No. 12-1858

In the United States Court of Appeals
for the Sixth Circuit

Freedom From Religion Foundation, Inc., et al.
Plaintiffs-Appellants,

v.

City of Warren, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan
No. 11-cv-15617 (Honorable Lawrence P. Zatkoff)

Brief of *Amicus Curiae* Americans United for Separation of Church and State in Support of Appellants and in Support of Reversal

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Disclosure of Corporate Affiliations and Financial Interest

Pursuant to Sixth Circuit Rule 26.1, *Amicus Curiae* Americans United for Separation of Church and State makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

NO

2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

NO

/s/ Shelli L. Calland

October 4, 2012 Shelli L. Calland

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Interest of Amicus Curiae

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C.[1] Its mission is twofold: (1) to advance the free-exercise right of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since it was founded in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in numerous church-state cases, including many cases before this Court.

As part of its commitment to ensuring that the state remains neutral on questions of religion, Americans United works to ensure that government entities do not favor particular religions—or religion more generally—when purporting to open forums to the public for private

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[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* states that no party's counsel authored this brief in whole or in part; and that no party, party's counsel, or person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

speech. Here, Americans United is concerned that the City, although purporting to open up the Civic Center for holiday displays, has excluded displays that do not comport with the majority's beliefs about religion.

Introduction

Defendants openly discriminate on the basis of religious belief and religious viewpoint in regulating the use of the Civic Center atrium for holiday displays. Displays that celebrate religious holidays are permitted, but displays that celebrate non-religious holidays are prohibited; displays that promote religious beliefs are allowed, yet displays that criticize religious beliefs are excluded. And all decisions about whether to accept or reject proposed displays are made by the Mayor—in his sole, unfettered discretion—without any clear or concrete guidelines to restrain his authority to make decisions on the basis of the content or viewpoint of proposed private speech.

After Defendants allowed the Civic Center to host a Christmas holiday display that included a Nativity Scene sponsored by the Warren Rotary Club, as well as a prayer station, Plaintiffs complained to the City. In response, the Mayor told Plaintiffs that "[a]ll *religions* are

welcome to celebrate their *religious* seasons with a display in city hall." (R. 1, Page ID 24, Compl., Ex. 4, Dec. 8, 2010 Ltr. (emphasis added).) Defendants then rejected Plaintiffs' proposed display, which celebrated a secular holiday and stated, "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." (R. 1, Page ID 28, Compl., Ex. 5, Dec. 9, 2011 Ltr.)

The Mayor's contemporaneous statements leave little doubt about the reasons for Defendants' decision. First, the Mayor objected that Plaintiffs' display sought to celebrate a secular holiday, not a religious one: "**Your non-religion is not a recognized religion.** Please don't hide behind the cloak of non-religion as an excuse to abuse other recognized religions." (R. 1, Page ID 56, Compl., Ex. 8, Dec. 21, 2011 Ltr.)

Second, Defendants took issue with Plaintiffs' criticism of religion and rebuttal of the pro-religion message inherent in the Nativity Scene:

- "I have reviewed the [proposed sign]. The language on the proposed sign is clearly anti-religion and meant to counter the religious tone of the Nativity Scene, which could lead to confrontations and a disruption of city hall."
- "Your phrase that 'Religion is but myth and superstition that hardens hearts and enslaves minds,' is highly offensive and is not a provable statement. Likewise, your statement that there are 'no gods' and 'no angels' is also not provable."
- "Your proposed sign cannot be excused as a freedom of religion statement because, to my way of thinking, this right does not mean the right to attack religion or any religion with mean-spirited signs."

(R. 1, Page ID 56, Compl., Ex. 8, Dec. 21, 2011 Ltr.) Indeed, after rejecting Plaintiffs' display, the Mayor later touted his "Defense of Nativity at Warren City Hall." (R. 1, Page ID 58, Compl., Ex. 9, Screenshot of City of Warren website.)

It would be difficult to conceive of more explicit examples of unlawful discrimination on the basis of the speaker's religious belief and religious viewpoint. Defendants permitted the celebration of

religious holidays but not secular ones, and Defendants permitted displays that promote religion but not displays that criticize it. Such discrimination on the basis of religious belief and religious viewpoint violates both the Free Speech Clause and the Establishment Clause of the First Amendment.

Despite the Mayor's candor about his preference for celebration of religion and his opposition to criticism of religion, the district court upheld the exclusion of Plaintiffs' display on the ground that it would have caused community uproar in the Civic Center. But the First Amendment does not permit the government to sustain a heckler's veto by barring controversial viewpoints on otherwise permissible topics. In any event, given the Mayor's articulated dislike of the message in Plaintiffs' display, a reasonable factfinder could readily conclude that Defendants' rejection of the Sign was impermissibly motivated by a desire to suppress that message. Finally, Defendants impermissibly vested the Mayor with unbridled discretion to accept or reject speech without any meaningful standards; this type of limitless discretion is itself unlawful because it creates the risk of censorship.

Defendants may create a limited public forum for displays celebrating seasonal holidays. But they may not limit those displays to those celebrating religious holidays, they may not allow praise of religion but ban criticism of it, and they may not determine eligibility for the forum through unfettered discretion unguided by clear, explicit standards. Accordingly, the district court's judgment should be reversed.

Argument

I. Defendants' Exclusion Of Secular Holiday Displays And Displays That Criticize Religion Violates Freedom Of Speech.

A. Defendants impermissibly discriminated against Plaintiffs' viewpoint about religion.

Defendants excluded Plaintiffs' proposed display because it (1) celebrated a secular holiday, rather than a religious one, and (2) criticized religion, rather than promoted it. In so doing, Defendants violated the most basic of free-speech principles: the First Amendment "prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted). Whether the public forum that Defendants created is traditional, designated, or

limited, Defendants "may not discriminate based upon the viewpoint of the speaker." *The Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 845 (6th Cir. 2000) (citation omitted).

Defendants' own statements reflect that they discriminated against Plaintiffs' viewpoint in at least two ways. *First*, Defendants permitted displays related to religious holidays but not displays related to secular ones. The Mayor initially advised Plaintiffs that "[a]ll *religions* are welcome to celebrate their *religious* seasons with a display in city hall." (R. 1, Page ID 24, Compl., Ex. 4, Dec. 8, 2010 Ltr. (emphasis added).) Then, in rejecting Plaintiffs' proposed display celebrating the winter solstice, the Mayor stressed that "**[y]our non-religion is not a recognized religion.** Please don't hide behind the cloak of non-religion as an excuse to abuse other recognized religions." (R. 1, Page ID 56, Compl., Ex. 8, Dec. 21, 2011 Ltr. (emphasis in original).)

But the government may not exclude speech on an otherwise permissible topic—in this case, seasonal holidays—based upon whether that speech is from a religious or non-religious perspective. *See, e.g.*, *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 109 (2001) (school

district impermissibly discriminated on basis of viewpoint by prohibiting after-school use of facilities by club that "seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (same where school district excluded film series that "dealt with a subject otherwise permissible under [the policy], and its exhibition was denied solely because the series dealt with the subject from a religious standpoint"); *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 779 (7th Cir. 2010) ("the University of Wisconsin has chosen to pay for student-led counseling, and its decision to exclude counseling that features prayer is forbidden"). Having opened up the Civic Center atrium for speech related to seasonal holidays, Defendants may not exclude speech by those who wish to celebrate holidays that are secular rather than religious.

Second, Defendants permitted only seasonal displays that promoted religion while excluding messages that criticized religion. Plaintiffs sought to challenge the inherently pro-religion message of the Nativity Scene by stating, "There is only our natural world. Religion is

but myth and superstition that hardens hearts and enslaves minds." (R. 1, Page ID 28, Compl., Ex. 5, Dec. 9, 2011 Ltr.) In response, the Mayor declared that he was excluding Plaintiffs' display because the "language on the proposed sign is clearly anti-religion and meant to counter the religious tone of the Nativity Scene." (R. 1, Page ID 55, Compl., Ex. 8, Dec. 21, 2011 Ltr.) He reiterated that he found Plaintiffs' proposed sign to be "antagonistic toward all religions," "highly offensive," and a "desecration of religion." (*Id.* at Page ID 55–56.) He insisted that freedom of religion "does not mean the right to attack religion or any religion with mean-spirited signs." (*Id.* at Page ID 56.) And he maintained that he "cannot and will not sanction the desecration of religion in the Warren City Hall atrium." (*Id.*)

Defendants compounded this viewpoint discrimination by allowing pro-religious displays to make non-provable statements, while prohibiting Plaintiffs from doing the same. The Mayor told Plaintiffs, "Your phrase that 'Religion is but myth and superstition that hardens hearts and enslaves minds,' is highly offensive and is not a provable statement. Likewise, your statement that there are 'no gods' and 'no angels' is also not provable." (*Id.* at Page ID 55.) But there is no

indication that Defendants required the Rotary Club, for instance, to prove that the events depicted in the Nativity Scene actually took place.

By permitting the promotion of religion but not the criticism of religion, Defendants committed a quintessential violation of the right to free speech: "To permit one side of a debatable public question to have a monopoly in expressing its views ... is the antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175–76 (1976).

B. Defendants may not sustain a heckler's veto by discriminating against viewpoints on religion that might "provoke controversy."

Defendants also violated Plaintiffs' right to free speech by excluding their viewpoints on the ground that they might "provoke controversy and hostility." (R. 1, Page ID 55, Compl., Ex. 8, Dec. 21, 2011 Ltr.) Before the district court, Defendants argued that they were permitted to exclude Plaintiffs' viewpoints on religion because they "could lead to confrontations and a disruption of City Hall." (*Id.*) The district court accepted that rationale, holding that the Mayor properly rejected Plaintiffs' sign due to its "potential for conflict." (R. 30, Page ID 503, Opinion and Order at p. 20.)

But even if a particular viewpoint is controversial, the government "must permit the speech and control the crowd; there is no heckler's veto." *Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005) (internal quotation marks and citation omitted). Indeed, because speech "challenging the beliefs of a significant segment of the public ... frequently will generate discord," a statement's "controversy often is inseparable from the viewpoint it conveys." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 362 (6th Cir. 1998) ("*UCFW*").

This has been the law for decades, it has been reiterated over and over by the Supreme Court and this Court, and it has protected viewpoints far more inflammatory than those at issue here. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 395–96 (school district could not prohibit "radical church" from speaking on an otherwise permissible topic, notwithstanding the school district's purported fear of "public unrest and even violence"; such a justification "would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the District otherwise opens to discussion on District property"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("[T]he Government may not

prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (citations omitted); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression.") (citations omitted); *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) ("The state may not rely on community hostility and threats of violence to justify censorship."); *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973) ("[S]tate officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights.") (citations omitted). Ultimately, "a function of free speech under our system of government is to invite dispute," and speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

Thus, once Defendants opened the Civic Center to displays about seasonal holidays, they could not prohibit Plaintiffs' viewpoints about those holidays on the ground that such viewpoints were likely to cause controversy.

C. *The district court substituted its own opinions of Defendants' motivations for those of a reasonable factfinder.*

The district court ignored substantial evidence that would enable a reasonable factfinder to conclude that Defendants were in fact motivated by antipathy toward Plaintiffs' views about religion. "Where the proffered justification for restricting access to a [forum] is facially legitimate, the government nevertheless violates the First Amendment when its stated purpose in reality conceals a bias against the viewpoint advanced by the excluded speakers." *UCFW*, 163 F.3d at 356 (citation omitted).

Here, there was no shortage of contemporaneous statements by the Mayor demonstrating that his decision was motivated by hostility towards Plaintiffs' religious viewpoints:

- "Your phrase that 'Religion is but myth and superstition that hardens hearts and enslaves minds,' is highly offensive and is not a provable statement."
- "[N]o organization has the right to disparage the beliefs of many Warren and U.S. citizens because of their beliefs. Thus, I cannot and will not sanction the desecration of religion in the Warren City Hall atrium."

- "Your proposed sign cannot be excused as a freedom of religion statement because, to my way of thinking, this right does not mean the right to attack religion or any religion with mean-spirited signs."
- "**Your non-religion is not a recognized religion.**"

(R. 1, Page ID 55–56, Compl., Ex. 8, Dec. 21, 2011 Ltr (emphasis in original).) Moreover, in listing his accomplishments as mayor on the City's website, the Mayor touted not his avoidance of disruption in City Hall, but rather his "Defense of Nativity at Warren City Hall." (R. 1, Page ID 58, Compl., Ex. 9, Screenshot of City of Warren website.)

Despite the Mayor's candor about his distaste for Plaintiffs' viewpoints, the district court concluded that "the letters are consistent with the Mayor's decision to deny placement of the Sign based on its non-celebratory and antagonistic nature and its potential for conflict under the relevant circumstances." (R. 30, Page ID 503, Opinion and Order at p. 20.) But even if Defendants were permitted to exclude viewpoints on the basis of their potential for controversy, this Court has held repeatedly—including twice this past year—that on summary judgment, district courts may not substitute their own views of the

record for those of the factfinder, including and especially when the defendants have made contemporaneous statements reflecting hostility toward plaintiffs' particular views about religion.

First, in *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), the district court had granted summary judgment against a student who alleged that she was expelled from a university's counseling program because of her religious beliefs. The university argued that it had expelled the student because she insisted on referring certain of her clinical clients to another counselor, but at the student's formal review, "[m]any of the participants' comments and questions focused on [the student's] beliefs and her religious objection." *Id.* at 737. This Court explained that "[t]hese statements represent the contemporaneous thoughts of the decision-makers who dismissed [the student], and they permit the inference that [the student's] religious beliefs motivated their actions, particularly in the absence of a formal policy." *Id.* at 738. Because of those contemporaneous statements, "a reasonable jury could conclude that [the student's] professors ejected her from the counseling program because of hostility toward her speech and faith, not due to a policy against referrals." *Id.* at 730.

Second, in *Satawa v. Macomb County Road Commission*, 689 F.3d 506 (6th Cir. 2012), the defendant had prohibited the plaintiff from displaying a crèche on the median of a highway. The district court held "that, as the defendants' litigating papers[] suggested, safety was at least part of the Board's motivation for denying the permit." *Id.* at 523. But the contemporaneous evidence reflected that the county discussed only "religious concerns," not safety. *Id.* Thus, the record permitted "the reasonable inference that the Board's self-serving (but still questionable) litigation documents were designed to conceal its real reason for denying the permit: the crèche's religious content." *Id.* at 524. This was "especially so at the summary-judgment stage, where [the Court] must construe the record in [the plaintiff's] favor." *Id.* at 523.

Third, in *Putnam Pit*, this Court reversed a grant of summary judgment for a city in a case in which the plaintiff alleged that the city impermissibly refused to link his website to the city's website. The city had pointed to a policy of linking only to sites that promoted the city's economy, welfare, or tourism. *See* 221 F.3d at 845. Summary judgment was inappropriate, however, because a city official's statements—including a statement that the plaintiff's publication presented opinions

that the official "didn't care for"—"raised a material issue of fact regarding whether the city discriminated against [the plaintiff] and his Web site based upon viewpoint." *Id.* at 846.

This Court's decisions in *Ward*, *Satawa*, and *Putnam Pit* illustrate that whatever rationale Defendants now offer in their legal papers, Defendants' contemporaneous statements cannot be ignored. Those statements could easily enable a reasonable factfinder to conclude that Defendants rejected Plaintiffs' sign out of disagreement with Plaintiffs' views about religion.

Finally, the veracity of Defendants' alleged controversy-avoidance motivation is further undermined (or so a reasonable factfinder could conclude) because Defendants have previously permitted controversial speech that was pro-religious. *See Ward*, 667 F.3d at 737 (when university claimed that plaintiff violated no-referral policy but permitted another student to make a referral, reasonable factfinder could infer that university's actions were motivated by disagreement with plaintiff's religious speech). In correspondence with Plaintiffs, the Mayor acknowledged that he had received "many calls" objecting to "a display in city hall celebrating Ramadan, the Moslem holy season." (R.

1, Page ID 56, Compl., Ex. 8, Dec. 21, 2011 Ltr.) But Defendants did not prohibit this pro-Islam display, even though it was apparently controversial. Because Defendants have permitted controversial pro-religious speech, but excluded Plaintiffs' allegedly controversial speech that was critical of religion, a reasonable factfinder would have an additional reason to conclude that Defendants' decision was motivated by opposition to Plaintiffs' views about religion.

D. Defendants may not vest the Mayor with unbridled discretion over holiday displays.

Defendants' regulation of holiday displays in the Civic Center atrium presents another fundamental First Amendment problem: Defendants have failed to articulate specific, meaningful standards governing who may contribute an item to a holiday display and what that item may be or say. Instead, the City authorizes the Mayor to act as a one-man standards board, assigning him total control over what speech is in and what speech is out.

The First Amendment, however, "prohibits the vesting of such unbridled discretion in a government official." *Forsyth Cnty. v. Nat'list Movement*, 505 U.S. 123, 133 (1992). The risk of viewpoint discrimination "is at its zenith when the determination of who may

speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988). Moreover, "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Consequently, "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.'" *UFCW*, 163 F.3d at 359 (citations omitted).

The record reflects that no rules guide the Mayor's approval and disapproval of holiday displays. The only arguable source of potential standards, the Warren Civic Center Rental Policies and Rules, pertains only to individuals and groups who want to rent space at the Civic Center for private meetings and parties, not to individuals and groups seeking to place a public sign in the atrium. (*See* R. 18, Page ID 273–280, Defs.' Mot. for Summ. J., Ex. 6.) Accordingly, the Mayor did not cite or rely upon those rental policies when explaining his decision. And

even if the rental policies did apply here, they too lack any objective criteria sufficient to curb the Mayor's discretion; the rental policies mention only "the nature of the meeting" and whether the "content of the meeting/activity [would] interfere with the rights of the general public or the [City's] proprietary functions," without any guidance about how these open-ended standards are to be defined or applied. (*Id.* at Page ID 274.)

Even the process for obtaining City approval was ad hoc and irregular. Plaintiffs initially requested permission to display their sign from the Mayor, but they were told to direct their request to the City agency purportedly responsible for approving displays in the Civic Center. (It is unclear whether other organizations, including the organization that sponsored the Nativity Scene, were also required to submit a rental application to that agency, or if this was a special hurdle that only Plaintiffs were required to clear.) Yet after Plaintiffs followed these instructions, it was the Mayor who ultimately denied Plaintiffs' request to place the sign in the Civic Center atrium. (R. 1, Page ID 55–56, Compl., Ex. 8, Dec. 21, 2011 Ltr. ("*I have reviewed* the proposed 2-sided 'sandwich board' sign.... As *I would not allow displays*

disparaging any one religion, so *I will not allow* anyone or any organization to attack religion in general.... When *I allowed a display* in city hall celebrating Ramadan ....) (emphasis added).) Defendants have not contradicted the Mayor's claim to this unrestricted power.

Both the Supreme Court and this Court have consistently held that such general and imprecise standards and procedures are unconstitutional because they depend too heavily on the subjective views of public officials. In *Forsyth County*, the Supreme Court invalidated an ordinance authorizing a county administrator to set permit fees on an applicant-by-applicant basis: "The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others ...." 505 U.S. at 133. In *UFCW*, the Court invalidated a transit authority's advertising policy because its prohibition of "controversial" advertisements "invite[d] 'subjective or discriminatory enforcement.'" 163 F.3d at 360 (citation omitted). In *Miller v. City of Cincinnati*, 622 F.3d 524 (6th Cir. 2010), the Court invalidated an administrative regulation governing access to the

interior of city hall where "the only direction provided" was that "the purpose of the interior of city hall is to allow City officials 'to exercise the rights and responsibilities specified in the Charter of the City of Cincinnati.'" *Id.* at 539–40. And in *Leonardson v. City of East Lansing*, 896 F.2d 190 (6th Cir. 1990), the Court invalidated an ordinance allowing the mayor to establish a police line "if he believes it is necessary to 'prevent, suppress, or contain' an event that may become a public disturbance": such a scheme "fails to provide a clear standard to guide the discretion of the mayor" and nothing "prevent[ed] the use of the Ordinance prospectively against activities that are entitled to protection under the First Amendment." *Id.* at 197–98.

As Defendants' actions in this case illustrate, "[t]he absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *UFCW*, 163 F.3d at 359 (citation omitted). The First Amendment prohibits Defendants from granting the Mayor such unlimited and arbitrary authority—whether or not that authority is actually abused in the way it was abused here.

II. The Establishment Clause Prohibits Defendants From Excluding Displays That Celebrate Secular Holidays Or Criticize Religion.

The City's exclusion of non-religious or anti-religious displays also violates the Establishment Clause, which "guarantee[s] religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989) (quotation marks omitted). The government must remain neutral between religion and nonreligion, *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005), and may not "aid, foster, or promote one religion or religious theory against another or *even against the militant opposite*." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (emphasis added).

Here, a reasonable factfinder could conclude that the City impermissibly favored religion by (1) allowing displays relating to religious holidays but not secular holidays, and (2) allowing displays that promote religion but not displays that criticize religion.

Under the familiar test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court asks "(1) whether the government's predominant purpose was secular; (2) whether the government action has the

purpose or effect of endorsing religion, and (3) whether the action fosters an excessive entanglement with religion." *Satawa*, 689 F.3d at 526 (citations omitted). On this record, a reasonable factfinder could easily conclude that Defendants' exclusion of Plaintiffs' display violates one or more of these elements.

A. A reasonable factfinder could conclude that Defendants acted with a religious purpose.

To comply with the Establishment Clause, the government must act with a purpose that is predominantly secular. *See Satawa*, 689 F.3d at 526. Moreover, it is not enough for the government merely to recite a secular purpose; the Court must "ensure that the secular purpose required was genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 527 (quotations omitted).

A reasonable factfinder could conclude that Defendants' exclusion of Plaintiffs' display resulted from a desire to promote religion in Civic Center. Contrary to the district court's suggestion, this is not a case in which the factfinder would need simply to "assume the Mayor had ulterior motives." (R. 30, Page ID 505, Opinion and Order at p. 22.) Instead, evidence of Defendants' religious motivation permeates the record.

First, the record reflects that Defendants excluded Plaintiffs' display because it sought to celebrate a holiday that was secular rather than religious. For example, the Mayor made it clear that only religious displays would be welcome: "[I]f any religion wants its display at Warren city hall, they are welcome." (R. 1, Page ID 24, Compl., Ex. 4, Dec. 8, 2010 Ltr.) The Mayor also justified his exclusion of Plaintiffs' display on the ground that Plaintiffs do not adhere to a "recognized religion" and that Plaintiffs' beliefs are "non-religion." (R. 1, Page ID 56, Compl., Ex. 8, Dec. 21, 2011 Ltr.)

Second, the record reflects that Defendants excluded Plaintiffs' display on the ground that it criticized religion. For instance, in rejecting Plaintiffs' display, the Mayor stated that he "cannot and will not sanction the desecration of religion in the Warren City Hall atrium." (R. 1, Page ID 56, Compl., Ex. 8, Dec. 21, 2011 Ltr.) He told Plaintiffs, "Your phrase that 'Religion is but myth and superstition that hardens hearts and enslaves minds,' is highly offensive and is not a provable statement." (*Id.* at Page ID 55.) He asserted that "[y]our proposed sign cannot be excused as a freedom of religion statement because, to my way of thinking, this right does not mean the right to attack religion or

any religion with mean-spirited signs." (*Id.* at Page ID 56.) And in listing his accomplishments as mayor on the City's website, the Mayor characterized his decision to exclude the Plaintiffs' sign in religious terms, by referring to his "Defense of Nativity at Warren City Hall." (R. 1, Page ID 58, Compl., Ex. 9, Screenshot of City of Warren website.)

It is well settled that "government should not prefer one religion to another, or religion to irreligion." *Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994). Here, the Mayor's own statements would enable a reasonable factfinder to conclude that Defendants excluded Plaintiffs' display based on a preference for displays celebrating religious holidays and an opposition to displays that criticized religion.

B. A reasonable factfinder could conclude that Defendants endorsed religion.

The government may not take action that has the "effect of endorsing religion," *Satawa*, 689 F.3d at 526, because it impermissibly "sends a message to nonadherents that they are outsiders, not full members of the political community," *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). Here, the record would enable a reasonable factfinder to

conclude that Defendants' bias against secular displays and criticism of religion had the effect of endorsing religion.

As detailed above, Defendants permitted religious holiday displays but excluded Plaintiffs' celebration of the winter solstice; and Defendants allowed displays to promote religion but excluded Plaintiffs' criticism of religion. In addition, Defendants required that the statements in Plaintiffs' display be "provable" (R. 1, Page ID 55, Compl., Ex. 8, Dec. 21, 2011 Ltr.), but did not apply the same requirement to religious displays. In excluding Plaintiffs' display on these grounds, Defendants impermissibly gave religion a preferred status.

C. A reasonable factfinder could conclude that Defendants fostered excessive entanglement with religion.

Defendants' attempts to determine whether Plaintiffs' religion was a "recognized religion" and to assess the "provability" of their statements about religion excessively entangled the government in religious judgments. Impermissible entanglement occurs "where the government is placed in the position of deciding between competing religious views." *Petruska v. Gannon Univ.*, 462 F.3d 294, 311 (3d Cir. 2006); *Lemon*, 403 U.S. at 612–13.

A reasonable factfinder could conclude that the Mayor's inquiry into the legitimacy of the Plaintiffs' religious beliefs and provability of their statements about religion impermissibly arbitrates between competing religious views. Courts have repeatedly held that the government may not inquire into the validity or legitimacy of particular religious views. *See, e.g.*, *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) (government may not engage in "the unacceptable business of evaluating the relative merits of differing religious claims.") (quotation marks omitted); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 n.9 (1987) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs"); *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *United States v. Ballard*, 322 U.S. 78, 87–88 (1944) (First Amendment prohibits inquiry into truthfulness of religious tenets, even in mail-fraud prosecution where truthfulness of religious statements used in solicitations would otherwise be relevant). In short, the First Amendment requires Defendants to "refrain from trolling through a

person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

* * *

Defendants allowed displays about religious holidays, yet barred displays about secular holidays; Defendants allowed promotion of religion, while excluding criticism of it. In favoring religious holidays and religious promotion, Defendants abandoned the Establishment Clause's requirement of religious neutrality.

Conclusion

The judgment of the district court should be reversed.

Respectfully submitted,

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Certificate of Compliance

I certify that this brief was prepared in Century Schoolbook, 14 point font. According to the word count function, and in accordance with the computation rules set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the brief contains 5,491 words.

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Certificate of Service

I certify that on October 4, 2012, a copy of this brief was served on all parties through the Court's electronic filing system.

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