No. 12-1858

In the

United States Court of Appeals for the Sixth Circuit

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.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division
No. 2:11-cv-15617
The Honorable Lawrence P. Zatkoff

BRIEF OF PLAINTIFFS/APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the 6th Circuit R. 26.1, Plaintiffs/Appellants make the following disclosure:

Plaintiff/Appellant Douglas J. Marshall is an individual, private party. Plaintiff/Appellant Freedom From Religion Foundation, Inc. is a non-profit, educational organization. There are no publicly owned corporations or parties to the appeal that have a financial interest in the outcome.

s/ Danielle J. Hessell
Danielle J. Hessell

Dated: September 27, 2012

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Sixth Circuit R. 34(a), Plaintiffs/Appellants, Douglas J. Marshall and Freedom From Religion Foundation, Inc., respectfully request oral argument on the instant appeal. Plaintiffs/Appellants believe that oral argument would enhance the Court's understanding of the important issues presented on appeal. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The United States Circuit Court of Appeals for the Sixth Circuit has jurisdiction to hear this timely appeal from the United States District Court of the Eastern District of Michigan's judgment entered May 31, 2012 pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1131 and 1343 and under 42 U.S.C. § 1983.

STATEMENT OF THE ISSUES

1. Restrictions on speech are unconstitutional in a public forum when they are not narrowly drawn to serve a significant government interest while allowing alternative channels and in a limited public forum when they are unreasonable and discriminate against a viewpoint. Defendants/Appellees denied the permit request of an irreligious speaker in a forum where Mayor Fouts states "if any religion wants to display at Warren city hall, they are welcome," and where a Nativity Scene and Prayer Station are permitted. Did the District Court err in finding the denial of the permit constitutional?

2. Government units violate the Establishment Clause when the government action has the predominant purpose of endorsing religion. The City rejected Plaintiffs/Appellants' permit because the sign was "antireligious", while Mayor Fouts admits that the Nativity Scene sets a "religious tone" and asserts that "if any religion wants to display at Warren city hall, they are welcome." Did the District Court err in finding the denial of the permit constitutional?

3. Acts by a government or municipality violate the Equal Protection Clause when there is disparate treatment and (1) where speech is unreasonable or discriminates on a viewpoint or (2) where the fundamental right of religion is violated under a strict scrutiny analysis. The City expressly denied

irreligious and non-religious speakers while welcoming and encouraging religious messages from religious speakers who place displays in City Hall. Did the District Court err in finding the denial of the permit constitutional?

STATEMENT OF CASE

On December 22, 2011, Plaintiffs/Appellants filed a motion for a temporary restraining order/preliminary injunction seeking permission to place a sign containing an irreligious message or, in the alternate, seeking removal of the crèche from the holiday display in the Atrium of the Civic Center in the City of Warren, Michigan. (R. 2, Pls' Mot. For TRO/Prelim. Inj.). As Plaintiffs/Appellants were unable to secure a hearing prior to the close of the winter holiday and removal of the holiday display, the motion was later withdrawn.

On December 22, 2011, Plaintiffs/Appellants filed this action, alleging violation of the First and Fourteenth Amendments to the United States Constitution. (R. 1, Complaint). Plaintiffs/Appellants challenged the denial of this permit request to display an irreligious message in the City Hall Atrium in Warren, Michigan.

On January 27, 2012, in lieu of an answer, Defendants/Appellees filed a motion for summary judgment (R 18, Def. Mot. For Summ. Judg.). On May 31, 2012, the District Court for the Eastern District of Michigan granted

Defendants/Appellees' motion for summary judgment. (R. 30, Op. & Order). This appeal follows. (*See* R. 32, Notice of Appeal).

STATEMENT OF FACTS

Nativity scenes are inherently Christian religious displays that are intended to have religious significance. The City, the DDA, and/or Mayor Fouts deliberately undertook to place a Christian nativity scene ("Nativity Scene") in a prominent place in the Atrium of the Warren Civic Center. The Nativity Scene was placed in the Atrium of the Civic Center during the 2011 winter holiday season, just as the City has apparently placed it in the same, or a similar, location during previous winter holiday seasons.

The Nativity Scene at issue bears a sign stating that it was sponsored and provided by the Warren Rotary Club, although, upon information and belief, the City, the DDA, and Mayor Fouts approved the placement and location of the Nativity Scene in the Atrium of the Warren Civic Center, which is commonly referred to as "City Hall." The Civic Center is the main government building for the City of Warren, and it houses the Mayor's office, the City Clerk's office, and numerous other city offices and conference rooms.

The Atrium of the Civic Center is approximately five stories high, is open to the public and is a place where other groups, such as the Warren Rotary Club and certain religious organizations, have been permitted to provide religious

counseling, place displays and to provide leaflets and other information. During the 2011 Christmas holiday season, the Atrium housed the display of the Nativity Scene. The Atrium's holiday display also contained at least one artificial Christmas tree, nutcracker, elf, reindeer, Santa's mailbox, and other wreaths and greenery. Also located in the Atrium is a "prayer station," or a table that is often staffed by one or two individuals. The Nativity Scene was separated by several feet from the other decorative items in the Atrium, and was placed prominently near the front glass wall of the Civic Center.

On January 20, 2010, FFRF sent Mayor Fouts a letter objecting to the placement of the Nativity Scene in the Civic Center Atrium during the month of December, 2009, alleging it was an unconstitutional endorsement of religion in violation of the First Amendment of the Constitution of the United States. (R. 1, Ex. 1, January 20, 2010 Letter). FFRF received no response to this letter. Then, on March 4, 2010, FFRF again wrote to Mayor Fouts, requesting information regarding the steps being taken to remedy the City's First Amendment violations. (R. 1, Ex. 2, March 4, 2010 Letter). Again, FFRF received no response to this letter.

With the 2010 holiday season approaching, FFRF sent yet another letter to Mayor Fouts on November 9, 2010, renewing its request that the City refrain from displaying the Nativity Scene in the Civic Center Atrium. (R. 1, Ex. 3,

November 9, 2010 Letter). On December 8, 2010, Mayor Fouts finally responded to FFRF's correspondence. (R. 1, Ex. 4, December 8, 2010 Letter). In his letter, Mayor Fouts stated that "[t]he city of Warren is **NOT** 'promoting or endorsing religious beliefs.' If we were doing this, other religions would not be allowed to display their religious holy seasons in our atrium. However, they have been allowed and will be allowed." *Id.* (emphasis in original).

The following holiday season, on December 9, 2011, Plaintiff/Appellant Marshall, a member of FFRF, wrote to Mayor Fouts requesting, on behalf of himself and other Warren residents who are members of FFRF, to display a sign (the "Sign") near the Nativity Scene. (R. 1, Ex. 5, December 9, 2011 Letter). Marshall hand-delivered the letter to Mayor Fouts' office and was told that he would receive a response no later than December 12, 2011. In that letter, Marshall provided photographs of the proposed Sign, along with the following description:

> The display is an attractive "sandwich board" and the dimensions are 40 ½ x 24 ½, and it reads as follows:
>
> Front: "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"
>
> Back: "State/Church
> Keep them Separate
> Freedom From Religion Foundation
> Ffrf.org"

Id. Plaintiff/Appellant Marshall received no response to his December 9, 2011 letter.

Mr. Marshall visited the Mayor's office on December 13th and 15th, and was repeatedly told by Mayor Fouts' staff that the Mayor was aware of his request and would respond soon. Having received no response on December 14, 2011, however, Plaintiff/Appellant Marshall again wrote to Mayor Fouts, requesting a response to his request to display the Sign. (R. 1, Ex. 6, December 14, 2011 Letter). Marshall received no response to his December 14, 2011 letter.

Plaintiff/Appellant FFRF's staff attorney, Stephanie Schmitt, placed additional telephone calls to Mayor Fouts's office on or about December 7, 15, and 16, 2011. During those telephone calls, Ms. Schmitt spoke with various people in Mayor Fouts's office, and also, eventually, with Mayor Fouts. Ms. Schmitt was informed that the DDA maintained responsibility for approval of any requested displays in the Civic Center Atrium, and that an application would have to be submitted to the DDA for Plaintiffs/Appellants' request to display the Sign. Ms. Schmitt was also informed that Mayor Fouts had to consult with the Warren City Attorney before any decision could be made on Plaintiffs/Appellants' requested Sign.

On December 20, 2011, undersigned counsel for Plaintiffs/Appellants sent yet another letter to Mayor Fouts, requesting a decision on Plaintiffs/Appellants' request to display the Sign in the Civic Center Atrium. (R. 1, Ex. 7, December 20, 2011 Letter). Enclosed with that letter was a completed form provided by the DDA to request the use of the Atrium to display the proposed Sign. *Id.*

On December 21, 2011, almost two weeks after Mr. Marshall sent his first letter to Mayor Fouts, and only a couple of days before the Civic Center closed for the holidays, Mayor Fouts finally responded to Plaintiffs/Appellants' request to place the Sign in the Atrium of the Civic Center. (R. 1, Ex. 8, December 21,

2011 Letter). In his letter, Mayor Fouts denied Plaintiffs/Appellants' request to place the Sign in the Atrium, stating, among other things:

> … 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.
>
> This proposed sign is antagonistic toward all religions and would serve no purpose during this holiday season except to provoke controversy and hostility among visitors and employees at city hall.
>
> ***
>
> Thus, I cannot and will not sanction the desecration of religion in the Warren City Hall atrium.
>
> As I would not allow displays disparaging any one religion, so I will not allow anyone or any organization to attack religion in general. 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. The proposed sign would only result in more signs and chaos.
>
> ***
>
> **In my opinion, Freedom of Religion does not mean "Freedom Against or From Religion."** And Freedom of Speech is not the right to yell "Fire!" in a crowded theatre. Indeed, there are common sense restraints on all constitutional rights.
>
> **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. You can't make a negative into a positive.
>
> Clearly, your proposed display in effect would create considerable ill will among many people of all **recognized** faiths.

Id. (emphasis in original).

Defendants/Appellees have articulated no reasonable, content-neutral, time, place, and manner restrictions on protected First Amendment activities in the Civic Center. It appears that they do not maintain or follow any such restrictions. But, even if such restrictions exist, they have not been provided to Plaintiffs/Appellants and Plaintiffs/Appellants have not been given an opportunity to comply with such restrictions. On the contrary, Defendants/Appellees adhere to policies, practices, and/or customs of supporting religion and religious belief and, in particular, the Christian religion, and discriminating against non-religious believers. For example, the City's website lists as one of Mayor Fouts' many accomplishments "Defense of Nativity at Warren City Hall." (R. 1, Ex. 9, City of Warren website screenshot).

Defendants/Appellees denied Plaintiffs/Appellants' request to display the Sign in the Atrium next to the Nativity Scene solely because Defendants/Appellees determined that the Sign's message is "anti-religious." (R. 1, Ex. 8, December 21, 2011 Letter). Therefore, Defendants/Appellees' denial is an unconstitutional, content-based restriction on Plaintiffs/Appellants' expression in a public forum.

SUMMARY OF ARGUMENT

> *[T]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. When the government acts with the ostensible and predominant purpose*

> *of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.*
>
> *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (internal quotes and citations omitted).

This matter involves the violation by City government of Plaintiffs/Appellants' rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Defendants/Appellees, the City of Warren, Michigan ("City"), the City of Warren Downtown Development Authority ("DDA"), and the Mayor of Warren, James R. Fouts ("Mayor Fouts"), have permitted the Warren Rotary Club to place a nativity scene display in a prominent location in the Atrium of the Warren Civic Center, commonly referred to as City Hall, along with other pro-religious displays including a Prayer Table. Plaintiffs/Appellants, Freedom From Religion Foundation, Inc. ("FFRF") and its member, Douglas J. Marshall ("Marshall"), requested permission to place a sign espousing the separation of state and church with an irreligious message ("Sign") next to the nativity scene display in the Atrium. After a marked delay, Defendants/Appellees finally responded to Plaintiffs/Appellants' request a few days before the Christmas holiday by denying permission to place the Sign in the Civic Center Atrium. Defendants/Appellees' denial was, on its face, based solely

on the irreligious content of Plaintiffs/Appellants' proposed Sign as stated in various letters from Mayor Fouts.

Plaintiffs/Appellants assert that the Atrium is a traditional or designated public forum, because of Defendants/Appellees' policy and practice of inviting the expression of various messages, including religious messages, in the Atrium. Further, even if the Atrium is analyzed as a limited public forum, the denial of the permit was unreasonable, constituted viewpoint discrimination, was an exercise of the Mayor's unfettered discretion, and was therefore a violation of the Free Speech Clause of the First Amendment.

The denial of the permit also created an impermissible establishment of religion, as the predominant purpose of the denial was religious and not secular and the action demonstrated endorsement of religion over irreligion, and was therefore a violation of the Establishment Clause of the First Amendment. Finally, Plaintiffs/Appellants assert the denial of the permit demonstrates disparate treatment of irreligious and non-religious messages, which treatment fails to meet the appropriate burdens of scrutiny, resulting in a violation of the Equal Protection Clause of the Fourteenth Amendment to United States Constitution.

ARGUMENT

Standard of Review

A district court's grant of summary judgment should be reviewed *de novo*. *Satawa v. Macomb County Rd. Comm'n*, 689 F.3d 506 (6th Cir. 2012) (citing *ACLU of Ky. v. Mercer Cnty., Ky.*, 432 F.3d 624, 628 (6th Cir. 2005)). Fed. R. Civ. P. 56(c) provides that summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kocis v. Multi-Care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996). If the Respondent successfully demonstrates, after a reasonable period of discovery, that the Petitioner cannot produce sufficient evidence beyond the bare allegations of the complaint to support an essential element of his or her case, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Upon review of this record, this court must consider all evidence and draw all reasonable inferences in Plaintiffs-Appellees' favor. *Siggers-El v. Barlow*, 412 F.3d 693, 699 (6th Cir. 2005).

As First Amendment rights are involved, this Court should closely scrutinize the record without deference to the District Court. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995) (instructing an "independent examination of the record as a whole, without deference to the

trial court"). *See also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

The court should also be mindful of the summary judgment standard, given the early timing of the District Court's granting of Defendants/Appellees' Motion for Summary Judgment, which was granted before any discovery was undertaken and, indeed, before Defendants/Appellees even filed an Answer to the Complaint. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986). To defeat a motion, a non-moving party must "set forth specific facts sufficient to show that a reasonable factfinder could return a verdict in his favor." *Yohn v. Coleman*, 639 F.Supp.2d 776, 783 (E.D. Mich. 2009) (citing *Sanders v. Freeman*, 221 F.3d 846, 851 (6th Cir. 2000)). Accordingly, "[t]he movant must meet the initial burden of showing 'the absence of a genuine issue of material fact' as to an essential element of the non-movant's case. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for

discovery, has no evidence to support an essential element of his or her case." *Yohn*, 639 F. Supp. 2d at 783.

I. The District Court Erred in Finding the Denial of the Permit for the Irreligious Sign Constitutional Under the First Amendment of the Constitution's Protection of the Freedom of Speech.

The right to the freedom of speech is protected from infringement by government entities and political subdivisions by the First Amendment and its application to the states under the Fourteenth Amendment. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). The denial of the permit at issue in this case is unconstitutional because the City Hall Atrium is a public forum and therefore any limits on speech must be narrowly-tailored to meet a significant public interest while allowing ample alternative channels of communication. In the alternative, even if the City Hall Atrium is determined to be a limited public forum, Defendants/Appellees' denial of the permit is unreasonable and constitutes viewpoint discrimination in light of Mayor Fouts's public statements and the application of the policies and practices of the City of Warren.

A. The District Court Erred in Holding that the City Hall Atrium is a Limited Public Forum, Because Defendants/Appellees' Policies and Practices Established it as Either a Traditional or Designated Public Forum.

The Supreme Court has recognized four types of fora: the traditional public forum, the designated public forum, the non public forum and the limited public forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). *See also Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009). A traditional public forum is a location "by long tradition or by government fiat have been devoted to assembly and debate." *Perry Education Ass'n v. Perry Local*, 460 U.S. 37, 47 (1983). A public forum "may also be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). A designated public forum is one in which the government "intentionally open[s] a nontraditional public forum for discourse." *Cornelius*, 473 U.S. at 802. When reviewing a space similar in nature to Warren's Atrium, the Rotunda at Murfreesboro City Hall was held to be a designated public forum as it was a "central room" and not a "workplace" where employees overwhelmingly perform job duties. *Henderson v. City of Murfreesboro, Tenn.*, 960 F. Supp. 1292 (M.D. Tenn. 1997).

Plaintiffs/Appellants applied for a permit to place the sign in the Atrium in Warren City Hall, specifically seeking a location as proximate to the religious elements of the holiday display as possible. As the District Court notes, "the Atrium is the space within which a determination of the relevant forum must be analyzed." (R. 30, Op. and Order, p. 11). Applying a forum analysis to the Warren City Atrium results in the conclusion that the forum should be analyzed as a public forum.

As this Court noted in *Satawa*, "public property which the state has opened for use by the public as a place for expressive activity," is called a designated public forum." *Satawa v. Macomb County Road Com'n*, 689 F.3d 506, 517 (6th Cir. 2012) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

> [Even though a government] did not have to create the designated public forum in the first place, and "need not indefinitely retain the open character of the facility," once it opens its doors to some expression, it must treat the designated public forum like a traditional public forum until it closes its doors again. Thus, during the time that a designated public forum is open to the public, "[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."

Id. (citations removed).

In holding the Mound Road median a public forum, this Court evaluated "the objective characteristics of the property, such as whether, by long tradition

or by government fiat, the property has been devoted to assembly and debate." *Id.* at 520. (citing *Ark. Educ. Television Com'n v. Forbes,* 523 U.S. 666, 677 (1998) (internal quotation marks omitted)). Although the median had characteristics of both public and non-public fora, the median was held a traditional public forum as it was used for "a variety of expressive purposes, such as the display of farm equipment (meant to show the historical nature of the village) and memorial plaques." *Id.* As the court further noted, property "'intended for bringing citizens together to exchange ideas,' 'used for public disclosure and debate,' or 'dedicated to commemorating the people, ideals, and events that compose the city's or county's identity' can qualify as traditional public forum." *Id.* (citing *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939)). In this assessment, traditional use is also important, as "[t]he right to use government property for one's private expression depends on whether the property has by law or ***tradition*** been given the status of a public forum, or rather has been reserved for specific official uses." *Capitol Square Review and Advisory Bd. v. Pinnette*, 515 U.S. 753, 761 (1995) (emphasis added).

Based on the history and tradition of speech and expression in the Warren City Hall Atrium, the District Court erred in finding the Atrium a limited public forum as it is either a traditional or designated public forum. The District Court

held that the "City has limited the Holiday Display to certain speakers and subjects" and has not opened the Atrium to the public at large, thereby creating a limited public forum. (R. 30, Op. and Order, p. 13-14). In fact, the City policy for use of the Atrium establishes few rules and regulations regarding the limitation of speakers. The criteria include a renter over the age 21; open membership in the organization without regard to race, color, sex, religion or physical handicap; and content which would not interfere with the rights of the public or proprietary function of the Warren Downtown Development Authority or the City. (R. 18, Ex. 6, City Rental Policy). Further, Mayor Fouts has historically expressed a policy of openness with regard to religious speech. In his December 8, 2010 letter, he stated that "[a]ll religions are welcome to celebrate their religious seasons with a display in city hall . . . I repeat, if any religion wants to display at Warren city hall, they are welcome." (R. 1, Ex. 4, December 8, 2010 Letter). This willingness to open the forum to "any religion" is in direct contradiction to the notion of limiting the forum and aligns it more closely with a public forum. Along with a willingness to open the forum, the City and Mayor have traditionally allowed displays from the public at large within both the Holiday Display and the Atrium in general. One example of opening the Holiday Display, in particular, is the inclusion of the Rotary Club crèche. An additional example of opening the Atrium to a religious message is the inclusion of the

Prayer Station. The practice and tradition of the City and the Mayor supports a conclusion beyond mere inference that the Atrium should be designated as a traditional public forum, or, at the very least a designated public forum.

As both traditional and designated public fora apply the same standards, in that content based restrictions may only be upheld if they are narrowly drawn to serve a significant government interest and leave open ample alternative channels of communication. *Perry*, 460 U.S. at 45-46; *Kincaid v. Gibson*, 236 F.3d 252, 256 (6th Cir. 2001). *See also Putnam*, 221 F.3d at 843; *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981); and *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 293 (1984). In this analysis, the restriction must be narrowly drawn to serve a significant governmental interest. The interest asserted by the Mayor includes the protection of pro-religious speech. The Mayor points to several historical references to illustrate the government interest:

> Indeed, our country was founded upon basic religious beliefs. The President takes the oath of office on the Holy Bible. The U.S. Congress has a house chaplin. Both major political party leaders invoked God in their speeches and pronouncements. Our coins have "In God We Trust." We have a whole host of other religious traditions in government situations at all levels.

(R.1, Ex.8, December 21, 2011 Letter). It is not disputed that the United States House of Representatives has a Chaplin or that a President may take the oath of office on a holy book. The question arises whether the restriction against all irreligious speech is narrowly tailored to a significant government interest. The promotion of a pro-religious message over an irreligious message should not be permitted in light of the Supreme Court's determination that

> [T]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.

McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (internal quotes and citations omitted). The promotion of religion over irreligion is not and cannot be a significantly compelling state interest as it offends other constitutional provisions and prohibitions.

Even if the promotion of religion were a constitutionally permitted, significant interest, the restriction against all irreligious speech is not narrowly tailored. "[T]he requirement of narrow tailoring is satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Nothing in the record supports the policy in this context. Therefore, the District Court's grant of summary judgment was inappropriate.

Finally, the government must leave open alternative channels for communication. *Perry*, 460 U.S. at 45-46. As the Mayor's letters make clear, messages supporting religion are supported and accorded ample channels of communication, while irreligious messages have no channels of communication--they are simply not allowed. The Mayor states that "[a]ll religions are welcome" in his 2010 letter, yet demonstrates in a 2011 letter his intent to disallow any speech which is "disparaging" of any religion as he "cannot and will not sanction the desecration of religion in the Warren City Hall atrium" and "will not allow anyone or any organization to attach religion in general." (R. 1, Ex. 4, December 8, 2010 Letter; R.1, Ex. 8, December 21, 2011 Letter). Further, he states that the "language on the proposed sign is clearly anti-religion and meant to counter the religious tone of the Nativity Scene" which was "antagonistic toward all religions." *Id.* The decision to disallow the permit was based on its irreligious content, which is an impermissible and unconstitutional content discrimination.

As the appropriate forum should be either a traditional public forum or a designated public forum, the City policy should be tested to determine if its content based restriction was narrowly tailored to a significant government interest while allowing ample channels of communication. The City and Mayor

Fouts have not met this burden. In summary, the policy of the City of Warren is unconstitutional under the First Amendment and summary judgment was inappropriate.

B. Alternatively, Even if This Court Determines that the Atrium is a Limited Public Forum, Defendants/Appellees' Denial of the Permit was Unreasonable in Light of Mayor Fouts's Responses and the City's Application of its Policy.

The District Court erred in granting summary judgment because the denial of the permit was unreasonable. In assessing a restriction on speech, the restriction must be reasonable in the context of the forum and must not discriminate against speech on the basis of viewpoint. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The District Court erred in its consideration of the purpose of the public forum by failing to review the actual policy and consistent practice of the City while overemphasizing the speculative allegations of potential conflict in its determination that the restriction was reasonable. In evaluating purpose as part of the forum analysis, *United Food & Commercial Workers Union* instructs that "a court must examine the *actual* policy – as gleaned from the *consistent* practice with regard to various speakers." *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 353 (6th Cir. 1998) (emphasis in original) (citing *Air Line Pilots Ass'n, Int'l v. Department*

of Aviation, 45 F.3d. 1144, 1154 (7th Cir. 1995)). *See also Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 687 (1992) (O'Connor, J., concurring) (referencing *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 809 (1985)). Under this approach, the "reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in light of the purpose of the forum and all the surrounding circumstances." *United Food*, 163 F.3d at 356 (citing *Cornelius*, 473 U.S. 788 at 809). Therefore, in reviewing the reasonableness of the decision, "the proper focus concerns whether or not the forum has included speech on the same general subject matter." *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of the City of Chicago*, 45 F.3d 1143, 1160 (7th Cir. 1995).

In holding that the policy was reasonable, the District Court turned to the exclusion of a speaker who "wishes to address a topic not encompassed within the purpose of the forum." (R 30, Op. & Order, p. 15) (referencing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). The court only turned to the Holiday Display, avoiding speakers in the Atrium itself, to narrowly evaluate the ostensible subject matter as the promotion of holiday cheer and good will. Applying *United Food's* rule of reviewing the "actual policy" and "consistent practice with regard to various speakers," it becomes clear that the irreligious sign covered a topic encompassed within the purpose of the forum.

First, the actual policy does not provide any express prohibition against religious speakers. The Warren Civic Center Facilities Rental Policies and Rules establish the criteria for granting permission to place a display:

> (a) What is the nature of the meeting?
> (b) Is membership to the group open to all persons without regard to race, color, sex, religion, or physical handicap?
> (c) Would content of the meeting/activity interfere with the rights of the general public or proprietary functions of the Warren Downtown Development Authority or the City of Warren?
> (d) Is the renter of the facility 21 years of age and willing to take responsibility for damages incurred during the time designated on the *Rental Application*?

(R. 18, Ex. 6, City Rental Policy). The policy establishes criteria which allow for groups to place a display as long as the group is "open to all persons without regard to . . . religion." *Id.* Although Plaintiffs/Appellants requested information through a Freedom of Information Act request (which was denied by the City) and no discovery occurred below, it appears that the Warren Rotary Club has been granted a permit to place a religious display, the Nativity Scene, within the Atrium and within the Holiday Display itself.

Second, the consistent practice of the City in the Atrium--the forum in question--has been to permit speech relating to the same general subject matter, i.e., religion. The subject matter of the proposed sign is religion, specifically the criticism of religion and the promotion of the views of non-believers. The front of the proposed sign states "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." This irreligious message, promoted by an organization of atheists, agnostics, and other freethinkers, falls squarely within the purview of religion as recognized by the Supreme Court. *See McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (stating "[T]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." (internal quotes and citations omitted)). As a result, the subject matter pertinent to the analysis is religion.

The City's use of the Atrium allows and, in fact, often promotes a religious message. Within the Holiday Display itself, the City has allowed the Rotary Club to host the Nativity Scene. On this point, the District Court erred when it held that "the City does not invite the public at large to place objects or decorations within the Holiday Display." (R. 30, Op. & Order, p. 14). This statement is factually inaccurate, as the record is clear that the Nativity Scene was placed by members of the public at large through the efforts of the Rotary Club. Mayor Fouts, in his correspondence, admits that Nativity Scene sets a "religious tone." (R. 30, Op. & Order, p. 18). Further, the City opened the Atrium in the winter of 2008 for religious use by allowing a Prayer Station, a place for ministers, preachers, and volunteer lay ministers of The Tabernacle (a Church of God

congregation in Warren, Michigan) to deliver a religious and related political message. *See* CNN TV, www.youtube.com/watch?v=WfDxq5Rz57g and David A. Fahrenhold. "Michigan 'Prayer Station' Volunteers Are Political Doubting Thomases," The Washington Post, February 27, 2012 (available at www.washingtonpost.com/politics/michigan-prayer-station-volunteers-are-doubting-thomases-politically/2012/02/24/gIQAVvEYer_story.html). Mayor Fouts acknowledges this service stating that the City also has "a prayer station in the city hall atrium for all religions to use . . . And we invite ALL Warren residents to use the Prayer Station and attend the National Day of Prayer ceremony." (R. 1, Ex. 4, December 8, 2010 Letter). Mayor Fouts admits to opening the forum for other religious activities, stating that "the local Islam mosque celebrated Ramadan with a display at city hall this year." *Id.* To further support this position, the Mayor stated that "[a]ll religions are welcome to celebrate their religious seasons with a display in city hall . . . I repeat, if any religion wants to display at Warren city hall, they are welcome." *Id.* The consistent practice of the City is one that promotes the dissemination of a religious message in the Atrium, rendering the decision to exclude an irreligious or non-religious message unreasonable.

Further, this Circuit has recognized that hidden biases could permeate a decision through the assertion that the speech itself is controversial. "An official

harboring bias against a particular viewpoint could readily exclude ads communicating that viewpoint simply by "determining" that the ad was controversial, aesthetically unpleasing, or otherwise offensive. We simply will not allow such speculative allegations to justify the exclusion of a speaker from government property." *United Food*, 163 F.3d at 357-58. Mere speculation is insufficient; more is required. *See Helms v. Zubaty*, 495 F.3d 252, 258 (6th Cir. 2007) (holding that restrictions were reasonable to prevent disruptions where actual evidence of disruption was presented including testimony of individuals unable to work).

In rejecting the permit for the small sandwich board, Mayor Fouts asserts that the sign "would serve no purpose during this holiday season except to provide controversy and hostility among visitors and employees at city hall." (R. 30, Op. & Order, pp. 16-17). Mayor Fouts further postulates that the sign "meant to counter the religious tone of the Nativity Scene, which could lead to confrontations and a disruption of city hall." *Id.* But Mayor Fouts never provides any evidence suggesting a likelihood of this occurring and in fact downplays the possibility as he discussed the reaction of citizens to another disfavored message. In his December 21, 2011 letter, Mayor Fouts discusses the pushback he received from the placement of a Ramadan display. (R. 1, Ex. 8, December 21, 2011

Letter). Mayor Fouts stated "I received many calls objecting," suggesting that the City weathered any such storm or disruption created by what many may consider a "controversial" message. These speculative allegations, used to support the District Court's decision, should not be allowed to "justify the exclusion of a speaker from government property." *United Food*, 163 F.3d at 357-58.

Reviewing the purpose of the forum and the surrounding circumstances, the unreasonableness of the City's action becomes clear. The City of Warren has set the tone promoting religious expression over irreligious expression by: (1) creating a policy open to all regardless of faith, (2) the approval of a crèche from the Rotary Club, (3) the approval of prayer tables year-round, and (4) by expressly inviting all religions to the Atrium in the Mayor's December 8, 2010 letter and other communications.

C. The Defendants/Appellees' Denial of the Permit was Not Viewpoint Neutral in Light of the Response of Mayor Fouts and the Application of the Policy by the City.

The District Court erred in granting summary judgment because the denial of Plaintiffs/Appellants' request for a permit was not viewpoint neutral. Viewpoint discrimination is a "subset or particular instance of the more general phenomenon of content discrimination," in which "the government targets not subject matter but particular views taken by speakers on a subject."

Rosenberger, 515 U.S. at 829, 831. When a government unit is not focused on the subject matter, "but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger,* 515 U.S. at 829 (internal citations omitted). *See also United Food*, 163 F.3d at 356 (referencing *Cornelius*, 473 U.S. at 811) ("Where the proffered justification for restricting access to a nonpublic 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").

When dealing with a religious viewpoint, the same analysis applies. When a group seeks to speak from a religious or irreligious viewpoint on a subject which would be otherwise permissible in a given forum, the government cannot ban the speech under the Constitution. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). *See also Good News Club v. Milford*, 533 U.S. 98, 111-12 (2001); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Schs.*, 373 F.3d 589, 594 (4th Cir. 2004). In *Lamb's Chapel*, the Supreme Court held that a school could not bar a group's film presentation about family values expressed in a religious context while allowing films on family values expressed in a secular context. *Lamb's Chapel,* 508 U.S. at 393-94. Similarly, in *Good News Club*, the Fourth Circuit found that the

exclusion of religious expression on teachings of morals and character development was unconstitutional where teachings on morals and character development were allowed solely because of the religious viewpoint expressed. *Good News Club* 533 U.S. at 111-12. The Court held that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Id.* at 111.

Similarly, in *Hansen v. Ann Arbor Public Schools*, the court evaluated whether the prohibition of an anti-homosexual group from a diversity event was viewpoint discrimination. The record in *Hansen* demonstrated a disagreement with the anti-gay group which motivated the restriction of speech as was documented in a statement to the student newspaper which said, "allowing adults hostile to homosexuality on the panel would be like inviting white supremacists on a race panel." *Hansen*, 293 F. Supp. 2d 780, 803 (E.D. Mich. 2003). These comments were sufficient for the court to find viewpoint discrimination. *Id* The court determined that "no matter how well-intentioned the stated objective, once schools get into the business of actively promoting one political or religious viewpoint over another, there is no end to the mischief that can be done in the name of good intentions." *Id.*

Here, the District Court erred first in limiting the analysis to the viewpoint or "purpose and spirit of the Holiday Display." (R. 30, Op. & Order, p. 19). In

this limitation, the District Court held that Mayor Fouts may favor certain messages including "celebration, good will, and decoration . . . so long as the "topic" of the limited public forum is not religion, politics, or debate." (R. 30, Op. & Order, p. 20). The topics permitted in the forum are broad and inclusive of the discussion of religion.

Warren's Policy does not limit the discussion of religious topics. Even though "a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum," the City of Warren's practice and application are instructive on the true scope of the forum. *Cornelius*, 473 U.S. at 806. In fact, the permitting process (established in furtherance of the City of Warren Municipal Code §3-1) provided directly for freedom of religious viewpoint as it established six viewpoint factors including "whether group membership of the requesting organization is open to all persons without regard to race, color, sex, religion or physical handicap."

Even if the topic permitted in the Atrium during the holiday season was limited to a discussion of the holiday, the City and Mayor Fouts permitted a religious approach to celebration of the holiday and must allow the counter viewpoint expressed in the Sign. The contents of the Sign demonstrate that it meets this topical filter, as it discusses an alternative viewpoint of celebrating the natural world and not deities during the winter solstice. This encouragement,

which calls for a rejection of the religious message present in the Nativity Scene, is the directly opposing viewpoint and not a valid content filter; it is impermissible viewpoint discrimination.

Indeed, rather than a viewpoint neutral position, the application of Defendants/Appellees' policy is entirely predicated on content, allowing pro-religious messages (the Nativity Scene which was evidently provided by the Warren Rotary Club, as well as the Prayer Table and Ramadan display) while denying irreligious or non-religious messages (the proposed Sign). First, this Nativity Scene creates "an unmistakable message that [government] supports and promotes the Christian praise to God that is the crèche's religious message." *Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 600 (1989). Second, Mayor Fouts expressly articulated that the policy would not "allow displays disparaging any one religion" or displays that "attack religion in general." (R. 1, Ex. 8, December 21, 2011 Letter). Moreover, the Mayor has made clear the boundaries of the policy in his December 8, 2010 letter stating, "[t]he city of Warren in no way whatsoever shows any favoritism to any religion. All religions are welcome to celebrate their religious seasons with a

display in city hall . . . I repeat, if any religion wants to display at Warren city hall, they are welcome." (R. 1, Ex. 4, December 8, 2010 Letter).[1]

In his December 29, 2011 letter, Mayor Fouts was direct in explaining his reasons for rejecting the non-religious, irreligious message because it was "clearly anti-religion and meant to counter the religious tone of the Nativity Scene." *Id.* "I cannot and will not sanction the desecration of religion in the Warren City Hall atrium." *Id.* Mayor Fouts supports his position based on his stated belief that the "proposed display in effect would create considerable ill will among many people of all **recognized** faiths." *Id.* (emphasis in original). He further states, "[i]**n my opinion, Freedom of Religion does not mean 'Freedom Against or From Religion."** *Id.* (emphasis in original). If there was any question on the intent, Mayor Fouts clarifies that "[m]y refusal to allow your display in city hall is based on my opinion that your display does not reflect any organized or recognized religion. Your so-called 'religion' is really just a 'non-religion.' You have no place of worship, no congregation, and no religious

[1] *See also* (Attachment A, December 29, 2011 Letter) ("My permission to allow the Nativity Scene from other communities' permission defers because I would allow **any** organized recognized religion to place its particular display in the same location to celebrate their holy season"). This letter was sent by the Mayor to counsel for Defendants after the Complaint was filed, but was not made a part of the record below. Plaintiffs/Appellants sought Defendants/Appellees' concurrence in a stipulation to add this document to the record, but that concurrence has not yet been obtained.

beliefs." (Attachment A, December 29, 2011 Letter). It is clear that Mayor Fouts's decision to deny Plaintiffs/Appellants' irreligious or non-religious message is based solely on its content as an opposing viewpoint to Christianity and "recognized faiths."

This policy clearly demonstrates a message that any content which opposes religion or is an irreligious view will be excluded. There is no clearer example of a viewpoint-based regulation than one which regulates only irreligious speech. These statements follow a similar pattern to *Hansen's* anti-homosexual, content-based restrictions, and they demonstrate that Mayor Fouts and Defendants/Appellees support a content-based restriction against an atheistic, irreligious message. There is no question that Defendants/Appellees have approved the placement of content promoting religion in the Atrium and denied requests to place irreligious content there.

Finally, were the District Court's view to become law, a city could establish a display to promote a one-sided purpose to impose a *de facto* viewpoint restriction. For example, a city could propose a pro-abortion display and ban any speech which does not support this viewpoint. By virtue of the established scope, any pro-life message would be prohibited and such a ban would be constitutional. The application of this rule would eclipse current precedent and chill viewpoints alternative to those who establish the local rules.

As the City's application of its policy is unreasonable and the denial of the permit discriminates against an irreligious viewpoint, Plaintiffs/Appellants respectfully request this Court overturn the District Court's decision granting summary judgment and hold the denial of the permit unconstitutional under the Free Speech Clause of the First Amendment.

D. The Mayor was Given Unbridled Discretion.

Separate from the issues of viewpoint and content discrimination, the Supreme Court has given independent constitutional significance to whether "a statute or ordinance [that] 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 (citing *City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750 (1988)). In a case evaluating "controversial" advertisements, the court concluded that the government violated this principle. "We have no doubt that, standing alone, the term 'controversial' vests the decisionmaker with an impermissible degree of discretion." *Id.* *See also Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir. 2010) (holding a policy unconstitutional for giving "authorized officials … unfettered discretion in deciding whether to sponsor an event in the interior of city hall.")

Here, just as in *Miller*, the Mayor relies heavily on the "controversial" nature of the Sign in his rejection of the permit application. But there is no evidence suggesting that the Mayor followed any established policy or criteria in denying a permit for the Sign. Rather, it is abundantly clear that the Mayor was given "unfettered discretion in deciding whether to [allow the Sign] in the interior of" City Hall's Atrium. *Id.*

II. The District Court Erred in Finding Denial of the Permit Constitutional Under the Establishment Clause of the First Amendment of the Constitution.

The touchstone of a court's analysis "under the Establishment Clause requires 'governmental neutrality between religion and religion, and between religion and nonreligion.'" *American Civil Liberties Union of Kentucky v. McCreary County, KY.*, 607 F.3d 439 (6th Cir. 2010) (citing *ACLU of Ky v. McCreary County, Ky ("McCreary IV")*, 145 F. Supp. 2d 845 (E.D. Ky. 2001), *aff'd* 545 U.S. 844 (2005) and *Epperson v. Arkansas*, 393 U.S. 97 (1968). Just as the government cannot demonstrate "hostility to religion, thus preferring those who believe in no religion over those who do believe", the inverse should be true: the government should not demonstrate hostility to irreligion and prefer those who believe over those who do not. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963). In evaluating an Establishment Clause claim, a court applies the *Lemon* test. Under the *Lemon* test, a court must assess whether

(1) the government activity in question has a secular purpose, (2) the activity's primary effect advances or inhibits religion, and (3) the governmental activity fosters an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). A failure "under any one of the *Lemon* prongs deems governmental action isolative of the Establishment Clause." *American Civil Liberties Union of Ohio Foundation, Inc. v. DeWeese*, 633 F.3d 424, 434 (6th Cir. 2011).

In its Establishment Clause analysis, the District Court erred by reviewing only the inclusion of the Nativity Scene in the Holiday Display under the *Lemon* test, without addressing the content of the website, Mayor Fouts's letters, or the denial of the irreligious permit. As the Defendants/Appellees approved the presence of religious displays while excluding an irreligious display, Defendants/Appellees' policies, practices and customs in the Atrium convey an impermissible, government-sponsored message of approval of religion based on the predominant purpose and endorsement of religion.

A. The Predominant Purpose of the Denial of the Permit Was Primarily Religious and Not Secular.

Government action is unconstitutional if the activity in question has a religious purpose. *Lemon*, 403 U.S. 602. Under the first prong of the *Lemon* test, "the eyes that look to purpose belong to an 'objective observer,' one who

take[s] account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary IV*, 545 U.S. 844 at 862. *See also Satawa v. Bd. Of County Road Com'rs of Macomb County*, 788 F. Supp. 2d 579, 606 (E.D. Mich. 2011) (emphasizing that the secular purpose must dominate and that a court should analyze the stated intent for the practice).

In evaluating the predominant purpose, the record should be examined with "eyes . . . that belong to an objective observer, one who takes account of the traditional external signs that show up in the text, . . . history, and implementation of the statute, or comparable official act." *McCreary Cnty.*, 545 U.S. 844 at 862. A court must ensure that "the secular purpose required [was] genuine, not a sham, and not merely secondary to a religious objective." *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2001)). This view of events must contemplate that "reasonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which [the] policy arose." *McCreary*, 545 U.S. 844 at 866.

The purpose of Mayor Fouts's denial of Plaintiffs/Appellants' permit is clear. The stated intent of Mayor Fouts's policy was laid bare in his many letters, and especially in his December 21, 2011 letter which prohibited irreligious views "meant to counter the religious tone of the Nativity Scene." (R. 1, Ex. 8,

December 21, 2011 Letter). Mayor Fouts continues: "I cannot and will not sanction the desecration of religion in the Warren City Hall atrium." *Id.* Further, Mayor Fouts clearly states a preference for religion over non-religion which violates the nature of the Establishment Clause's most basic touchstone addressed in *McCreary IV*. In correspondence with Plaintiffs/Appellants, Mayor Fouts demonstrates an interest in allowing religion a virtual free-pass to display in the Atrium without being subject to any additional scrutiny placed on an irreligious organization or citizen. In his December 29, 2011 letter, Mayor Fouts states "[m]y permission to allow the Nativity Scene from other communities' permissions defer [*sic*] because I would allow **any** organized recognized religion to place its particular display in the same location to celebrate their holy season." (Attachment A, December 29, 2011 Letter) (emphasis in original). In the same letter, he states "I do endorse, support and encourage any religion to place its display at city hall." *Id.* The religious preference has been a recurring theme in Warren politics, as Mayor Fouts stated in late 2010, "[a]ll religions are welcome to celebrate their religious seasons with a display in city hall . . . I repeat, if any religion wants to display at Warren city hall, they are welcome." (R. 1, Ex. 4, December 8, 2010 Letter).

The documented motivation behind the Defendants/Appellees' actions is important, as it demonstrates, to any reasonable observer, an impermissible

predominant purpose of those actions. Although this Court failed to find such a motive in *Satawa*, it noted that "[i]f the county had a bad motive, or wanted to curry political favor with a particular group, the predominant purpose might not be considered secular." *Satawa*, 689 F.3d at 527 n.22. Here, the City's carte-blanche approach to granting access to religious displays while shuttering irreligious displays, coupled with the City's website reference to Mayor Fouts's accomplishment in "Defense of Nativity at Warren City Hall", demonstrates an attempt to find favor with the voters of the community of Warren at the expense of a minority viewpoint.

B. The Denial of the Permit Was an Unconstitutional Endorsement of Religion by the City.

The second prong of the *Lemon* test is the endorsement test, which asks whether "the government action has the purpose or effect of endorsing religion." *ACLU of Kentucky v. Mercer County, Ky.*, 432 F.3d 624, 635 (6th Cir. 2005). An objective standard is applied, "similar to the judicially-created reasonable person standard of tort . . . [T]he inquiry here is whether the reasonable person would conclude that [the] display has the effect of endorsing religion. *Id.* at 636. *See also Adland v. Russ*, 307 F.3d 471, 479 (6th Cir. 2002) (asking "whether a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government"). These actions are not limited to the

evaluation of a policy or the placement of one religious icon, but include surrounding activities such as correspondence. This Court, in *DeWeese*, held a judge displayed "overt religious messages and religious endorsements" in both posting the Ten Commandments and based on the editorial comments made on religion and secular humanism. *DeWeese*, 633 F.3d at 434-35. The action of the government cannot be reviewed in the confines of a narrow vacuum but rather is reviewed objectively based on the entirety of the situation.

First, the District Court erred in its limited review of the placement of the Nativity Scene. As previously noted, the District Court reviewed only the inclusion of the Nativity Scene and did not address the denial of the irreligious permit. Where the inclusion of the Nativity Scene in the holiday display by itself may be a different question under *Allegheny*, *Lynch*, and *Doe*, the rejection of non-religious and irreligious permits could lead a reasonable observer to conclude that the action constituted an endorsement of religion by the government. *See Allegheny Cty. v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990).

Second, the casual, reasonable observer could see that the action was an unconstitutional endorsement of religion. The presence of the Nativity Scene and Prayer Table, coupled with Mayor Fouts's express comments previously noted in

the varied communications regarding his endorsement, support and encouragement of any religion, present objective facts indicative of a violation of this element. (R. 1, Ex. 4, December 8, 2010 Letter; R. 1, Ex. 8, December 21, 2011 Letter; Attachment A, December 29, 2011 Letter). These statements include:

- December 29, 2011: "My permission to allow the Nativity Scene from other communities' permissions defer [*sic*] because I would allow **any** organized recognized religion to place its particular display in the same location to celebrate their holy season."
- December 29, 2011: "I do endorse, support and encourage any religion to place its display at city hall."
- December 8, 2010: "All religions are welcome to celebrate their religious seasons with a display in city hall . . . I repeat, if any religion wants to display at Warren city hall, they are welcome."

This overt promotion of religion, -- indeed, express support of religion -- including the Prayer Station and the denial of the contrary message, leads to only one reasonable conclusion: Warren, Michigan supports religion and, in contravention of *Schempp* and *McCreary,* is hostile rather than neutral to non-religion and irreligion.

As the City's policy and denial of the permit demonstrates an impermissible Establishment of Religion, Plaintiffs/Appellants respectfully request this Court overturn the District Court's decision granting summary judgment and hold the denial of the permit unconstitutional under the Establishment Clause of the First Amendment.

III. The District Court Erred in Finding the Denial of the Permit Constitutional Under the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

The Equal Protection Clause "protects against arbitrary classifications, and requires that similarly situated persons be treated equally." *Jackson v. Jamroq*, 411 F.3d 615, 618 (6th Cir. 2005). *See also Scarbourough v. Morgan Cnty. Bd. Of Ed.*, 470 F.3d 250, 260 (6th Cir. 2006) (holding that the Clause "protects against invidious discrimination among similarly situated individuals or implicating fundamental rights").

Although no discovery was initiated in this matter, the available evidence demonstrates disparate treatment between religious individuals and irreligious or non-religious individuals. "The threshold element of an equal protection claim is disparate treatment." *Jackson*, 411 F.3d at 618. Mayor Fouts' letters pinpoint the disparate treatment. (R.1, Ex. 8, December 21, 2011 Letter and Attachment A, December 29, 2011 Letter). Mayor Fouts stated that: "I do endorse, support and encourage any religion to place its display at city hall," and

"I cannot and will not sanction the desecration of religion in the Warren City Hall atrium. As I would not allow displays disparaging any one religion, so I will not allow anyone or any organization to attack religion in general." (R. 1, Ex. 8, December 21, 2011 Letter). As noted in the arguments above, religious individuals are invited to display and celebrate their faiths in the Atrium, while the denial of the permit demonstrates that the non-religious need not apply as "**Freedom of Religion does not mean 'Freedom Against or From Religion."** (R. 1, Ex. 8, December 21, 2011 Letter). Based on the content of Mayor Fouts's letters and actions, Plaintiffs/Appellants can establish a course of action with a discriminatory purpose.

The second prong of the analysis requires an assessment of the classification used by the City of Warren. "[O]nce disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Jackson*, 411 F.3d at 618. In its actions demonstrated above, the City classified a distinction based on religion and irreligion/non-religion and a classification based on speech. The first classification, a claim for violation of the Equal Protection Clause involving the Establishment Clause, is subject to a strict scrutiny analysis. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Strict scrutiny applies where laws intended to "advance or inhibit religion or having either effect, generally

violate the Establishment Clause." *Bowman v. U.S.*, 564 F.3d 765, 772-73 (6th Cir. 2008) (citing *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)). As previously demonstrated, the actions of Defendants/Appellees violate the fundamental rights under the Establishment Clause and are therefore unconstitutional under the Fourteenth Amendment.

The second classification, the claim for violation of the Equal Protection Clause involving speech, applies the "appropriate First Amendment standard . . . [of] viewpoint neutrality and rational relationship to the purpose of the forum." *Miller v. City of Cincinnati*, 622 F.3d 524, 539 (6th Cir. 2010). As previously asserted and demonstrated above, the actions of Defendants/Appellees violate the freedom of speech and are therefore unconstitutional under the Fourteenth Amendment.

In summary, Plaintiffs/Appellants' Equal Protection Clause claim was entitled to survive the summary judgment motion as the denial of the permit and treatment of the irreligious and non-religious violates the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For the reasons set forth above, Plaintiffs/Appellants Petitioners Freedom From Religion Foundation, Inc. and Douglas J. Marshall respectfully request that this Court find the denial of the permit unconstitutional under the First and

Fourteenth Amendments, and reverse the District Court's decision granting summary judgment to Defendants/Appellees.

Respectfully submitted,

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Dated: September 27, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I certify that the Plaintiffs/Appellants' brief contains 10,187 words and, therefore, is in compliance with Fed. R. App. P. 32(a)(7)(b)(i).

s/ Danielle J. Hessell
Danielle J. Hessell

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all registered parties of record.

s/ Danielle J. Hessell
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ATTACHMENT A

James R. Fouts - Mayor

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December 29, 2011

Danielle J. Hessell
BUTZEL LONG, a professional corporation
Stoneridge West
41000 Woodward Avenue
Bloomfield Hills, MI 48304

Dear Ms. Hessell,

I am in receipt of your December 20, 2011 correspondence to me.

Your letter contains one very evident inaccuracy. My permission to allow the Nativity Scene from other communities' permissions defers because I would allow **any** organized recognized religion to place its particular display in the same location to celebrate their holy season.

The Nativity Scene does not mean the endorsement or support of any one religion since I allowed the Islam religion to have a display in the same atrium in celebration of Ramadan, the Islam holy season.

There never is nor was **any** discrimination of religion by the city or I.

My refusal to allow your display in city hall is based on my opinion that your display does not reflect any organized or recognized religion. Your so-called "religion" is really just a "non-religion." You have no place of worship, no congregation, and no religious beliefs.

Your non-religion message is also un-American because you do not believe in the Constitutional right to freedom of religion.

The timing of your request for a display in the atrium had only one intent – to disparage all religious expression.

How can you profess to be a guardian of our right to worship while you want to prevent **any** organized religion the right to a religious display?

To repeat, neither the City of Warren nor I, as mayor, do not endorse, support or encourage the practice of any religion with a display at City Hall.

I do endorse, support and encourage any religion to place its display at city hall.

Your lawsuit has no merit and I feel confident that my position will be upheld by the U.S. District Court.

Sincerely,

James R. Fouts
Warren Mayor