Case No. 12-1858

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT - STATE OF MICHIGAN

FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin non-profit corporation, and DOUGLAS J. MARSHALL, a Michigan individual,

Plaintiffs – Appellants

v.

CITY OF WARREN, MICHIGAN, CITY OF WARREN DOWNTOWN DEVELOPMENT AUTHORITY, and JAMES R FOUTS, Mayor of Warren, Michigan,

Defendants – Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
No. 2-11-cv-15617
Honorable Lawrence P. Zatkoff

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DEFENDANTS/APPELLEES' BRIEF ON APPEAL

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III. REQUEST FOR ORAL ARGUMENT

Defendants-Appellees request oral argument. Although the applicable law is clear and the relevant facts have been presented on stipulation of the parties, Defendants-Appellees believe that oral argument would be of assistance to the Court to address Plaintiffs-Appellants consistent misapplication of precedent, tortured reading of correspondences authored by Defendants and the many issues raised in Amicus Briefs which could not all be addressed in this Brief on Appeal due to page limitations.

IV. JURISDICTIONAL STATEMENT

Defendants-Appellees do not dispute the jurisdictional statement set forth in Plaintiffs-Appellants' (Corrected) Brief on Appeal.

V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the District Court Properly Recognize that the Holiday Display within the Atrium of Warren's Municipal Building is a Non-Public or, at Best, a Limited Public Forum?

Appellees Answer: **Yes.**
Appellants Answer: **No.**
The District Court Answer: **Yes.**

B. Was the Exclusion of Appellants' Antagonistic "Winter Solstice" Sign Reasonable and Viewpoint Neutral Where it Presented a Political Debate about Religion and Was to be Placed so as to Overtly Attack the Other Traditional, Secular, Passive Symbols that Had Previously Been Permitted in the Holiday Display?

Appellees Answer: **Yes.**
Appellants Answer: **No.**
The District Court Answer: **Yes.**

C. Did Appellants Fail to Preserve Their Right to Assert a Facial or As-Applied Challenge of Warren's Rental Policy that Governs Access to the Atrium of the Municipal Building?

Appellees Answer: **Yes.**
Appellants Answer: **No.**
The District Court Answer: **Yes.**

D. Have Appellants Failed to Present a Valid Challenge to Warren's Rental Policy that Governs Access to the Atrium of the Municipal Building Where they Rely on Nothing More than Speculation and Argument?

Appellees Answer: **Yes.**
Appellants Answer: **No.**
The District Court Answer: **Yes.**

E. Is the Incorporation of a Creche in a Municipal Holiday Display Permitted Under the Establishment Clause of the First Amendment?

Appellees Answer: **Yes.**
Appellants Answer: **No.**
The District Court Answer: **Yes.**

F. Was Summary Dismissal of the Establishment Clause Claim Required Where There is No Evidence that Appellees "Endorsed" Religion By Incorporation of Creche in the Holiday Display and Given that the "Winter Solstice" Sign Was Appropriately Excluded From the Holiday Display Based on Viewpoint Neutral Considerations?

Appellees Answer: **Yes.**
Appellants Answer: **No.**
The District Court Answer: **Yes.**

G. Did the Trial Court Properly Dismiss Appellants' Equal Protection Claim Where the Denial of the "Winter Solstice" Sign was Rationally Related to Preservation of the Character of the Holiday Display and Avoidance of Disruption in City Hall and Where There is No Evidence of Discriminatory Purpose?

Appellees Answer: **Yes.**
Appellants Answer: **No.**
The District Court Answer: **Yes.**

VI. STATEMENT OF THE CASE

This case was initiated by Plaintiffs Freedom from Religion Foundation, Inc. and its member Douglas J. Marshall (collectively hereinafter "Plaintiffs" or "FFRF") who claim that Appellees violated their First Amendment right to free speech by excluding a proposed "Winter Solstice" sign from being placed immediately next to a crèche that is part of Warren's seasonal holiday display during the month of December each year. This holiday display is located in the interior atrium of Warren's Municipal Building. Appellants further claimed that (a) the Appellees violated the Establishment Clause of the First Amendment by incorporating a nativity scene or crèche into this holiday display; and (b) the Appellees violated the Equal Protection Clause of the Fourteenth Amendment by denying Appellants' access to the holiday display.

The Free Speech Clause was not violated here. The holiday display within the atrium of Warren's Municipal Building is a non-public or, at best, limited public forum. This atrium opens to all employee workspaces and public-service counters. Further, public access in the atrium has never been the subject of an "open invitation" but is governed by a written Rental Policy so as to prevent disturbances within this City Hall. As such, the "Winter Solstice" sign was properly excluded. In fact, its exclusion was expressly based on reasonable and viewpoint neutral considerations including: (a) its likelihood to cause disturbances

in City Hall; (b) its non-celebratory, aggressive message would not promote good morale or joy during the holiday season; (c) the fact that FFRF sought to have the sign, which presents a political debate about religion and not a passive holiday symbol, next to the crèche so as to attack its purported message; and (d) given that it is a mere advertisement for FFRF. Under established law, Appellants may not avoid this record by merely speculating about the assumed viewpoints of the Appellees.

The Establishment Clause was not violated by inclusion of a crèche into the extensive holiday display that was primarily comprised of celebratory and secular symbols that are traditionally associated with the holiday season. Indeed, it has been well-established in federal law that a crèche within such a holiday display is constitutionally permissible to further good will and joy within the community during the holiday season.

The Equal Protection claim presented fails as it is premised on nothing more than an unsupported assertion that there *"must have been"* a discriminatory bias. This is especially so given that legitimate, viewpoint-neutral criteria resulted in the exclusion of the "Winter Solstice" sign that is very obviously, and unlike the other passive symbols in the holiday display, likely to offend and create disturbances in City Hall. Furthermore, the claim was properly dismissed as the record amply

showed that Appellees never gave intentional or preferential treatment to one particular religious view or another.

Given the foregoing, on May 31, 2012, the District Court issued a lengthy and detailed Opinion and Order properly disposing of all constitutional claims presented in the case and granting Defendants-Appellees Motion for Summary Judgment. **RE #30**. This appeal followed.

VII. STATEMENT OF RELEVANT FACTS

For many years, the City of Warren ("Warren") has placed a holiday display within the atrium of its Municipal Building. This display is primarily secular in nature and includes many of the traditional symbols of the Christmas season including Santa's elves, snowmen, nutcrackers, reindeer, Christmas trees and wreathes adorned with lights, ribbons and ornaments, a "Winter Welcome" sign, a "Merry Christmas" sign, bushels of poinsettias, wrapped gift boxes, large candy canes and a Santa-mailbox. **RE #18, Exs.1 and 2.** In recent years, Warren's holiday display also included a nativity scene a/k/a crèche. **Ibid; RE #1, p. 3, ¶14; RE #2, p. 7**. This crèche is accompanied by a sign that makes clear that it is "sponsored by the Warren Rotary Club" and not intended to advocate Warren's viewpoint. **RE #18, Ex.10**. This being so, the extensive secular nature of the holiday display is not disputed by FFRF. **RE #18, Ex.2 and RE #2, p. 2.**

Warren's Municipal Building is a government workplace. The building atrium where the holiday display is located each year contains a four-foot high vaulted ceiling. **RE #18, Ex.1, 2 and 7**. The front of each municipal office in the four-floor building opens to the atrium. **RE #18, Ex.7**. There is no glass or other barrier to prevent sound from traveling to these offices from the atrium. **Ibid**. Importantly, all government employee workspaces for Warren are located within these offices. **Ibid**. Also important is that the "counter" of these offices from

which City business is transacted with the public is open to the atrium for each level of these offices. **Ibid**.

To prevent disturbances to the functioning of Warren's government, public access to the atrium inside the Municipal Building is restricted to instances where permission is granted by the City's Downtown Development Authority (DDA) and/or Tax Increment Financing Authority (TIFA) Director. **RE #18, Ex.6, p. 2**. More specifically, Warren Municipal Code §3-1, a section authorized by MCL 117.4j(3), provides:

> (b) The city shall have the power to manage and control the finances, rights, interests, buildings, and property, to enter into contractors, to do any act to advance the interests, good government, and prosperity of the City and its inhabitants, and to protect the public peace, morals, health, safety and general welfare. In the exercise of such powers, the city may enact ordinances, rules and regulations, and take such other action as may be required, not inconsistent with law. The power of the city shall include, but shall not be limited to, the following:
>
> …
>
> (5) To construct, provide, maintain, extend, operate, and improve:
>
> (a) Office, Community buildings. Within the city: a city hall, city office buildings, community buildings, police stations, fire stations, civic auditoriums, public libraries and polling places; and
>
> (b) Parks, recreation, transportation, public utility facilities. Either within or without the corporate limits of the city or of Macomb; public parks, recreation grounds, stadiums, municipal camps, public grounds… ; and any other structure or facility which is devoted to or intended for public purposes within the scope of the powers of the city. **RE #18, Ex.5**.

As authorized by this Ordinance, Warren's Civic Center Facilities Rental Policies and Rules (the "Rental Policy") limits access to Warren's Municipal Building facilities based on six (6) viewpoint-neutral factors for deciding whether a particular use of these facilities, including of the atrium, should be permitted which include: (a) the nature of the meeting; (b) whether group membership of the requesting organization is open to all persons without regard to race, color, sex, religion or physical handicap; and (c) whether the use would cause an interference with the rights of the general public or a disruption of the proprietary functions of the City's Municipal Building. **RE #18, Ex.6, p. 2**. Advertising of any type is strictly prohibited in the atrium. **Ibid, p. 1-2.** The Rental Policy provides for the application process for anyone desiring to use these facilities. **Ibid, p. 1**.

On or about January 20, 2010, Appellants Freedom from Religion Foundation, Inc. and Douglas Marshall (collectively "Appellants" or "FFRF") sent a first written demand that Warren remove the crèche from its holiday display. **RE #26-2**. This letter came to Warren several weeks *after* the crèche and the rest of the holiday season display had been taken down for the 2009-2010 holiday season. **RE #1-2**.[1] In or about March 2010 FFRF sent a second letter to Warren

[1] This asserts it is "unlawful for the City of Warren to maintain, erect, or host a holiday display that consists solely of a nativity scene, thus singling out, showing preference for, and endorsing one religion." **Ibid**. Though this is the stated legal podium from which FFRF argued its position, Warren never maintained, erected or hosted a holiday display consisting solely of a crèche. **See RE #18, Ex.1-2**.

demanding that the crèche be removed from the holiday display. **RE #26-3**. On or about November 9, 2010 FFRF wrote a third-letter to Warren, this time demanding that the crèche be precluded from the upcoming 2010-2011 holiday display. **RE #26-4**. Defendants-Appellees responded by letter dated December 8, 2010, denying FFRF's demand and noting that Warren permits all religions to "celebrate their religious seasons with a display in City Hall" during the holiday season. **RE #26-5**.

On or about December 9, 2011, over a year later, FFRF wrote Warren again with a new request for "permission to display [its own] sign *near the nativity scene* that is currently on display in the Atrium" of Warren's Municipal Building. **RE #18, Ex.3**. The proposed sandwich-board sign is 40.5" x 24.5" and the front reads:

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

See RE #26-6. The sign back is a mere advertisement for FFRF, and reads:

State/Church
KEEP THEM SEPARATE

Freedom From Religion Foundation
Ffrf.org

Ibid. To be sure of its antagonistic nature, FFRF did not merely seek to have this sign included in Warren's holiday display --- it sought to have the sign placed immediately *next to* the crèche. **See RE #18, Ex.4**.

The proposed "Winter Solstice" sign points observers to www.Ffrf.org which further compounds the likelihood for confrontations and disruptions because www.Ffrf.org expands upon FFRF's overt attack against the traditional, passive symbols in Warren's holiday display. For example, in a published article on www.FFRF.com, titled: *Winter Solstice Freethought Signs Go Up (December 2009)*, FFRF's President states:

> *"We nonbelievers don't mind sharing the season with Christians… but we think there should be some acknowledgment that the Christians really 'stole' the trimmings of Christmas, and the sun-god myths, from pagans."* **RE #18, Ex.8.**[2]

[2] *FreeThought Today, Volume 26 No. 10*: Published by the Freedom From Religion Foundation, Inc. @ http://ffrf.org/publications/freethought-today/articles/winter-solstice-freethought-signs-go-up/.

In another published article on this website, which is titled: *Away with the manger — in with the Solstice! (December 2011)*, FFRF's co-Presidents are pictured holding up a "natural nativity" that separately mocks each and every element of the traditional holiday crèche. **RE #18, Ex.7**. This article advocates:

> *"For a fact, the Christians stole Christmas. We don't mind sharing the season with them, but we don't like their pretense that it is the birthday of Jesus. It is the birthday of the Unconquered Sun — Dies Natalis Invicti Solis. Christmas is a relic of sun worship. For all of our major festivals, there were corresponding pagan festivals tied to natural events. We've been celebrating the Winter Solstice, this natural holiday, long before Christians crashed the party."* **RE #18, Ex.9.**[3]

Within a week after the December 9, 2011 demand letter, FFRF's staff attorney was advised that a formal Civil Center Facilities Rental Application needed to be submitted to the DDA pursuant to Warren's Rental Policy before the placement of the "Winter Solstice" sign could be considered. **RE #1, pp. 6-7, ¶31**. FFRF never submitted this application. Instead, on December 14, 2011, FFRF wrote another letter to Warren's Mayor demanding that the "Winter Solstice" sign be placed in the atrium (right next to the Warren Rotary Club's crèche). **RE #26-7**. On December 20, 2011, FFRF's counsel submitted a completed Center Facilities Rental Application to Warren's Mayor, instead of the DDA, with an enclosure letter renewing its demand. **RE #26-8**.

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[3] Published by the Freedom From Religion Foundation, Inc. @ http://www.ffrf.org/news/releases/away-with-the-manger-in-with-the-solstice/.

On December 21, 2011, the request for placement of the "Winter Solstice" sandwich-board sign *next to* the crèche was denied by written communication from Warren's Mayor. **RE #26-9**. That denial letter, in part, provides:

> This proposed sign is antagonistic to all religions and would serve no purpose during this holiday season except to provoke controversy and hostility among visitors and employees at city hall. **RE #26-9.**

To make it even more clear that this was a viewpoint-neutral decision, Mayor Fouts expressed that one who sought to incorporate a sign into the holiday display conveying that "there is no Santa Claus" would be met with the same denial. **Ibid**. Mayor Fouts also indicated that the Rental Policy does not "allow displays disparaging any one religion" or that "attack religion in general." **Ibid**.

The next day, FFRF filed this lawsuit. **RE #1**. Together with its Complaint, FFRF sought a Preliminary Injunction. **RE #2, 8**. By Order dated 12/28/2011, the district court set hearing on the Motion for Preliminary Injunction. **RE #7**. By notice dated 12/29/2011, FFRF withdrew its Motion for Preliminary Injunction. **RE #9**. The parties then submitted a Stipulation Regarding Photograph Evidence which included photographs of the holiday display in dispute. **RE #10**. In lieu of an answer, Defendants-Appellees filed a Motion for Summary Judgment as to all claims asserted by FFRF. **RE #18**. FFRF responded to this Motion for Summary Judgment. **RE #26**. Defendants-Appellees filed a Reply Brief in support of the

same. In a detailed 31-page Opinion and Order dated May 31, 2012, the district court dismissed all claims for lack of merit. **RE #30**. This appeal followed.

VIII. STANDARD OF REVIEW FOR ALL ISSUES

A district court's grant of summary judgment is reviewed de novo. *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 893 (6th Cir 2006).

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 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 facts 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). Moreover, the Court of Appeals is required to take as true the facts that are stipulated to by the parties. *Thos. J. Dyer Co. v. Bishop Intern. Engineering Co*., 303 F.2d 655 (6th Cir., 1962).

Appellants' suggestion that a different standard of review applies here because this case was dismissed pre-discovery is improper. This Court should not reverse an order granting summary judgment on discovery grounds unless it plainly appears that the district court abused its discretion by denying a party opportunity to obtain documents or other information that would materially affect viability of that party's case. *U.S. ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir.., 1998). Here, the parties stipulated to the character and appearance of the holiday display in dispute at **RE #10**. These are the relevant facts needed to decide this case. Nonetheless, FFRF asserts that discovery may support a theory that Defendants-Appellees had an illicit desire to promote Christianity. However, even if this were true, and it is not, such discovery is unwarranted as it will not materially affect the outcome of this case because FFRF could not have avoided "dismissal of a First Amendment claim by raising questions about a government-actor's viewpoints or alleged illicit motives." *See Big Dipper Entertainment, L.L.C. v. City of Warren,* 641 F.3d 715, 717 (6th Cir., 2011).

IX. ARGUMENT

A. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANTS' FIRST AMENDMENT FREE SPEECH CLAIM.

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. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *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 Holiday Display in the Atrium of Warren's Municipal Building is a Non-Public Forum.

"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), [P]roperty that the government owns, has always owned, 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.* (emphasis added).

In this case, the atrium of Warren's Municipal Building 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's Downtown Development Authority (DDA) and/or Tax Increment Financing Authority (TIFA) Director. **RE #18, Ex. 6, p.2**. In fact, the Rental Policy provides for a written application process for anyone desiring to use the atrium. **Ibid, p. 1**. Access is dependent upon analysis of the six (6) viewpoint neutral factors of this 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." **Ibid, p. 2**. The Rental Policy strictly prohibits advertisements or solicitation of any type in the atrium. **Ibid, p. 1-2.** Additionally, members of the public are not invited to add to the holiday display. **Ibid; RE# 30, p. 14**. This policy of mere selective access is hardly debatable where the Appellants themselves submitted a written pre-access request, albeit to the Mayor instead of the DDA or TIFA Director, seeking permission to incorporate their "Winter Solstice" sign into the holiday display in the atrium of Warren's Municipal Building. **RE #26-7; RE #26-8**.

Equally compelling is that *United Food* sets forth a second step for determining the type of forum that 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. *Cornelius*, 473 U.S. at 804-5. Here, Warren's Municipal Building is a

government workplace. The atrium where the holiday display is located contains a four-foot high vaulted ceiling that fronts each of the municipal offices from which City business is transacted. **RE #18, Ex.7**. All employee workspaces are located within these offices and all of the public-service counters from which City business is transacted open to the atrium. **Ibid**. Given the foregoing, exclusion of the proposed "Winter Solstice" sign was compatible with the purpose of the holiday display located therein under the *United Food* standard. In particular, the holiday display is intended to decorate the Municipal Building to promote good-will and joy during the holiday season. **RE #18, p. 11; RE #18, Exs. 1-2; RE #30, p. 14**. The "Winter Solstice" sign was rejected for inclusion into the display because it overtly presents a different purpose --- to attack the crèche to which it as to be placed next to and belittle all who may tie the holiday season into their religious beliefs. **RE #18, pp. 9, 19-21, 28; RE #26-9**. Indeed, Mayor Fouts expressed that one desiring to darken the holiday display or create such controversy with a sign representing that there is "no Santa Claus" would be met with the same denial of access. **RE #26-9**. Accordingly, the district court's conclusion that the holiday display in the atrium constitutes, at best, a limited public forum was proper under *Cornelius.*

Appellants urge this Court to use the non-binding rule from *Henderson v. City of Murfreesboro*, 960 F.Supp. 1292, 1297 (M.D. Tenn, 1997) to conclude that

Warren's holiday display was a designated public forum. However, the rule from *Murfreesboro* is merely that a rotunda room in City Hall was transformed into a **limited** public forum --- not for everyone, but for artists wishing to display art --- by creation of a "City Hall Art Committee which invited art to be submitted [by the public at large] to the committee for possible display in the Rotunda." *Murfreesboro* recognized that the rotunda room was only changed into a **limited** public forum because the art committee had issued an "open invitation" for *all* artists to apply "to display original works of art with no restriction as to subject matter." *Id*, at 1299. Contrary to Appellants' assertion, there was no finding that the rotunda became a public forum even under these circumstances. Moreover, in this case there exists no "open invitation" for public access in the atrium of Warren's Municipal Building. Instead, all access to the atrium is selective based on the established, content-neutral criterion of the written Rental Policy. **RE #18, Ex. 6-7**. This distinction is critical because the atrium of Warren's Municipal Building adjoins all government workspaces while the rotunda room in *Murfreesboro* is not adjoined by or anywhere near government workspaces. *Id*, at 1299. As such, reliance on *Murfreesboro* is severely misplaced.

Appellants' assertion that *Satawa* supports its theory that the holiday display in Warren's atrium is a public forum is equally misplaced because *Satawa* involved the outside median of a highway. In holding that this highway median is

a public forum, this Court cited to the long-standing principle that "streets and parks ... have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of *assembly, communicating thoughts between citizens,* and *discussing public questions.*" *Id*, at 520. Moreover, this particular highway median had "been a place where people could gather since at least 1991, when the Village of Warren Historical Commission built [a] gazebo" and contained park benches, memorial plaques and public displays was a public forum. This is because the median was found to be "a place long dedicated, whether by law or tradition, to 'assembly, communicating thoughts between citizens, and discussing public questions.' *Id*, at 521. In reaching its conclusion, *Satawa* often cites *Hague v. Comm. for Industrial Organization*, 307 U.S. 496 (1939) and *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) which both deal with the public nature of outdoor public parks and highways. Such long-standing rules have no application to this case which deals, in stark contrast, with an atrium inside of the City of Warren's government workplace.

Accordingly, Appellants' First Amendment-Free Speech claim was properly dismissed on summary judgment. The district court's ruling should be affirmed in its entirety.

2. The Exclusion of Appellants' Proposed "Winter Solstice" Sign 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. 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. Additionally, a speaker may properly be excluded from a non-public forum because he wishes to address a topic not encompassed within the purpose of the forum. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). The avoidance of controversy is also a reasonable basis for excluding a speaker from a non-public forum. *Cornelius*, 473 U.S. at 811. Also, a speaker may be properly excluded because he is not a member of the class of speakers for whose benefit a forum was created. *Perry*, 460 U.S. at 49. Subject matter and

speaker identity are also valid bases to deny a speaker access. *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir., 2001). 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, the "Winter Solstice" sign was excluded from the holiday display in the atrium of Warren's Municipal Building because it: (a) sought to address a topic other than the traditional Christmas theme of the entire, as permitted by *Lehman*; (b) could not be reasonably understood to promote good morale or joy during the holidays, as permitted by *Greer*; and (c) would cause controversy and create disturbances in the adjoining government workspaces and public service counters, as permitted by *Cornelius*; and[5] In particular, Defendants-Appellees denied the sign on the basis that:

> This proposed sign is antagonistic to all religions and would serve no purpose during this holiday season except to provoke controversy and hostility among visitors and employees at city hall. **RE #1-9.**

[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.

[5] *Cornelius* prohibits use of the First Amendment to force a municipality to display persuasive speech "or other distractions" principally aimed at competing for the potential observers' attention. As such, it is prudent to recall that the Winter Solstice sign contains a message overtly attacking the passive, symbolic crèche to which Plaintiffs seek to have it placed ***immediately next to***. Indeed, Plaintiffs' letters and website indicate the purpose is an overt attack against the crèche as opposed to any promotion of joy or good-will during the holiday season.

To make clear that this was a viewpoint-neutral decision, Defendants-Appellees expressed that one who sought to incorporate a sign into the holiday display conveying that "there is no Santa Claus" would be met with the same denial. **Ibid**. Defendants-Appellees also indicated that the Rental Policy would not "allow displays disparaging any one religion" or displays that "attack religion in general." **Ibid**. This was appropriate.

First, rejection because the "Winter Solstice" sign was off-topic is a permitted basis for exclusion under *Lehman.* A holiday display by its nature is celebratory and intended to convey good-will and joy. *American Civil Liberties v. Birmingham*, 791 F.2d 1561, 1565 (1986); *Lynch v. Donnelly*, 465 U.S. 668, 670-2 (1984). Like the displays in *Birmingham* and *Lynch*, Warren's holiday display included passive, secular, traditional **symbols** of the holiday season intended to promote joy and good-will during the holiday season. These traditionally recognized holiday **symbols** included Santa's elves, snowmen, nutcrackers, reindeer, Christmas trees and wreathes adorned with lights, ribbons and ornaments, a "Winter Welcome" sign, a "Merry Christmas" sign, bushels of poinsettias, wrapped gift boxes, large candy canes and even a Santa-mailbox. **RE #18, Ex. 1-2**. In fact, the crèche itself is recognized to convey a traditional, secular message when incorporated into such a holiday display. *Lynch; See also Doe v. City of*

Clawson, 915 F.2d 244, 247-8 (6th Cir., 1990).[6] On the other hand, Appellants did not present the proposed "Winter Solstice" sign as part of any designated "holiday" celebration and it does not convey a traditional, celebratory or holiday message. Instead, its title merely refers to the scientific phenomena where the Sun is at its southernmost point in the sky causing the day to be the shortest of the year.[7] Then, the text of the sign is not merely a passive, symbolic symbol in line with the rest of the display. Instead, the message of this sign is an overt attack of the concept of religion and designed solely to antagonize those with religious faith. Indeed, the message criticizes all persons who celebrate the holiday season in a traditional, secular and/or religious manner. In fact, FFRF sought to have its sign placed immediately next to the previously permitted crèche so as to attack its traditional, symbolic message. It 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.

The antagonistic message of the sign further renders its exclusion from the

[6] Given the holdings of these cases, Appellants' position that the theme of their irreligious sign is in line with Warren's holiday display because it constitutes religious speech is flatly wrong.

[7] See: *news.nationalgeographic.com/news/2009/12/091221-winter-solstice-2009-first-day-winter-shortest-day-year.html*

holiday display appropriate under *Greer*.[8] As the record illustrates Appellants did not merely seek to have their "Winter Solstice" sign added to the holiday display; the request was that their sign be placed *immediately next to* the crèche already in the holiday display. Given that the text of this sign attacks all persons with religious beliefs, this placement request illustrates the reasonableness of the denial under *Greer*. Appellants' anti-holiday, political purpose is further illustrated by FFRF's published article *Away with the manger — in with the Solstice! (December 2011)*, wherein co-Presidents Dan Barker and Anne Gaylor are pictured holding up a "natural nativity" that separately mocks each and every element of the traditional holiday crèche. **RE #18, Ex. 7**. This is especially troublesome given that the proposed "Winter Solstice" sign promotes the website where this article is published. **RE #26-6**. 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*,

[8] "When the State establishes a limited public forum, [it] is not required to and does not allow persons to engage in every type of speech. The State may be justified in reserving [the forum] for certain groups or for the discussion of certain topics. *Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001). "The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995).

473 U.S. at 799 (1985); *See also ACLU v. Schundler*, 168 F.3d 92, 97 (3rd Cir., 1999).

Third, Defendants-Appellants expressly excluded the sign because:

> *The language of the proposed sign is clearly anti-religion and meant to counter the religious tone of the Nativity Scene, which could lead to confrontations and disruption of city hall.* **RE #26-9**.

This concern that the proposed sign would create disturbances in Warren's government workplace is a legitimate basis for its exclusion under *Cornelius*.[9] In fact, public access to the atrium of Warren's Municipal Building is limited via the Rental Policy[10] which expressly considers whether a proposed use would cause "interference with the rights of the general public or a disruption of the proprietary functions" of the Warren's Municipal Building. **RE #18, Ex.6**. To ensure there is no interruption of City business, the Rental Policy also considers "whether group

[9] Appellants rely on *Helms v. Zubaty*, 495 F.3d 252, 258 (6th Cir., 2007) to argue that the government must present proof that actual disruptions resulted in the public workplace before speech may be excluded on this basis. However, the holding of *Helms* is the exact opposite in that this Court actually reasoned that a speaker wishing to assert that a decision to exclude his/her speech was content-based bears the burden of setting forth "specific facts that might indicate that [the government actor] was motivated by the content of [his/her] speech." *Id*, at 258. Likewise, this Court in *Foster v. City of Southfield*, 106 F.3d 400 (6th Cir., 1996) held that "the *potential disruptiveness* of the speech" is enough to defeat a First Amendment claim. This follows *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 disruption of the office and the destruction of working relationships is manifest before taking action."

[10] Such 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).

membership of the requesting organization is open to all persons without regard to race, color, sex, religion or physical handicap."[11] **Ibid**. Based on these viewpoint-neutral factors, the proposed sign was excluded from the holiday display. This was certainly reasonable given that its message overtly insults all groups and individuals with *any* religious belief or who associate the holiday season with religion. **RE #26-6.** The sign goes so far as to accuse all religious believers of following "myth and superstition" resulting in "harden[ed] hearts" and enslave[ed] minds." **Ibid**. Given this message, it was certainly reasonable for Defendants-Appellees to have concerns that the sign would cause disturbances and/or controversy in City Hall. Moreover, the sign was certainly outside the content-neutral parameters of speech permitted in the atrium by the Rental Policy. Indeed, this proposed sign advertises for Appellants' by advocating for "separation of state and church" and promoting the *www.FFRF.com* website. **RE #26-6.** Such advertisements are strictly prohibited by the Rental Policy. **RE #18, Ex.6**. The promotion of this website is further problematic because *www.FFRF.com* is rife with offensive comments toward ***all persons*** with ***any*** religious affiliation and outright attack against ***anyone*** who observes the holiday season from a religious perspective. **See e.g. RE #18, Ex. 7-9**. As such, it was certainly reasonable to reject this sign under the *Cornelius* standard.

[11] This too is a textbook viewpoint-neutral consideration. *Christian Legal*, 130 S. Ct. at 2993.

3. The Speculative, Unsupported Argument that the "True" Reason that the Proposed "Winter Solstice" Sign Was Excluded Was Content-Based is Improper.

The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *Rosenberger*, 515 U.S. at 829; *citing Perry*, 460 U.S. at 46. However, "[t]he necessities of confining a [limited] forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. *Id*. Moreover, "[i]t is 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. *Big Dipper Entertainment, L.L.C. v. City of Warren*, 641 F.3d 715, 717 (6th Cir., 2011), *citing Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). To this end, a government official may make comments that show a viewpoint-based bias toward the proposed speech without violating the First Amendment so long as the predominate reason(s) upon which the speech is ultimately excluded are legitimate and content-neutral. *Big Dipper*, 641 F.3d at 718.

As discussed in the preceding section, Defendants-Appellees' excluded the proposed "Winter Solstice" sign from the holiday display in the atrium of Warren's Municipal Building based on legitimate, viewpoint-neutral factors including that this sign (a) presents a political debate about religion and is not a passive,

traditional holiday symbol designed to promote joy during the holiday season as is the case with the rest of the objects in the display; (b) does not promote good morale at City Hall or convey a celebratory message; and (c) was likely to create controversy inside the Municipal Building and result in disturbances within the abutting employee workspaces. **See RE #18, p. 16-18; RE #18, Ex. 6, p. 2; RE #18, Ex. 7**. This is permissible under the established law set forth in the preceding section and, particularly, *Schwitzgebel* which recognizes that one group's speech may be excluded while another's is permitted, where the excluded group seeks to physically intrude upon and interfere with the speech of the previously permitted group. Given the legitimate stated reasons for the exclusion here, Appellants' mere speculation about a "true" illicit or viewpoint-based motive for the exclusion of this sign was properly rejected by the District Court as a basis to avoid summary judgment.[12] *Big Dipper; Renton*.

Appellants' reliance on *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) is misplaced. In *Lamb's Chapel*, the speech at issue was excluded for the sole reason that it discussed a topic from a religious perspective. *Id*, 508 U.S. at 393-4. Here, however, Defendants-Appellees' have

[12] Moreover, "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 v. Liberty Lobby, Inc*., 477 U.S. 242, 256 (1986).

historically allowed all passive, celebratory symbols of the holiday season in the holiday display in the atrium of Warren's Municipal Building. **RE #18, p. 9; RE #18, Exs. 1 and 2**. This has included traditional secular symbols like wreaths, Santa's elves, lights and snowflakes (**See RE #18, Exs. 1 and 2**) and traditional religious symbols like the crèche and a Ramadan display (**RE #18, Exs. 1 and 2; RE #26-8; and RE #26-9**). However, no ***secular or religious*** display has ever been permitted that uses aggressive words, instead of passive symbols, to demean the otherwise traditional message conveyed by the holiday display as a whole. It was on this basis, and not solely because it discussed religion, that the proposed "Winter Solstice" sign was excluded from Warren's holiday display. **RE #18, p. 9; RE #26-9**. As such, *Lamb's Chapel* simply does not apply. Summary judgment was properly granted to Defendants-Appellees.

4. <u>The Rental Policy Does not Vest Unbridled Discretion in any Public Official.</u>

Appellants assert, for the first time in this appeal, the argument that Mayor Fouts was given unbridled discretion to exclude the proposed "Winter Solstice" sign. First and foremost, Appellants failed to preserve this argument for appeal as they never presented a facial challenge of the Rental Policy. *Brickner v. Voinovich*, 977 F.2d 235, 238 (6th Cir., 1992) (Issues not adequately pleaded, raised or preserved in the District Court are waived on appeal); *Michigan Up & Out of Poverty Now Coalition v. State*, 210 Mich.App. 162 (Mich.App., 1995)

(Issues raised for first time on appeal, even those relating to constitutional claims, are not ordinarily subject to appellate review).

Moreover, the Rental Policy does not given any public official (Mayor Fouts, the DDA or the TIFA Director) unbridled discretion. 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." *United Food*, 163 F.3d at 359. However, a government official may be given appropriate, limited discretion to restrict the time, place, duration, or manner of use of public property provided that such discretion is "exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination and with a systematic, consistent and just order of treatment." *Cox v. State of New Hampshire*, 312 U.S. 567, 576 (1941). The Rental Policy here contains viewpoint-neutral factors that guide the reviewing official in deciding when access should be permitted in the atrium of Warren's Municipal Building. **RE #18, Ex. 6**. In particular, advertisements of any type are strictly prohibited. **Ibid**. Access is also restricted for groups who propose speech that is likely to incite the disruption of the proprietary functions of the City's Municipal Building and who limit membership based on race, color, sex, religion or physical handicap. **Ibid**. Considering that City Hall is a public

workplace, these are well-recognized viewpoint-neutral considerations in an access policy that do not support a First Amendment challenge. *See Christian Legal*.

Finally, even when discretion in a regulatory scheme is broad, a court should not invalidate it "for overly broad discretion unless and until there is a showing of a pattern of unlawful favoritism". *Parks v. Finan*, 385 F.3d 694, 700 (6th Cir., 2004). Here, FFRF does not offer a single statute or case to support this type of an "as applied" argument. Nor has FFRF demonstrated any "pattern of unlawful favoritism" to support such a challenge. In reality, the record here establishes that all religions have been allowed to include passive, celebratory symbols in the holiday display in the atrium of Warren's Municipal Building. **RE #1, Ex. 4; RE #26-8**. Mayor Fouts confirmed to FFRF that this has been the manner in which the Rental Policy is and will be applied. **Ibid**. Indeed, the "Winter Solstice" sign was excluded because it was not celebratory or passive like the rest of the symbols in the holiday display in Warren's atrium but offensive and likely to incite a disturbance in City Hall. Thus, the denial had nothing to do with FFRF being a religious or irreligious group. To be sure, Mayor Fouts even indicated that a sign conveying "there is no Santa Claus" would be equally excluded from the display. **RE #26-9**. Accordingly, the First Amendment claim was properly dismissed on summary judgment. There exists no basis for reversal.

B. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANTS' CLAIM UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

Count II of Appellants' Complaint alleges that the Defendants-Appellees violated the Establishment Clause of the First Amendment by allowing a crèche to be incorporated into the holiday display inside the Municipal Building.[13] This claim has zero legal merit.

1. Incorporation of the Creche into Warren's Holiday Display is Constitutionally Permissible Under the First Amendment.

A crèche on municipal property does not violate Establishment Clause of First Amendment as a matter of law when it is displayed in context of the Christmas season and as part of holiday display that also includes secular symbols. *Doe v. City of Clawson*, 915 F.2d 244, 247-8 (6th Cir., 1990).[14] A crèche can even be the dominant symbol in a municipal holiday display without violating the Establishment Clause. *Id*, 915 F.2d at 247-8. This rule exists because the crèche conveys a merely symbolic, passive, secular message when incorporated into a holiday display. *Americans United for Separate of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1542-3 (6th Cir., 1992); *Clark v. Community for Non-Creative Violence*, 468 U.S. 288, 293 (1984). Expounding on this concept,

[13] Contrary to Appellants' Brief on Appeal, this was the only basis for the Establishment Clause claim in the District Court.

[14] *See also Americans United for Separate of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1542-3 (6th Cir., 1992); *Clark v. Community for Non-Creative Violence*, 468 U.S. 288, 293 (1984); *Lynch v. Donnelly*, 465 U.S. 668 (1984); and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 600 (1989).

the Supreme Court has held that while a crèche "is capable of communicating a religious message" the mere "inclusion of [this] single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries" within a holiday display is not violation of the Constitution. *Lynch*, 465 U.S. at 670-2; *See also County of Allegheny*, 492 U.S. at 578-79 (upholding the display of a Chanukah menorah outside a government building). The Sixth Circuit adopted this holding, providing that a crèche on government property during the holiday season is constitutional because the "context of national holiday, composition of display, and location of display" must be considered. *Doe*, 915 F.2d at 247-8. Likewise, *American Civil Liberties v. Birmingham* holds that, in the context of the celebration of Christmas as a national holiday, a government crèche on public property for the "secular purpose for displaying the crèche - to promote a feeling of joy and goodwill" is constitutionally permissible. *American Civil Liberties*, 791 F.2d at 1566. In dismissing an identical claim by FFRF in another case, the First Circuit equally held that "the fact of some religious content [must] not [be] dispositive because there are different degrees of religious and non-religious meaning." *Freedom From Religion Foundation v. Hanover School Dist.*, 626 F.3d 1 (1st Cir., 2010).

Here, the crèche in the atrium of Warren's Municipal Building contains a sign indicating it is "sponsored by the Warren Rotary Club" to make clear that it is not intended to advocate a City viewpoint. **RE #18, Ex. 10**. The crèche was incorporated into an extensive holiday display that included Santa's elves, snowmen, nutcrackers, reindeer, Christmas trees and wreathes adorned with lights, ribbons and ornaments, a "Winter Welcome" sign, a "Merry Christmas" sign, bushels of poinsettias, wrapped gift boxes, large candy canes and even a Santa-mailbox. **RE #18, Ex. 1-2**. The extensive and secular nature of the holiday display in issue was never even disputed by FFRF. **RE #18, Ex. 2; RE #2, p. 2**. Accordingly, Count II was properly dismissed by the District Court on summary judgment.

2. The Appellants' Proposed "Winter Solstice" Sign Was Appropriately Excluded from the Holiday Display Based on Viewpoint Neutral Considerations.

Appellants now contend that the exclusion of the proposed "Winter Solstice" sign should be evaluated as part of Count II of their Complaint which alleges a violation of the Establishment Clause of the First Amendment. In doing so, Appellants assert that Defendants-Appellees endorsed religion when they permitted a religious symbol to be incorporated into the holiday display (the crèche) while excluding their irreligious sign. However, in the District Court FFRF asserted only that the Defendants-Appellees violated the Establishment

Clause because they permitted a crèche in the holiday display. As set forth in the preceding section, such a claim fails as a matter of law. As such, FFRF is not arguing an entirely different premise for Count II of its Complaint. This is improper as such a claim is not preserved for appeal. *Barany-Snyder v. Weiner*, 539 F.3d 327 (6th Cir., 2008); *See also Thurman v. Yellow Freight Systems, Inc.*, 97 F.3d 833 (6th Cir., 1996) (vague references to an issue fail to clearly present it to district court so as to preserve issue for appeal).

Moreover, the Appellants' proposed "Winter Solstice" sign was not excluded from the holiday display because it presented an irreligious message. Indeed, passive, celebratory symbols of religion, majority and minority, have been permitted in Warren's holiday display. **RE #1, Ex. 4; RE #26-8**. However, the "Winter Solstice" sign was excluded because it is not a passive, celebratory symbol at all. Instead, the sign uses words to insult anyone who associates the holiday season with religion and demean the other traditional symbols in the holiday display. **RE #1, Ex.8**. This is appropriate under *Cornelius* and *ACLU v. Schundler*, 168 F.3d 92, 97 (C.A.3, 1999). Indeed, to be sure that the denial had nothing to do with a preference for one religious view or another, Mayor Fouts even indicated that a sign conveying "there is no Santa Claus" would be equally excluded from the display. **RE #26-9**. It is entirely improper for Appellants to argue now, in the face of the expressed viewpoint-neutral reasons for exclusion,

that some illicit motive existed that gives rise to an Establishment Clause claim. *Big Dipper*, 641 F.3d at 717 (6th Cir., 2011), *Renton*, 475 U.S. at 48. Summary judgment in favor of Defendants-Appellees must be affirmed.

3. As a Matter of Law, Defendants-Appellees Have Never "Endorsed" Religion.

Appellants now contend that denial of a permit for the proposed "Winter Solstice" sign constitutes an endorsement of religion in violation of the Establishment Clause of the First Amendment. Such an argument is not properly presented on appeal as it was never raised during the District Court proceedings. *Barany-Snyder; Thurman*.

Moreover, this assertion fails under *Lemon v. Kurtzman*, 403 U.S. 602 (1971) because a government actor can only violate the Establishment Clause by affirmatively "establishing" an "excessive government entanglement with religion." While this may occur if the government sponsors or "endorses" religious speech on public property, it certainly does not occur when the government avoids religious entanglement by refusing to permit some form of religious speech on public property. *See County of Allegheny v. American Civil Liberties Union***,** 492 U.S. 573, 591 (1989);[15] *Walz v. Tax Commission*, 397 U.S.

[15] The prohibition against the 'establishment of religion' mandates that: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs,

664, 674 (1970). Such an argument has zero merit. Summary judgment was properly granted.

C. APPELLANTS' EQUAL PROTECTION CLAIM UNDER THE FOURTEENTH AMENDMENT WAS PROPERLY DISMISSED ON SUMMARY JUDGMENT.

To avoid dismissal of an Equal Protection claim, FFRF must aver and establish that Defendants-Appellees implemented a policy requiring the different treatment of different religious groups or for intentionally preferential treatment of one particular religion. *Freedom From Religion Foundation v. Hanover School Dist.*, 626 F.3d 1, 14 (1st Cir., 2010). FFRF has not done so here. Instead, FFRF admits that the written Rental Policy governs that govern access to the holiday display in the atrium of Warren's Municipal Building is facially viewpoint-neutral. ***See Plaintiffs/Appellants Brief, Doc. # 006111455144, p. 29***.

Instead, Appellants contend, for the first time, that discovery may allow them to establish that there was disparate treatment between religious individuals and non-religious individuals. This is improper where the stated basis for FFRF's Equal Protection claim was only that Defendants-Appellees "through their conduct, policies, practices, and/or customs, prevented Plaintiffs from expressing a private message in a public forum based on the content of their speech, thereby

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for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.*" *Id, citing Everson v. Board of Education of Ewing*, 330 U.S. 1, 15-16 (1947).

denying the use of this forum to those whose messages Defendants find unacceptable." **RE #1, p. 12-13**. In responding to the Motion for Summary Judgment, FFRF never expanded this claim. As such, the argument now, premised on nothing more than mere legal conclusions and speculation, that FFRF may be able to demonstrate some disparate treatment for religious versus irreligious groups is improper under *Barany-Snyder; Thurman.* Moreover, FFRF's claim that additional discovery may provide them with support for this theory is improper. A pleading met by a motion to dismiss must set forth "grounds for entitlement to relief [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted); *See also Papasan v. Allain*, 478 U.S. 265, 286 (1986) (On a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). FFRF certainly did not and has not met this burden. To this end, FFRF never even presented this position to the District Court as required by *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir., 2000) ("[I]f the appellant has not filed either a Rule 56(f) affidavit or a motion that gives the district court a chance to rule on the need for additional discovery, this court will not normally address whether there was adequate time for discovery.").

Furthermore, to avoid summary dismissal of an Equal Protection claim the claimant bears to burden to demonstrate a discriminatory purpose. *Keene v. Mitchell*, 525 F.3d 461 (6th Cir., 2008). Discriminatory purpose is not established by the mere averment that one group of speakers has been excluded from expressing its ideas on government property while another group has not been so excluded. *Washington v. Davis*, 426 U.S. 229, 293 (1976); *Village of Arlington Heights*, 429 U.S. 252, 265. Nonetheless, FFRF's argument is now and has always been a mere, vague assertion that their "Winter Solstice" sign was excluded while the crèche was permitted in the holiday display. ***See Appellants' Brief, p. 43-44***. This argument fails to present an issue to avoid summary judgment.

Finally, government action that does not interfere with fundamental rights or target a suspect class is constitutional "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Here, the "Winter Solstice" sign was expressly excluded from the holiday display because its message (using words, instead of passive symbols) overtly attacked the theme and other symbols in the traditional, celebratory, primarily-secular holiday display and because its placement immediately next to the crèche, as requested by FFRF, would result in disruption in employee workspaces and the public-service counters

inside Warren's Municipal Building.[16] Given these undisputed facts, it is not the content of the speech, but the "deliberate verbal or visual assault, that justifies proscription" without giving rise to a valid Equal Protection claim. *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 n.6 (1975). As such, this claim was properly dismissed on summary judgment.

X. CONCLUSION

The District Court correctly granted Defendants-Appellees' Motion for Summary Judgment. Accordingly, this Court must affirm the District Court's Opinion and Order dated May 31, 2012 in its entirety.

Respectfully submitted:

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[16] Defendants rejected the sign as it was "antagonistic [] toward all religions" and served "no purpose during [the] holiday season, except to provoke controversy and hostility." **RE #1-9**.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) because this brief contains 10,004 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman.

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Dated: November 2, 2012

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Docket #1 Plaintiffs' Complaint

Docket #2 Plaintiffs' Motion for Preliminary Injunction

Docket #7 Order to Appear and Scheduling Order, re: Plaintiff's Motion for Preliminary Injunction

Docket #8 Addendum to Plaintiffs' Motion for Preliminary Injunction

Docket #9 Notice of Withdrawal of Plaintiffs' Motion for Preliminary Injunction

Docket #10 Stipulation Regarding Photographic Evidence by All Parties

Docket #18 Defendants' Motion for Summary Judgment, Notice of Hearing and Certificate of Service

Docket #26 Plaintiffs' Response to Defendants' Motion for Summary Judgment, Notice of Hearing and Certificate of Service

Docket #30 Order Granting Defendants' Motion for Summary Judgment; Denying Motion for Sanctions

CERTIFICATE OF SERVICE

The undersigned certifies that on November 2, 2012, she served Appellees' Brief on Appeal upon: ROBIN LUCE-HERMANN (P46880), DANIELLE J. HESSELL (P68667) and JENNIFER DUKARSKI (P74257) by electronically filing the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following addresses: hessell@butzel.com and dukarski@butzel.com.

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