IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOUGLAS MARSHALL,

Plaintiff,

v.

CITY OF WARREN and JAMES R. FOUTS, in his individual capacity and in his official capacity as mayor of Warren,

Defendants.
_____/

Case No. 14-cv-12872

Hon. Marianne O. Battani

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

By this motion, and pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Douglas Marshall seeks a preliminary injunction requiring Defendants City of Warren and/or James R. Fouts to allow Plaintiff to operate his proposed "reason station" in the Warren Civic Center atrium on terms no less favorable than those provided to the persons and groups who operate the "prayer station" in that space.*

* In the alternative, if the Court concludes that the prayer station represents government speech, the Court should issue a preliminary injunction prohibiting continued operation of the prayer station. Plaintiff believes, however, that it is clear under the law and facts that the prayer station represents private speech.

A supporting brief accompanies this motion.

Local Rule 7.1(a) requires Plaintiff to ascertain whether this motion will be opposed. Because this motion is being filed contemporaneously with the complaint, there is not yet an attorney of record for Defendants in this case. Plaintiff's counsel did place a telephone call to the Warren city attorney's office to explain the nature of this motion and its legal basis. Plaintiff's counsel requested but did not obtain concurrence in the relief sought.

Respectfully submitted,

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Dated: July 23, 2014

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BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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QUESTION PRESENTED

Where city officials have opened the city hall atrium to religious speech by a private church group that operates a "prayer station" but are denying Plaintiff permission to express his atheist viewpoint at a "reason station" in the same forum, is Plaintiff entitled to a preliminary injunction on First Amendment grounds?

APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001)

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995)

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)

INTRODUCTION

Defendants City of Warren and its mayor James R. Fouts are denying Plaintiff Douglas Marshall access to public space based on the viewpoint of the speech Mr. Marshall wishes to express there. In the atrium of Warren's city hall, private religious speech is allowed, but Mr. Marshall's private atheist speech is excluded. Because Mr. Marshall is highly likely to succeed on the merits of his claim that his First Amendment rights are being violated, he is entitled to immediate injunctive relief.

The evidence of viewpoint discrimination in this case is overwhelming. Public space in the city hall atrium can be reserved for use by private groups and individuals who submit a written application to the city. Since 2009, a local church group has applied for, and has been granted, permission to operate a "prayer station" in the atrium. Volunteers at the prayer station distribute religious literature, discuss their religious beliefs with passersby, and offer to pray with interested members of the public.

Mr. Marshall, a resident of Warren and an atheist, wishes to set up a "reason station" in the same large open space, so he can distribute atheist literature and offer to discuss his philosophical beliefs with members of the public who wish to learn more about freethought. Mr. Marshall therefore submitted an application to the city for the reason station that is identical in all material respects to the

applications previously submitted for the prayer station. But Mr. Marshall's application was rejected because, according to a letter signed by Mayor Fouts, Mr. Marshall's belief system "is not a religion" and is not entitled to the constitutional protections guaranteed for religious belief.

Where, as here, the government opens up public space for private speech, it is unconstitutional for the government to discriminate based on the viewpoint of the speaker. In particular, religious viewpoints and non-religious viewpoints must be treated equally. Accordingly, Mr. Marshall seeks a court order requiring Defendants to allow him to operate his proposed reason station in the city hall atrium on terms no less favorable than those provided to those who operate the prayer station in that space.

FACTS

The City Hall Atrium Is Available for Public Use

The City of Warren's municipal government is housed in a building called the Warren Civic Center, also known as city hall. (Marshall Decl. ¶ 3.[1]) The Civic Center contains a large atrium that is open to the public. (*Id.*, ¶ 4.) Warren has written policies governing reserved use of the atrium and other space in the Civic Center. (Dkt. 1-2, Compl. Ex. A, Civic Center Facilities Rental Policies and Rules.) The policies state that the atrium space is available for reserved use by a

[1] Mr. Marshall's Declaration is being filed with this motion as its only exhibit. The remaining exhibits referenced in this brief were filed with the Complaint, Dkt. 1.

wide variety of groups and individuals, including civic organizations and Warren residents. (*Id.*, ¶ 1.) They provide that the atrium "may be reserved for most types of functions or activities EXCEPT . . . [a]ny private event charging a fee or admission" and "[w]hen there is sale of merchandise, products or services (unless otherwise approved . . .)." (*Id.*, ¶ 5.) Four criteria are considered when reviewing applications: "(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 the 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?" (*Id.*, ¶ 4.)

Individuals and groups wishing to use space in the atrium must complete a Civic Center Facilities Rental Application. (*Id.*, ¶ 3.) The application asks for contact information, a description of the activity, and expected attendance, among other things. (Dkt. 1-3, Compl. Ex. B, Civic Center Facilities Rental Application.)

The "Prayer Station"

Since at least 2009, Warren has allowed a local Pentecostal ministry known as the Tabernacle to use atrium space for a "prayer station." (Marshall Decl. ¶ 8; Dkt. 1-4, Compl. Ex. C, Walden Civic Center Facilities Rental Applications.) The

Tabernacle, through its pastor Darius Walden, submits Civic Center Facilities Rental Applications to request permission to use the atrium space for this purpose. (Dkt. 1-4.) The prayer station consists of a folding table with chairs, religious literature on display, and a banner that says "PRAYER STATION." (Marshall Decl. ¶ 8; Dkt. 1-5, Compl. Ex. D, Photograph of Prayer Station.) Volunteers operate the prayer station in the atrium four days a week from 9 a.m. to 3 p.m. (Dkt. 1-4.) They distribute religious pamphlets and offer to pray and discuss their religious beliefs with passersby. (Marshall Decl. ¶ 9.)

The Proposed "Reason Station"

Plaintiff Douglas Marshall is a resident of Warren. (*Id.*, ¶ 1.) Mr. Marshall is an atheist. (*Id.*, ¶ 10.) As an atheist, Mr. Marshall does not believe in a god, and he promotes what he describes as reason and freethought as an alternative to religious belief. (*Id.*, ¶ 12.)

Mr. Marshall wishes to share his secular philosophical beliefs with interested members of the public in the Warren Civic Center atrium, just as the Tabernacle shares its religious views with individuals who approach the prayer station in that space. (*Id.*, ¶ 14.) Specifically, Mr. Marshall wishes to use atrium space to operate a "reason station." (*Id.*) Similar in size, structure and function to the prayer station, the reason station would consist of a folding table and chairs, an identifying sign, and atheist literature on display and available to the public. (*Id.*, ¶ 15.) Mr.

Marshall would offer to have philosophical discussions with passersby who express an interest in atheism and freethought.[2] (*Id*.) He does not intend for his reason station to interfere with the existing prayer station in any way. (*Id*., ¶ 17.)

On April 9, 2014, Mr. Marshall submitted a Civic Center Facilities Rental Application to Warren. (*Id*., ¶ 18; Dkt. 1-6, Compl. Ex. E, Marshall Civic Center Facilities Rental Application.) Mr. Marshall included his name, address, phone number, and email on the application. (Dkt. 1-6.) He requested atrium space for a "reason station." (*Id*.) The application requests reserved space in the atrium two days a week from 11:00 a.m. to 3:00 p.m. (*Id*.) In all material respects, Mr. Marshall's application is identical to the applications submitted by Pastor Walden, except that where Pastor Walden's applications seek use of the atrium for a "prayer station," Mr. Marshall's application seeks use of the atrium for a "reason station." (*Compare* Dkt. 1-6 *with* Dkt. 1-4.)

Mayor Fouts Rejects the Reason Station

On or about April 17, 2014, Mr. Marshall received a letter from Mayor Fouts dated April 15, 2014. (Marshall Decl. ¶ 19; Dkt. 1-7, Compl. Ex. F, Letter

[2] Some of the literature Mr. Marshall wishes to distribute at the reason station would come from the Freedom From Religion Foundation, a 501(c)(3) non-profit organization of which he is a member, and one of the legal organizations representing Mr. Marshall. (Marshall Decl. ¶ 16.) The mission of the Freedom From Religion Foundation includes educating the public about nontheism. (*Id*.)

from Mayor Fouts.) In the letter, Mayor Fouts denied Mr. Marshall's request to use space in the atrium. Mayor Fouts's letter states in full:

> Dear Mr. Marshall:
>
> The City of Warren through the Downtown Development Authority has received your request to use space in the atrium. It is my understanding that you are affiliated with Freedom from Religion, a group that has objected to the Nativity Scene, the Prayer Station in the atrium and the Annual Day of Prayer in front of city hall.
>
> All of these events are allowed because of the right to freedom of religion constitutional amendment. We cannot and will not restrict this right for any religion to use the atrium, as long as the activity is open to all religions.
>
> Freedom from Religion is not a religion. It has no tenets, no place of worship and no congregation. To my way of thinking, your group is strictly an anti-religion group intending to deprive all organized religions of their constitutional freedoms or at least discourage the practice of religion. The City of Warren cannot allow this.
>
> Also, I believe it is your group's intention to disrupt those who participate in the Prayer Station which would also be a violation of the freedom of religion amendment.
>
> For these reasons, I cannot approve of your request.
>
> Sincerely,
>
> /s/ James R. Fouts
>
> James R. Fouts
> Mayor of Warren

(Dkt. 1-7, emphases in original.)

On April 18, 2014, Americans United for Separation of Church and State, one of the legal organizations representing Mr. Marshall, sent a letter to Mayor Fouts and Warren City Attorney David Griem (copying City Council) explaining in detail that Mayor Fouts's denial of Mr. Marshall's application was plainly unconstitutional, notifying the mayor that failure to reverse his decision would likely lead to litigation, and asking for a response within thirty days. (Dkt. 1-8, Compl. Ex. G, Letter from Americans United.) No response was received.

ARGUMENT

THIS COURT SHOULD GRANT A PRELIMINARY INJUNCTION BECAUSE DEFENDANTS ARE VIOLATING PLAINTIFF'S FIRST AMENDMENT RIGHTS.

A district court is required to consider and balance the following four factors when evaluating a motion for preliminary injunction:

1. the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim;

2. whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief;

3. the probability that granting the injunction will cause substantial harm to others; and

4. whether the public interest is advanced by the issuance of the injunction.

Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994). Where "a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). Here, all four factors weigh strongly in Plaintiff's favor.

A. Plaintiff is highly likely to succeed on the merits of his First Amendment claims.

In this case, there are three reasons why Mr. Marshall is overwhelmingly likely to succeed on the merits of his First Amendment claims. *First*, by allowing a church group to use atrium space for its prayer station while denying Mr. Marshall permission to use atrium space for his reason station, Defendants are discriminating against Mr. Marshall's viewpoint in violation of his right to free speech under the First Amendment. *Second*, and relatedly, by favoring religious speech over irreligious speech, Defendants are violating the Establishment Clause of the First Amendment. And *third*, as an alternative basis for why Plaintiff is likely to succeed on the merits, in the unlikely event that this Court were to find that the prayer station is government speech as opposed to private speech, Defendants' promotion of prayer and religion in city hall would also violate the Establishment Clause.

1. Defendants are violating the free speech guarantee of the First Amendment by discriminating against Plaintiff on the basis of the non-religious viewpoint he wishes to express.

The Sixth Circuit employs a three-step analysis to evaluate whether the government has violated an individual's free speech rights. The court begins by asking whether the speech at issue is protected under the First Amendment. If it is, the court proceeds to determine the nature of the forum where the speech would occur. Lastly the court applies the appropriate standard for the forum to determine whether the speech restriction is constitutional. *Parks v. City of Columbus*, 395 F.3d 643, 647 (6th Cir. 2005). "When the government restricts speech, the government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000).

Protected Speech

We begin with the first step. Mr. Marshall seeks to convey information to members of the public about issues of philosophy, religion, and personal belief, both by speaking to them about his views and distributing literature about atheism. (Marshall Decl. ¶¶ 14-16.) There is no question that this form of speech is protected by the First Amendment. It is well-settled that the free speech guarantee of the First Amendment protects the "oral and written dissemination of religious views and doctrines" and "the hand distribution of religious tracts." *Parks*, 395 F.3d at 647. Consequently, the expression of atheist views and the hand distribution of atheist literature is also protected speech.

Forum Analysis

The next step would ordinarily be to determine what kind of "forum" the Civic Center atrium is. *See Parks*, 395 F.3d at 647. "The Supreme Court has adopted a forum analysis for use in determining whether a state-imposed restriction on access to public property is constitutionally permissible." *Kincaid v. Gibson*, 236 F.3d 342, 347 (6th Cir. 2001) (en banc). There are four types of fora recognized by the Sixth Circuit: the traditional public forum, the designated public forum, the limited forum, and the nonpublic forum. *See Miller v. City of Cincinnati*, 622 F.3d 524, 534-35 (6th Cir. 2010) (describing the four types of fora). First Amendment protections are at their apex in traditional and designated public fora, and less robust in limited and nonpublic fora. *See id.*

Regardless of the forum, it is always unconstitutional for speech to be restricted on the basis of viewpoint.[3] *Kincaid*, 236 F.3d at 355; *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 845 (6th Cir. 2000); *see also Ark. Educ.*

[3] One possible exception to the general rule against viewpoint discrimination may be the government's obligation to exclude religious speech when necessary to comply with the Establishment Clause. The Supreme Court has acknowledged this possibility but has declined to say whether "a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001). In this case, as in *Good News Club*, there is no need to confront the question because Defendants cannot possibly argue that excluding Mr. Marshall's speech from the atrium is necessary to avoid violating the Establishment Clause. To the contrary, as explained below, Defendants' discriminatory conduct blatantly *violates* the Establishment Clause—in addition to being viewpoint discriminatory.

Television Comm'n v. Forbes, 523 U.S. 666, 682 (1998); *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 296 (3d Cir. 2011). Therefore, where a plaintiff's central claim is viewpoint discrimination, there is no need to identify the type of forum at issue. *See Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Mot. Vehicles*, 288 F.3d 610, 623 (4th Cir. 2002) ("the type of forum that exists . . . is relevant only if the [speech] restriction is viewpoint-neutral"); *Children First Found., Inc. v. Legreide*, 373 F. App'x 156, 159 (3d Cir. 2010) ("forum analysis does not apply to restrictions on expression that are based on a speaker's viewpoint" because such restrictions are unconstitutional "regardless of the forum involved").

In this case, viewpoint discrimination is the heart of Plaintiff's free speech claim. Accordingly, for purposes of the present motion it is unnecessary for the Court to define the city hall atrium space as any particular kind of forum. Even assuming the atrium space is a limited or nonpublic forum, Defendants are violating the First Amendment if they are denying Mr. Marshall access to that space based on the viewpoint of the speech he wishes to express there.

Viewpoint Discrimination

The final and dispositive step in the free speech analysis, then, is to determine whether it is likely that Mr. Marshall's speech is being restricted on the

basis of viewpoint. Based on the evidence presented with this motion, the Court should have no trouble concluding that the answer is yes.

The Supreme Court has repeatedly held that when the government opens its property to non-religious speech by secular groups, it is unconstitutional viewpoint discrimination to exclude speech from a religious perspective by religious groups. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993), the Supreme Court held that when a public school district opens its property to after-school use by private groups for the presentation of views about "family issues and child rearing," it cannot exclude a church group's presentations on those subjects on grounds that they are expressed "from a Christian perspective." Then, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 831-32 (1995), the Supreme Court held that when a public university pays for the printing of student publications, it cannot refuse to pay for the printing of some publications on the basis that they have "Christian editorial viewpoints." Most recently, in *Good News Club v. Milford Central School*, 533 U.S. 98, 109-112 (2001), the Supreme Court held that when a public school allows outside groups to use its facilities after hours for events "pertaining to the welfare of the community" or to promote the "development of character and morals," it cannot prohibit a Christian group from using the facilities for that purpose merely because its activities are "decidedly religious in nature." In all three cases, 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." *Good News Club*, 533 U.S. at 112.[4]

In this case, of course, "religious viewpoints" are already being given access to Warren's atrium space, and it is Mr. Marshall's atheist viewpoint that is being excluded. However, the very definition of viewpoint neutrality means that the *Lamb's Chapel*, *Rosenberger* and *Good News Club* holdings are not limited to the protection of speech from a religious perspective; they must apply equally to speech from an atheist perspective. "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). Here, Defendants allow those who operate the prayer station to express their religious views in the public atrium. Viewpoint neutrality requires that they also allow Mr. Marshall access to the atrium so that he may express his atheist views.

The evidence makes it clear that Mr. Marshall is being denied access to the atrium because of his viewpoint. His application to set up a "reason station" is

[4] *See also Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); *Widmar v. Vincent*, 454 U.S. 263 (1981) (state university violated Free Speech Clause by prohibiting religious student groups from holding meetings in university facilities that were open to meetings of secular student groups).

identical in all material respects to Pastor Walden's application to set up a "prayer station." (*Compare* Dkt. 1-6 *with* Dkt. 1-4.) And Mayor Fouts's letter in response to Mr. Marshall's application says that the City of Warren will not restrict the ability of "any religion to use the atrium." (Dkt. 1-7, emphasis in original.) The mayor's letter goes on to deny Mr. Marshall the ability to use the atrium because his belief system "is not a religion." (*Id*.) Further, Mayor Fouts explained, "To my way of thinking," Mr. Marshall is associated with an "anti-religion group" that "discourage[s] the practice of religion." (*Id*.)

There is no reasonable way to interpret this letter other than as viewpoint discrimination. Restrictions on speech may not be imposed as part of "an effort to suppress expression merely because public officials oppose the speaker's view," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), and "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. Here, Mayor Fouts will allow any religion to use the atrium, but has excluded Mr. Marshall because he disagrees with Mr. Marshall's freethought perspective, which the mayor views as "anti-

religious."[5] It is therefore highly likely that Mr. Marshall will succeed on the merits of his free speech claim.

2. Defendants are also violating the Establishment Clause of the First Amendment by favoring religious speech over non-religious speech.

In addition to violating the First Amendment's free speech guarantee by restricting Mr. Marshall's speech based on his viewpoint, Defendants are violating the First Amendment's Establishment Clause by treating religion more favorably than non-religion. The Supreme Court has stated time and again that the Establishment Clause "mandates governmental neutrality between religion and religion, *and between religion and nonreligion*." *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005) (emphasis added) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) ("a principle at the heart of the Establishment Clause" is "that government should not prefer one religion to

[5] Mayor Fouts's letter also vaguely alludes to his apparent belief that Mr. Marshall or his group intend to "disrupt those who participate in the Prayer Station." (Dkt. 1-7.) However, there is absolutely no reason to believe that either Mr. Marshall or anyone with whom he is associated intends to interfere with the prayer station; in fact, Mr. Marshall confirms in a declaration that he does not intend to do so. (Marshall Decl. ¶ 17.) "When the government defends a regulation on speech as a means to . . . prevent anticipated harms, it must . . . demonstrate that the recited harms are real, not merely conjectural . . . ." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). Absent a persuasive demonstration by Defendants that Mr. Marshall actually intends to disrupt the prayer station, this unsupported speculation in Mayor Fouts's letter should play no role in this Court's decision whether to grant a preliminary injunction.

another, or religion to irreligion"); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (no governmental body "can constitutionally pass laws or impose requirements which aid all religions as against non-believers"). In this case, Defendants are unabashedly favoring the prayer station over the reason station *because* the prayer station is a religious activity and the reason station is not. (*See* Dkt. 1-7.) This type of favoritism violates the First Amendment's requirement that government remain "neutral in its relations with groups of religious believers and non-believers." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

To be clear, Plaintiff is not arguing that Defendants necessarily violate the Establishment Clause by allowing a church group to use government-owned space in the city hall atrium to express its religious beliefs or engage in religious practice through its operation of the prayer station. Rather, Defendants violate the Establishment Clause by giving those who operate the prayer station *preferential treatment* over those who would operate the secular reason station. The point is well illustrated by *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), where the Supreme Court struck down a sales-tax exemption that was available exclusively to religious periodicals. The tax exemption violated the Establishment Clause because there were no "like benefits for nonreligious groups" and "the exemption was intended to benefit religion alone." *Id.* at 14 n.4. Such governmental benefits, the Court held, may not be "reserved for publications dealing solely with religious

issues, *let alone restricted to publications advocating rather than criticizing religious belief or activity*, without signaling an endorsement of religion that is offensive to the principles informing the Establishment Clause." *Id*. at 16 (emphasis added).[6] By contrast, in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), the Supreme Court upheld a property-tax exemption that benefited churches precisely because the statute did not single out religious organizations for special treatment; the benefit was available to "a broad class of property owned by nonprofit, quasi-public corporations." *Id*. at 673.

Here, Defendants are violating the Establishment Clause because the benefit of atrium access is not available to religious and non-religious groups alike; religion is being singled out and given preferential treatment over non-religion. Indeed, Mayor Fouts wrote in his letter rejecting Mr. Marshall's reason station application that the city "will not restrict the right of any religion to use the atrium" but will not allow an atheist group with "no place of worship and no congregation" equal access to the atrium space. (Dkt. 1-7, emphasis in original.) This policy

[6] Similarly, in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 & n.9 (1985), the Supreme Court held that a state statute that provided Sabbath observers with an absolute right not to work on their Sabbath violated the Establishment Clause, explaining that the statute "commanded that Sabbath religious concerns automatically control over all secular interests at the workplace" and that the statute gave "no rights" to "[o]ther employees who have strong and legitimate, but non-religious, reasons for wanting a weekend day off."

clearly privileges religion over non-religion and therefore violates the Establishment Clause.

3. Alternatively, if the court concludes that the prayer station is government speech, then it is prohibited by the Establishment Clause.

Defendants may argue that the First Amendment does not apply in this situation because the prayer station is "government speech." As explained below, they would be wrong because the prayer station is not government speech. However, even if the prayer station were found to be government speech, Defendants' conduct would still be unconstitutional because it would violate the Establishment Clause.

(a) The prayer station is not government speech.

Defendants might be tempted to argue that the prayer station is government speech because that is how they won a recent case involving the same parties. In *Freedom From Religion Foundation, Inc. v. City of Warren*, 707 F.3d 686, 696 (6th Cir. 2013), the Sixth Circuit concluded that Warren's seasonal holiday display in the city hall atrium amounted to government speech because it represented the city's own message. The viewpoint neutrality requirement of the First Amendment "restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Therefore, Warren was not required to place a secular "Winter Solstice" sign in the atrium

alongside its own Christmas-themed holiday display. *Freedom From Religion Found.*, 707 F.3d at 697.

This case is different. In *Freedom From Religion Foundation*, the court found the holiday display represented Warren's own message, noting that the city "erected, maintained, took down and stored the display each year," "covered the costs in doing so," and "reserved final approval of all components of the display to itself." *Id.* at 696. Here, on the other hand, the prayer station is private speech that Warren has permitted to occur in its atrium. The record evidence shows that Pastor Walden submits applications on behalf of the Tabernacle Church requesting the city's permission to use Civic Center facilities. (Dkt. 1-4.) Those who operate the prayer station determine the religious message that is conveyed to the public and the content of the religious literature that is available for display and distribution. Defendants, by granting *permission* for atrium use, allow the church group to speak in the atrium; they do not craft or control the prayer station's message. Indeed, Mayor Fouts's letter confirms that the city will allow "any religion *to use* the atrium." (Dkt. 1-7, emphasis added.) Thus, the Tabernacle's use of the atrium for the prayer station in this case is like the church groups' use of school facilities for after-school activities in *Lamb's Chapel* and *Good News Club*, not like the city's own holiday display in *Freedom From Religion Foundation*.

The Supreme Court has specifically recognized "the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." *Summum*, 555 U.S. at 473. And in another case involving speech by private groups in the lobby of a city hall, the Sixth Circuit squarely rejected the city's "government speech" defense, remarking that "no one can reasonably interpret a private group's rally or press conference as reflecting the government's views simply because it occurs on public property." *Miller v. City of Cincinnati*, 622 F.3d 524, 537 (6th Cir. 2010). Here, too, the government-speech argument—if Defendants choose to raise it—should be rejected. The prayer station is private religious speech, not the speech of Warren's municipal government.

(b) <u>If the prayer station is government speech, it violates the Establishment Clause.</u>

That being said, if this Court does determine that the prayer station is government speech, Plaintiff is still likely to succeed on the merits because the prayer station as government speech would violate the Establishment Clause. "While the Supreme Court has affirmed the rights of private groups to use public facilities to spread a religious message, it has specifically prohibited public bodies from acting likewise." *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1545 (6th Cir. 1992); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("There is a crucial difference between

government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."). "[G]overnment speech must comport with the Establishment Clause." *Summum*, 555 U.S. at 468.

The Establishment Clause prohibits "[g]overnment efforts to endorse religion." *Santa Fe*, 530 U.S. at 316; *see also Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985); *Satawa v. Macomb County Rd. Comm'n*, 689 F.3d 506, 526 (6th Cir. 2012) (governmental conduct violates Establishment Clause if it it "has the purpose or effect of endorsing religion"). Here, the prayer station unquestionably endorses religion. Therefore, if it is government speech, it violates the Establishment Clause.

Again, the Sixth Circuit's recent *Freedom From Religion Foundation* decision, 707 F.3d 686, does not help Defendants this time around. In that case, Warren's holiday display was found not to violate the Establishment Clause because it fit within the line of Supreme Court cases holding that a government-sponsored holiday display does not endorse religion when it includes a diverse array of religious *and* secular holiday symbols, thereby expressing the government's neutrality between the secular and religious aspects of the holiday season. *Id.* at 692-93. In this case, by contrast, if the prayer station is government speech then Defendants are clearly not expressing a message of government

neutrality between religion and non-religion; they are unequivocally communicating a message that the government endorses religion. Such a message is unconstitutional. *See, e.g.*, *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 494 (6th Cir. 2004) (prohibiting judge from displaying Ten Commandments in courtroom because it "conveys a message of religious endorsement"); *Doe v. Porter*, 370 F.3d 558, 563 (6th Cir. 2004) (striking down school district's practice of allowing private religious college to teach, in public school, a class promoting the Bible, for practice "sen[t] a clear message of state endorsement of religion"); *Adland v. Russ*, 307 F.3d 471, 489 (6th Cir. 2002) (proposed display of Ten Commandments monument at Kentucky state capitol would have unconstitutionally endorsed religion); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 684 (6th Cir. 1994) (public school's display of portrait of Jesus in hallway unconstitutionally endorsed and promoted Christianity).

B. Plaintiff will suffer irreparable injury absent preliminary injunctive relief.

Once the court finds a likelihood that Plaintiff's constitutional rights are being violated, there is little question that the remaining preliminary-injunction factors also weigh strongly in favor of preliminary injunctive relief. "With regard to the factor of irreparable injury, for example, it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Connection Distributing Co. v. Reno*, 154 F.3d

281, 288 (6th Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Newsom v. Norris*, 888 F.3d 371, 378 (6th Cir. 1989). Accordingly, "when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *ACLU of Kentucky v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd*, 545 U.S. 844 (2005).

As demonstrated above, Defendants are violating Mr. Marshall's First Amendment rights. Absent injunctive relief, he will continue to suffer irreparable harm.

C. The issuance of a preliminary injunction will not cause substantial harm to others.

As a matter of law, the Sixth Circuit has held that a party cannot claim that it will be harmed by an injunction if the conduct to be enjoined violates the Constitution. *See Tyson Foods v. McReynolds*, 865 F.3d 99, 103 (6th Cir. 1989) ("Holly Farms has suffered no injury as a result of the preliminary injunction [because] it has no right to the unconstitutional application of state laws."); *see also Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001) ("[I]f the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its

enjoinment."). Here, Plaintiff seeks a preliminary injunction requiring Defendants to provide him with access to the atrium space for his proposed reason station on equal terms with the Tabernacle's access to the atrium space for its prayer station. Such an injunction will remedy an ongoing constitutional violation and will cause no harm to others.

D. The public interest will be served by a preliminary injunction.

The final factor is whether the public interest will be served by an injunction. Again, Mr. Marshall's high likelihood of success on the merits of his claims largely disposes of the public-interest factor. "When a constitutional violation is likely, . . . the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party's constitutional rights." *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010). In this case, the public-interest factor weighs strongly in favor of preliminary injunctive relief because, as demonstrated above, absent the issuance of an injunction a continuing "constitutional violation is likely." *Id.*

CONCLUSION

For the reasons set forth above, Plaintiff requests that this Court issue a preliminary injunction requiring Defendants to allow Plaintiff to operate his proposed "reason station" in the Warren Civic Center atrium on terms no less

favorable than those provided to the persons and groups who operate the "prayer station" in that space.[7]

Respectfully submitted,

/s/ Daniel S. Korobkin

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Attorneys for Plaintiff

Dated: July 23, 2014

[7] In the alternative, if the Court concludes that the prayer station represents government speech, the Court should issue a preliminary injunction prohibiting continued operation of the prayer station.

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF system; enclosed the document with the complaint and summons being served on all defendants by registered mail with restricted delivery and return receipt requested; and emailed the document along with a copy of the complaint to David Griem (P23187), Warren city attorney, at davidgriemlaw@gmail.com and to his assistant at jdecker@cityofwarren.org.

/s/ Daniel S. Korobkin
Daniel S. Korobkin (P72842)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOUGLAS MARSHALL,

Plaintiff,

v.

CITY OF WARREN and
JAMES R. FOUTS, in his individual capacity and in his official capacity as mayor of Warren,

Defendants.
_____/

DECLARATION OF DOUGLAS MARSHALL

Douglas Marshall states as follows:

1. I am the plaintiff in this case.

2. I am a resident of the City of Warren, which is located in Macomb County, Michigan.

3. Warren's municipal government is housed in the Warren Civic Center, also commonly known as City Hall.

4. The Civic Center has a large atrium which is open to the public.

5. I periodically go to the Civic Center and enter its atrium in the regular course of my personal and civic affairs, including to pay my property taxes and my water bill, and to pick up and drop off my absent voter ballot.

6. I also regularly pay property taxes to the City of Warren, which support Warren's ongoing operation and maintenance of the Civic Center's atrium.

7. When I enter the atrium, I ordinarily encounter the prayer station there.

8. The prayer station has regularly been in the atrium since at least 2009. The prayer station consists of a folding table with two chairs, religious literature on display, and an overhead banner that says, "PRAYER STATION." The photograph attached as Exhibit D to the Complaint in this case is a true and correct depiction of the prayer station.

9. I have approached the prayer station in the past to learn more about it. Multiple copies of religious pamphlets and flyers were spread out on the table and available for the public to read and take home with them. The volunteers who run the prayer station asked me to pray with them and to join them at church services.

10. I am an atheist.

11. For me, atheism is a deeply and sincerely held viewpoint.

12. As an atheist, I do not believe in God, and I promote reason and freethought as an alternative to religious belief.

13. Although it is difficult to know exactly what it is like to believe in God, my commitment to an atheist belief system occupies a place in my life roughly parallel to that occupied by God in traditionally religious persons.

14. I do not agree with the religious message expressed by the prayer station, and I wish to set up a "reason station" in the Civic Center atrium to express my atheist and freethought views.

15. The reason station would be similar in size, structure and function to the prayer station. It would consist of a folding table and chairs, an identifying sign, and atheist literature on display and available to the public. I and other volunteers who operate the reason station would offer to have philosophical discussions with passersby who express an interest in atheism and freethought.

16. Some of the literature I wish to distribute at the reason station would come from the Freedom From Religion Foundation, a 501(c)(3) non-profit organization of which I am a member. The mission of the Freedom From Religion Foundation includes educating the public about nontheism.

17. I do not intend for the reason station to disrupt the prayer station in any way.

18. In April 2014, I submitted a Civic Center Facilities Rental Application requesting permission to use the atrium space for the reason station. A copy of this application is attached as Exhibit E to the Complaint in this case.

19. About a week later, I received a letter from Mayor Fouts rejecting my application. A copy of this letter is attached as Exhibit F to the Complaint in this case.

20. Based on the denial of my request to set up a reason station in the atrium, the permission given to the church group to run the prayer station, and the explanation provided by Mayor Fouts's letter, there is no doubt in my mind that Warren and Mayor Fouts favor and endorse traditional religious beliefs over atheistic beliefs. This makes me feel unwelcome at the Civic Center, an outsider in the community, a second-class citizen in Warren, and a disfavored member of a religious minority group. I also object to my tax payments being used to support the operation and maintenance of a facility that Warren and Mayor Fouts control in a discriminatory manner that advances traditional religious beliefs over atheistic beliefs. The decision to deny my reason station application makes me feel discriminated against, offended, angry, upset, and sad.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 17 day of July, 2014, in Warren, Michigan.

Douglas Marshall

Douglas Marshall