torcaso v. Watkins*, 367 U.S. 488 (1961), and held that Maryland could not force an atheist to swear a belief in God as a condition of assuming his office as a notary public. Atheism was treated like a religion for purposes of the Religion Clauses; atheists were free to invoke both the Free Exercise and Establishment Clauses. And since *Torcaso*, the Court has never backtracked on the idea that atheists too are equally entitled to religious liberty. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989) (noting that the First Amendment "guarantee[s] religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism"); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) ("[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."). For example, courts let atheists sue

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III. Excluding FFRF's Display Because It Was "Noncelebratory," "Controversial" or "Disparaging" Would Also Amount to Unconstitutional Viewpoint Discrimination.

While there is a genuine issue of material fact as to whether FFRF's display was excluded because of its atheistic viewpoint, Warren and the district court below also refer to a number of other possible criteria that Warren could have been

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under the Free Exercise Clause, *see Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005), and under religious-liberty legislation like the Religious Land Use and Institutionalized Persons Act, *see Kaufman v. Karlen*, 270 F. App'x 442 (7th Cir. 2008).

It has to be this way. If atheism were not treated as a religion, the state could affirmatively promote it. The public schools could teach atheism as true to our kindergarteners; the Establishment Clause would simply not apply. Atheists could be fired from their jobs without it being "religious" discrimination. *But see EEOC Compliance Manual, Religious Discrimination* § 12, at 7 (2008), *available at http://www.eeoc.gov/policy/docs/religion.html* ("The prohibition on discrimination and the requirement of reasonable accommodation . . . also extend to those who profess no religious beliefs."); *Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975) (allowing an atheist to sue for religious discrimination claim under Title VII); *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (same); *Shapolia v. Church of Jesus Christ of Latter-Day Saints*, 13 F.3d 406 (10th Cir. 1993) (same).

Thus even if this Court accepted the erroneous idea that a government could create a forum exclusively for "religious displays," Warren's action here still violated the First Amendment, because the First Amendment requires that FFRF's display be treated as a religious display. Seen from this perspective, Warren's exclusion of FFRF's display violated the terms of Warren's own policy, and is unconstitutional for that reason. *See, e.g.*, *Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set.").

using. The Mayor's letter said, for example, that FFRF's display would "provoke controversy" and that it was "disparaging." Ex. H (Doc. # 26-9). Going to great (and probably implausible) lengths to portray Warren's action in a favorable light, the court below concluded that the purpose behind the forum was "to celebrate the holiday season and promote good will." Dist. Ct. Op. (Doc. # 30) at 15. But these criteria are not viewpoint neutral.

Take, for example, Mayor's claim that FFRF's display had to be excluded because it was overly controversial. It is well-established that such a criterion is viewpoint-based. Justice Alito may have a narrower conception of the Free Speech Clause than anyone else on the current Supreme Court. *See Snyder v. Phelps*, __ U.S. __, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting by himself); *United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577, 1592 (2010) (Alito, J., dissenting by himself). But he put it well in a case he decided while on the Third Circuit: "To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint." *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004).

The Sixth Circuit too has said this. Indeed, this Court has a case directly on point. As discussed *supra*, in *United Food*, the government tried to remove

"controversial" advertisement from public buses. The Sixth Circuit gave several reasons why this was unconstitutional, but one of them was this:

> We believe any prohibition against 'controversial' advertisements unquestionably allows for viewpoint discrimination. A controversy arises where there exists a disputation concerning a matter of opinion. An opinion that conforms with prevailing community standards is unlikely to prove contentious . . . . A viewpoint challenging the beliefs of a significant segment of the public, however, frequently will generate discord. Thus, an ad's controversy often is inseparable from the viewpoint it conveys.

United Food, 163 F.3d at 361-62 (citations and quotations omitted); *see also Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 972 (9th Cir. 2008) ("[A] ban on controversial speech may all too easily lend itself to viewpoint discrimination."); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1230 (7th Cir. 1985) ("We question whether a regulation of speech that has as its touchstone a government official's subjective view that the speech is 'controversial' could ever pass constitutional muster.").

The same lesson applies here. The Mayor says that FFRF's display is controversial, but the display merely conveys FFRF's views on religion. It is FFRF's views on religion that are controversial. But if religious messages can be excluded on grounds that they are controversial (or "not provable," as the Mayor repeatedly says), then little free-speech protection will be left for religious minorities (or any minorities).

Even a ban on "disparaging" speech would not be viewpoint neutral. The Supreme Court has held this several times, most recently in its decision in *Snyder v. Phelps*. There a group of protestors faced civil liability for going to a military funeral and putting up signs disparaging gays and lesbians. *See id.*, 131 S. Ct. at 1210 (noting that the signs had said things like, "'You're Going to Hell' and 'God Hates You'"). The Supreme Court explained that liability had been imposed in a viewpoint-discriminatory fashion. "[A]ny distress occasioned by Westboro's picketing turned on the content *and viewpoint* of the message conveyed," the Court explained, because "[a] group of parishioners standing at the very spot where Westboro stood, holding signs that said 'God Bless America' and "God Loves You,' would not have been subjected to liability." *Id.* at 1219 (emphasis added).

The principle here is stunningly simple. To allow a positive affirming message ("God Loves You") while forbidding the negative disparaging opposite message ("God Hates You") is viewpoint discrimination. This is not dicta. This is the core of *Phelps*'s holding. Had liability been imposed on content and viewpoint-neutral grounds—if, for example, Westboro had been fined for protesting over megaphones over a certain established decibel level—there would

have been no constitutional problem. *See Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding noise-level restrictions).[4]

And *Phelps* is no outlier. It accords with earlier Supreme Court cases that take the same position. In *Texas v. Johnson*, 491 U.S. 397 (1989), the Court struck down a statute that forbade desecration of a flag, with desecration defined to include any acts that "deface, damage, or otherwise physically mistreat [the flag] in a way that the actor knows *will seriously offend* one or more persons." *Id.* at 400 n.1 (emphasis added). A ban only on flag burning that viewers consider "offensive" is not viewpoint neutral. *See id.* at 416-17 (holding that it was impermissible for the State "to forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role," as it would be permitting speech "only in one direction"). Earlier in *Schacht v. United States*, 398 U.S. 58 (1970), the Court had struck down a statute that forbade

[4] A recent Supreme Court case confirms this conception of viewpoint neutrality. In *United States v. Alvarez*, __ U.S. __, 132 S. Ct. 2537 (2012), the Court struck down the Stolen Valor Act, which prohibited people making false statements about their military service. There were three dissenters who would have upheld the Act. Writing for those Justices, Justice Alito defended the Act as being "strictly viewpoint neutral." *Id.* at 2557 (Alito, J., dissenting). This was so, he explained, because "the Act applies equally to all false statements, whether they tend to *disparage or commend* the Government, the military, or the system of military honors." *Id.* (Alito, J., dissenting) (emphasis added). Thus even the *Alvarez* dissenters (with their narrower view of what the Free Speech Clause protects) recognize that a ban on "disparaging" comments is not viewpoint neutral.

the wearing of a military uniform in a way that would "tend to bring the military into discredit and disrepute." *Id.* at 63. Discriminating against speech that discredits or brings into disrepute is impermissible, as it "leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it," and thus "cannot survive in a country which has the First Amendment." *Id.*

The moral of these cases is that restrictions on "disparaging" speech are not viewpoint neutral. But the reasons for that conclusion are particularly salient and obvious here. *Any* statement of FFRF's views can be construed as disparaging to theistic faiths, because atheism inherently denies what theists believe to be true. It is a fact that different religions make incompatible claims. Christians believe in a triune God; Jews and Muslims do not. Theists believe in some sort of God; atheists do not. Atheists cannot talk about what they believe and why they believe it without simultaneously disparaging what theists believe. This case is thus a practical demonstration of how a limitation on "disparaging" speech is tantamount to a limitation on viewpoint.

Finally, the court below suggested another possible rationale for Warren's exclusion of FFRF's display, arguing that Warren could properly restrict the forum to signs that "celebrate the holiday season and promote good will." Dist. Ct. Op. (Doc. # 30) at 15. But this point encounters two problems. For one thing, there is simply no evidence that this is actually what Warren did. As explained earlier,

objective criteria must be laid out by Warren in advance. Warren cannot simply act in whatever fashion it chooses, and then have an overly generous district court save it by inventing a viewpoint-neutral justification that was not the real motivation for Warren's actions. And then second, this rationale is still not viewpoint neutral. "Celebrating" is viewpoint discriminatory on its face. So is "promoting good will." Both of these criteria allow speakers who are positive about religious holidays, but not those who are negative about the same subject. These are restrictions on viewpoint masquerading as restrictions on subject matter. *See United Food*, 163 F.3d at 362 (finding viewpoint discrimination where "it is the *treatment* of a subject, not the subject itself, that is disfavored" (emphasis in original) (citations and quotations omitted)); *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 960 (S.D. Cal. 1997) (striking down as a "classic form of viewpoint discrimination" a rule that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)"); *Air Line Pilots Ass'n Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1995) ("The appropriate focus of the viewpoint inquiry examines whether the proposed speech dealt with a subject that was otherwise permissible in a given forum." (quotations omitted)).

None of this ties Warren's hands in some impossible way. Provided it adopts a clear policy in advance, there are a number of ways in which Warren can regulate the content of the displays it allows in its atrium without committing the cardinal sin of viewpoint discrimination. A ban on profanity, for example, would be content-based but viewpoint-neutral, and thus permissible in a limited public forum. *See Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001) (upholding a ban on license plates containing profanities on this ground).[5] The same is true for a ban on displays with false factual statements, *see United States v. Alvarez*, __ U.S. __, 132 S. Ct. 2537 (2012), or a ban on displays that advertise political candidates, *see Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). And, of course, Warren could simply choose to close its atrium to all holiday-related speech. But Warren cannot do what it has done here. It cannot exclude the holiday display of a disfavored atheist group while allowing the displays of "recognized" religions.

[5] This is consistent with *Cohen v. California*, 403 U.S. 15 (1971), which invalidated the conviction of a man who wore a jacket that said "Fuck the Draft" in a courthouse. *Cohen* made clear that it was invalidating a general state-wide ban on profanity, and that it would be a different case if California had simply tried to restrict profanity that occurred on governmental property. *See id.* at 19.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, with directions that this case proceed to trial.

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Respectfully submitted,

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Amicus designates as relevant to its brief the following documents from the district court's electronic docket, Case No. 2:11-cv-15617 (E.D. Mich.):

Ex. 6 to Defs.' Mot. for Summ. J. ..... Doc. # 18-7
Ex. H to Pls.' Resp. to Defs.' Mot. for Summ. J. ..... Doc. # 26-9
Dist. Ct. Op. ..... Doc. # 30

CERTIFICATION OF COMPLIANCE UNDER RULE 32(a)(7)(C)

I hereby certify that this brief complies with Fed. RR. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,875 words, including footnotes and excluding parts of the brief not counted under Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2012, I filed this brief using the Sixth Circuit's ECF system, which will serve it electronically on:

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