NO. 11-1612

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

JOHN SATAWA,
PLAINTIFF-APPELLANT,

V.

MACOMB COUNTY ROAD COMMISSION, *ET AL.*,
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE GERALD E. ROSEN
CASE NO. 2:09-cv-14190

APPELLANT'S BRIEF

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiff-Appellant states the following:

Plaintiff-Appellant John Satawa is an individual, private party. There are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiff respectfully requests that this court hear oral argument. This case presents for review important constitutional questions regarding the rights of individuals to display private nativity scenes on public property during the Christmas season.

Oral argument will assist this court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

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STATEMENT OF JURISDICTION

On October 23, 2009, Plaintiff filed this action, alleging violations of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (R-1, Compl.). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On October 30, 2009, Plaintiff filed a motion for a temporary restraining order / preliminary injunction (R-8, Pl.'s Mot. for TRO/Prelim. Inj.), which the district court denied on December 28, 2009 (R-24, Op. & Order Addressing Pl.'s Mot. for Prelim. Inj.).

After the close of discovery, the parties filed cross-motions for summary judgment. (R-37, Pl.'s Mot. for Summ. J. & Inj.; R-43, Defs.' Opp'n; R-41, Defs.' Mot. for Summ. J.; R-42, Pl.'s Opp'n).

On April 19, 2010, the court entered an opinion and order granting Defendants' motion for summary judgment and denying Plaintiff's motion. (R-47, Op. & Order Regarding Cross-Mots. for Summ. J). Judgment was subsequently entered in favor of Defendants, resolving all parties' claims. (R-48, J.).

On May 9, 2011, Plaintiff filed a timely notice of appeal (R-49, Notice of Appeal), seeking review of the district court's opinion and order. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

This case challenges a government policy decision that disfavors religion and abridges fundamental constitutional rights. The target of this official government act is Plaintiff's private nativity scene, which had been displayed on a public median in the City of Warren, Michigan since 1945. Defendants' decision to deny Plaintiff a permit to display his nativity scene on this public median during the 2009 Christmas season ended a 63-year holiday tradition.

In *Lynch v. Donnelly,* the Supreme Court noted that a "crèche . . . depicts the historical origins of this traditional event [Christmas] long recognized as a National Holiday" and "[t]o forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, *would be a stilted overreaction contrary to our history and to our holdings*." *Lynch v. Donnelly*, 465 U.S. 668, 680, 686 (1984) (emphasis added).

Similarly here, Defendants' ban on the display of Plaintiff's private nativity scene is contrary to our Nation's history and the values protected by our Constitution.

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether denying Plaintiff the right to engage in private, religious expression in a traditional public forum by denying him a permit to temporarily

display a private nativity scene on a public median during the Christmas holiday season based on the content of Plaintiff's speech violates the First Amendment to the United States Constitution.

II. Whether denying Plaintiff the right to engage in private, religious expression (privately-sponsored display) in a traditional public forum while permitting publicly-sponsored displays in the same forum violates Plaintiff's right to freedom of speech and deprives him of the equal protection of the law in violation of the First and Fourteenth Amendments to the United States Constitution.

III. Whether denying Plaintiff the right to engage in private, religious expression in a traditional public forum because the content of his speech is religious violates the Establishment Clause of the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

On October 23, 2009, Plaintiff filed this action, alleging violations of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (R-1, Compl.). Plaintiff challenges the denial of his permit request to display his private nativity scene during the Christmas holiday season on a public median in the City of Warren, Michigan.

On October 30, 2009, Plaintiff filed a motion for a temporary restraining order / preliminary injunction, seeking an order to permit his nativity display during the 2009

Christmas holiday season. (R-8, Pl.'s Mot. for TRO/Prelim. Inj.) The district court denied Plaintiff's motion on December 28, 2009. (R-24, Op. & Order Addressing Pl.'s Mot. for Prelim. Inj.). In its order, the court requested that Plaintiff "show cause" as to why it should not consolidate its ruling on Plaintiff's motion for a preliminary injunction with a ruling on the merits pursuant to Rule 65 of the Federal Rules of Civil Procedure. (R-24, Op. & Order Addressing Pl.'s Mot. for Prelim. Inj.). Plaintiff responded to the show cause order. (R-25, Pl.'s Resp. to Show Cause Order). Subsequently, the court vacated the order and allowed discovery to proceed. (R-29, Order Vacating Show Cause Order).

After the close of discovery, the parties filed cross-motions for summary judgment. (R-37, Pl.'s Mot. for Summ. J. & Inj.; R-43, Defs.' Opp'n; R-41, Defs.' Mot. for Summ. J.; R-42, Pl.'s Opp'n).

On April 19, 2010, the court entered an opinion and order granting Defendants' motion for summary judgment and denying Plaintiff's motion. (R-47, Op. & Order Regarding Cross-Mots. for Summ. J). Judgment was subsequently entered in favor of Defendants. (R-48, J.). This appeal follows. (*See* R-49, Notice of Appeal).

STATEMENT OF FACTS

A. The Parties.

Plaintiff is a longtime resident of the City of Warren, Michigan, and a practicing member of the Catholic Church. (R-8, Satawa Decl. at ¶ 1 at Ex. 1 to Pl's

Mot. for TRO/Prelim. Inj. (hereinafter "Satawa Decl.")). For over 60 years, Plaintiff and his family displayed a nativity scene on a public median in the City of Warren. (R-8, Satawa Decl. at ¶ 3).

Defendant Board of County Road Commissioners of Macomb County (hereinafter "Road Commission" or "Board") is a taxpayer-funded government agency. The three-person Road Commission, acting as a Board, makes policy decisions for the commission. Pursuant to its policy making authority, the Road Commission has the authority to issue permits for the temporary construction or placement of private structures, including signs and other displays, in the rights-of-way of county roads, including median strips. At all relevant times, Defendant Gillett was a commissioner on the Road Commission, and in 2009, she was the Chairperson. Defendant Hoepfner is the County Highway Engineer for the Road Commission. In that capacity, he is responsible for implementing and enforcing the policy decisions of the Road Commission, including its policies and decisions regarding permit applications for the placement of structures in the rights-of-way of county roads.[1] (R-37, Gillett Dep. at 11-19, 30-31, 37, 44, 61 at Ex. 1; R-37, Hoepfner Dep. at 9-18, 39-

[1] Defendant Hoepfner testified on behalf of the Road Commission pursuant to Fed. R. Civ. P. 30(b)(6) as follows:

> Q: So the policy and permit application *does allow for private installation[s] in rights-of-way* so long as they get approval?
>
> A: *Yes*, if the Board approves it, yes, or if the Road Commission approves it.

(R-37, Hoepfner Dep. at 49 at Ex. 2; R-37, Dep. Ex. 28 (Rule 30(b)(6) Deposition Notice) at Ex. 5) (emphasis added).

42, 48-49 at Ex. 2; R-37, Dep. Ex. 3 (Permit Appl. Form) at Ex. 3; R-37, Dep. Ex. 7 (Road Comm'n Policy) at Ex. 4).

B. Plaintiff's Nativity Display.

In 1945, Plaintiff and his family began erecting a private nativity display during the Christmas holiday season on the public median between Mound and Chicago Roads in Warren, Michigan.[2] (R-8, Satawa Decl. at ¶ 3; R-37, Satawa Dep. at 79-81 at Ex. 6; R-37, Hoepfner Dep. at 52-54 at Ex. 2; R-37, Dep. Exs. 14-15 (Photographs of Nativity Scene) at Ex. 7; R-37, Dep. Ex. 40 (St. Anne's Parish Record) at Ex. 8). In December, 2008, this tradition came to a sudden end when Plaintiff was informed by the Road Commission, through Defendant Hoepfner, that he had to remove the display.[3] (R-8, Satawa Decl. at ¶ 19; R-37, Hoepfner Dep. at 24-25 at Ex. 2). Defendants were acting in response to a complaint from the "Freedom From Religion Foundation," which objected to the *religious* content of Plaintiff's display. (R-37, Gillett Dep. at 41-42, 44-45 at Ex. 1; R-37, Hoepfner Dep. at 20-21 at Ex. 2; R-37, Dep. Ex. 8 (Compl. from Freedom From Religion Found.) at Ex. 10).

On or about December 11, 2008, Plaintiff received a letter from the Road Commission signed by Defendant Hoepfner, directing Plaintiff to "immediately

[2] The long and storied history of this display is set forth in the district court's opinion on Plaintiff's request for a preliminary injunction. (R-24, Op. & Order at 3-6).

[3] At no time prior to this lawsuit was Plaintiff ever informed by Defendants that his nativity display caused any safety issues. (*See* R-37, Satawa Dep. at 55-56 at Ex. 6 (discussing only the permit); R-37, Hoepfner Dep. at 24-25 at Ex. 2 (same); R-37, Dep. Ex. 12 (Formal Denial Letter) at Ex. 9).

remove" the nativity scene. The letter stated,

> It has come to the attention of the Road Commission of Macomb County that you have installed a temporary structure in the median of Mound Road south of Chicago Road in the City of Warren. *A search of our records indicates that no permit was issued for this structure to be placed in the Road Commission right-of-way*. This letter serves as your notice to immediately remove this structure from the right-of-way. If the removal does not occur within 30 days of the receipt of this letter, the Road Commission forces will remove the structure and bill you for the costs incurred.

(R-8, Satawa Decl. at ¶ 20, Ex. C; R-37, Hoepfner Dep. at 25-27 at Ex. 2; R-38, Dep. Ex. 10 (Road Comm'n Letter Ordering Removal of Nativity Scene) at Ex. 11) (emphasis added). Plaintiff complied with Defendants' demand. (R-8, Satawa Decl. at ¶ 21; R-37, Hoepfner Dep. at 27 at Ex. 2).

C. Defendants' Permit Process and Denial of Plaintiff's Permit Request.

In January, 2009, Plaintiff went to the office of the Road Commission to obtain a permit for the display of his nativity scene per the letter he received from Defendant Hoepfner. (R-8, Satawa Decl. at ¶ 22). At the Road Commission office, Plaintiff spoke to a clerk and inquired about the permit process. The clerk asked what the permit was for, and Plaintiff explained the situation regarding his nativity scene and the letter he received from Defendant Hoepfner. The clerk indicated to Plaintiff that she was aware of the situation and asked him to wait while she called another Road Commission employee, Ms. Sue VanSteelandt, to assist. (R-8, Satawa Decl. at ¶ 23).

Ms. VanSteelandt, who appeared to Plaintiff to be a supervisor or a manager,

approached the counter and asked Plaintiff some questions about the nativity scene, indicating that she had already received some information about it. Ms. VanSteelandt requested that Plaintiff provide some contact information on a permit application, and then directed him to sign and date it. Plaintiff complied and submitted the application as directed. Ms. VanSteelandt informed Plaintiff that he would soon receive a letter with a response from the Road Commission. (R-8, Satawa Decl. at ¶ 24; R-38, Van Steelandt Dep. at 20-26, 42 at Ex. 12; R-38, Dep. Ex. 22 (Incomplete Permit Appl.) at Ex. 13).

On or about February 7, 2009, Plaintiff received a letter from the Road Commission dated February 6, 2009. Enclosed with the letter was a copy of an application for a permit to temporarily display his nativity scene in the county "right-of-way." The letter stated, "Please sign the enclosed application by the 'X' and return to us in the enclosed envelope. Unfortunately, the application that you submitted prior was incomplete." The letter was signed, "Permit Department, Road Commission of Macomb County." (R-8, Satawa Decl. at ¶ 25, Ex. D; R-38, Dep. Ex. 11 (Road Comm'n Letter Regarding Permit Appl.) at Ex. 14). The permit application provided by the Permit Department is the application that is used to request a permit to construct or install structures or other items, including temporary structures (such as Plaintiff's nativity scene), on public rights-of-way, including medians, in Macomb

County.[4] (R-8, Satawa Decl. at ¶ 26; R-37, Hoepfner Dep. at 13-18, 48-49 at Ex. 2; *see also* R-37, Dep. Ex. 3 (Permit Appl. Form) at Ex. 3; R-37, Dep. Ex. 7 (Photographs of Nativity Scene) at Ex. 4).

In light of the road commission's February 6, 2009, letter indicating that Plaintiff's first permit application was "incomplete," on or about February 12, 2009, Plaintiff submitted an application that set forth the details of his proposed nativity scene, including photographs to show its size and location and to demonstrate that the display would not obstruct any vehicular or pedestrian traffic or create any public safety issues. Indeed, the nativity display, or one similar to it, had been displayed in this location without any public safety issues (or complaints) for over 60 years. (R-8, Satawa Decl. at ¶ 32, Ex. I).

In his 2009 permit application, Plaintiff stated the following:

> Applicant, Mr. John Satawa, requests permission to temporarily display a Nativity Scene in the median of Mound Road south of Chicago Road in the City of Warren for a period beginning on November 28, 2009 and ending on January 9, 2010. Applicant's display is intended to be an exercise of his private religious speech, which is fully protected under the Free Speech Clause of the First Amendment.
>
> The proposed Nativity Scene is approximately 8' x 8' x 8' at the peak, and it will be displayed in a manner similar to how it has been displayed at this location for the past 60 years. The enclosed photographs, which

[4] The permit application provided to Plaintiff *was completed*, in part, *by Permit Department employees*, who typed on the application the following: "Mound, to place a nativity scene in the county right-of-way" at the top and "Application to place a nativity scene in the right-of-way at the above location" at the bottom. (R-37, Hoepfner at 38 at Ex. 2; R-38, Dep. Ex. 4 (Pl.'s 2009 Permit Appl.) at Ex. 15).

> were taken of the display in January 2009, illustrate the nature, size, and location of the proposed display. As demonstrated by the photographs, *there are no obstructions to vehicular or pedestrian traffic or any other safety concerns caused by the display*.
>
> The proposed display will be lighted by two 150W floodlights and two 100W light bulbs. There is an electrical outlet available at the median location that has been used in previous years to provide power for the display. Applicant will pay for all electrical costs associated with his display. Additionally, applicant will be responsible for putting up and taking down the display. No assistance from government employees will be required.
>
> *Please advise if any insurance will be required, the reasons for said insurance, and the amount*.[5] Applicant is willing to pay all *reasonable* costs associated with his temporary display. *Applicant is also willing to post a sign at the display which states clearly that it is his private display and not the display of Macomb County, the City of Warren, or any other government entity*. Applicant is willing to coordinate and cooperate with Macomb County on the content, size, and location of this sign.

(R-8, Satawa Decl. at ¶¶ 32, 33, Ex. I; R-37, Hoepfner Dep. at 29-30 at Ex. 2; R-38, Dep. Ex. 4 (Pl.'s 2009 Permit Appl.) at Ex. 15).

On March 9, 2009, the Macomb County Road Commission issued a "formal denial" of Plaintiff's application for a permit "to erect a nativity scene in the Mound Road right of way." According to this "formal denial," which is the only formal explanation provided by Defendants for denying Plaintiff's permit request, the basis for the denial was because the nativity scene "*displays a religious message*."[6] (R-8,

[5] Plaintiff could enter into a hold harmless agreement with the Road Commission, and he could get insurance to indemnify the Road Commission. (R-37, Hoepfner Dep. at 66, 68 at Ex. 2).

[6] Defendants' policy decision to end the longstanding tradition of displaying a nativity

Satawa Decl. at ¶ 34, Ex. J; R-37, Hoepfner Dep. at 43 at Ex. 2; R-37, Dep. Ex. 12 (Road Comm'n Formal Denial of Permit) at Ex. 9). The Board had the authority to approve the nativity display, but chose not to. (R-37, Gillett Dep. at 30-31 at Ex. 1; R-37, Hoepfner Dep. at 41-42 at Ex. 2).

D. The Mound Road Median.

The median between Mound and Chicago Roads is unique in that it is large (over 60 feet wide), it is open to the public, and it contains many unattended items on display, as well as park benches.[7] (*See* R-37, Hoepfner Dep. at 65 at Ex. 2; R-8, Satawa Decl. at ¶¶ 27-31, Exs. E, F, G, H (Photographs of Median Displays)). For example, "Friends of the Village," a private organization of local residents who want to maintain the "village" character of Warren, displays various items on this median, including old wagons and farming equipment. Volunteers from the organization planted flowers, trees, and shrubs on the median. And the organization displays signs on the median, including signs requesting donations.[8] (R-8, Satawa Decl. at ¶ 27, Ex.

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scene on this public median caused political divisiveness and social conflict in the community. (*See* R-38, Van Steelandt Dep. at 33-37 at Ex. 12; R-38, Dep. Ex. 24 (Letters from Comty. / Pub.) at Ex. 17).

[7] There are no government or other public buildings within the vicinity of this public median, and this is the same location where the nativity scene had been displayed in the city without complaint for over 60 years. (R-8, Satawa Decl. at ¶ 35). In fact, the median contains historic-themed displays, and Plaintiff's nativity scene is compatible with this theme. (R-38, Zamora Decl. at ¶¶ 2-4, Ex. A, Dep. Ex. 35 (Letter from Warren Village Historic Dist. Comm'n) at Ex. 18).

[8] Despite having knowledge of the "Friends of the Village" displays, Defendant Hoepfner did *not* send a letter to the organization demanding the removal of its items

E). The Warren Branch of the Woman's National Farm and Garden Association planted flowers, shrubs, and trees in the median, and members of this organization maintain the landscaping on the median and around a gazebo and its courtyard, which were installed on the median by the City of Warren Historical Society.[9] The median contains memorial trees and brass memorial plaques affixed to rocks. (R-8, Satawa Decl. at ¶¶ 28, 29, Exs. F, G). The median displays a sign that states, "Village of Warren, 1893, Historic District." (R-8, Satawa Decl. at ¶ 30, Ex. H (Photograph of Median Sign)). Adjacent to the median and, more specifically, immediately adjacent to the location where the nativity scene has been displayed, is a public sidewalk. The public median contains park benches that are available for public use. And the gazebo on the median is open to the public as well. In fact, a historic marker is located near the gazebo. (R-8, Satawa Decl. at ¶¶ 27, 31, Ex. E; R-37, Hoepfner Dep. at 54-65 (discussing displays on median); R-39, Dep. Exs. 16-20 (Photographs of Displayed Items on Median) at Ex. 19).

Under Michigan law, *see* Mich. Comp. Laws § 257.20, a median is considered a

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from the median *because, according to Hoepfner, he had "not received any complaints that the items are - - create a problem for anyone*." (R-37, Hoepfner Dep. at 54-56 at Ex. 2; R-39, Dep. Ex. 16 (Photographs of Displayed Items on Median) at Ex. 19; *see also* R-37, Hoepfner Dep. at 57-60, 62-65 (acknowledging other displays on the median, but not requesting that they be removed); R-39, Dep. Exs. 17, 18, 20 (Photographs of Displayed Items on Median) at Ex. 19).

[9] For years, the Road Commission approved the display of the gazebo. (*See* R-37, Hoepfner Dep. at 65-72 at Ex. 2; R-39, Dep. Exs. 29, 30, 31, 33 (Docs. Regarding Sign & Gazebo Displays) at Ex. 20).

part of the street. (*See* R-39, Taylor Dep. at 54-55 at Ex. 21; R-39, Dep. Ex. 7 (MCL § 257.20 "Highway or Street") at Ex. 22).

E. Defendants' *Post Facto* "Safety" Concerns.

After the lawsuit was filed by Plaintiff, Defendants asserted "safety concerns" as a basis for denying the permit. According to the sworn declarations provided to this court by Defendants Gillett and Hoepfner in opposition to Plaintiff's request for a TRO / preliminary injunction, Plaintiff's "permit to install his nativity scene in the Mound Road right of way *was addressed with the Board* during the March 6, 2009 Board meeting, and *the Board authorized* [*Defendant*] *Hoepfner to deny the permit* based on [the Road Commission's] policies and *safety concerns*."[10] (R-13, Gillett Decl. at ¶ 9 at Ex. A; R-13, Hoepfner Decl. at ¶ 26 at Ex. B (emphasis added); *but see* R-37, Hoepfner Dep. at 44 at Ex. 2 (stating that he can't remember any safety issues being discussed at the meeting)).

However, the <u>*recording*</u> of the March 6, 2009, Board meeting (the only meeting where Plaintiff's permit was discussed) does not support Defendants' sworn

[10] The Board had the authority to approve Plaintiff's permit application, but it did not. Defendant Gillett testified as follows:

> Q: At the March 6th, 2009 board meeting, as I believe you stated previously, at that point if the board wanted to approve the permit could you not have told Mr. Hoepfner to approve the permit?
>
> A: We could have. Yes is the answer.

(R-37, Gillet Dep. at 30-31 at Ex. 1; R-37, Hoepfner Dep. at 39-42 at Ex. 2). Defendant Gillett acknowledged that she approved the <u>*denial*</u> of Plaintiff's permit. (R-37, Gillet Dep. at 37 at Ex. 1).

testimony. The following is the *only* discussion of Plaintiff's permit application by the Board during this meeting:

> MALE SPEAKER: This is an interesting one, last year a gentleman for the last 60 years has been installing a nativity scene at Mound Road and Chicago Road in the median of Mound Road, I received a letter from some anti-nativity scene law firm asking me to get rid of it.
> MALE SPEAKER: (Inaudible) Wisconsin?
> MALE SPEAKER: Yeah.
> MALE SPEAKER: Yeah.
> MALE SPEAKER: So I wrote the man a letter and ordered him to remove the nativity scene from the right-of-way. He has come in now and applied for a permit to install the nativity scene next year. His cover letter is from a law firm, the Thomas More Law Center. I've contacted Ben Aloia and asked him to research it. *Ben has informed me that we should not allow this nativity scene to be installed*, and he has given me some *language that I should respond to this permit. I intend to do that*. This probably won't go away and I suspect they'll sue us.
> FEMALE SPEAKER: All we can do is obey the law.

(R-37, Gillett Dep. at 24-26, 45-46, 53-55 at Ex. 1; R-39, Dep. Ex. 9 (Email Regarding Bd. Meeting Recording) at Ex. 23; R-39, Dep. Ex. 13 (Tr. of Bd. Meeting) at Ex. 24 (emphasis added); R-39, Tr. Cert. at Ex. 25). Consequently, the *actual* reason for the denial of Plaintiff's permit is as stated by Defendants in the formal denial letter.[11] Indeed, Defendants' *post facto* litigation strategy of asserting "safety"

[11] It is not the "normal" procedure for Defendant Hoepfner to bring a permit application to the attention of the Board. However, he did so with Plaintiff's permit application because, according to Defendant Hoepfner, "*it was very controversial*." (R-37, Hoepfner Dep. at 42 at Ex. 2) (emphasis added). In fact, as Defendant Gillett acknowledged, the complaint that Defendants were acting upon, which was the *only* complaint about the nativity scene ever received by Defendants, had *nothing* to do with safety; it was based on the content of Plaintiff's speech. (*See* R-37, Gillett Dep. at 37-45 at Ex. 1; R-37, Dep. Ex. 8 (Compl. from Freedom From Religion Found.) at

(*i.e.*, sight line obstruction) as a basis for denying Plaintiff's permit is without support. In fact, Defendant Hoepfner, the individual relied upon by Defendants to make the "safety" determination, testified as follows:

> Q: What was – now, *prior to March 9 of 2009, did you do any safety study or safety evaluation*?
> A: *No*.
> * * * *
> Q: Now, your understanding of the displayed nativity scene, does it block any pedestrian traffic on the sidewalks on the Mound Road median?
> A: *No, it doesn't*.
> Q: Does it block any vehicles, physically obstruct or block any vehicles from being able to travel on Mound or Chicago road?
> A: *No, it doesn't*.
> Q: And so prior to issuing your letter on March 9, 2009, *what was the safety issue or issues that you were concerned about?*
> A: *The fact that a vehicle could strike this nativity scene.*
> Q: *Was that it?*
> A: *That's it.*

(R-37, Hoepfner Dep. at 45-46; *see also* 34-35 at Ex. 2) (emphasis added). Defendant Hoepfner also candidly admitted during his deposition that he "didn't deny [the permit request] for sight problems." (R-37, Hoepfner Dep. at 34 at Ex. 2).

Defendants hired a "traffic safety expert" to offer opinions in this lawsuit as to the safety concerns related to the nativity display.[12] Defendants' expert testified that

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Ex. 10).

[12] The "expert report" of Defendants' witness was admittedly "incorrect" and subsequently modified to include the scenario described in this brief. (R-39, Taylor Dep. at 15-18 at Ex. 21). Defendants' revised scenario does not take into account the evergreen trees that are located immediately behind Plaintiff's display. (R-39, Taylor Dep. at 30 at Ex. 21).

the nativity display did *not* violate any of the applicable *safety standards*.[13] (R-39, Taylor Dep. at 12-13, 40-42 at Ex. 21). Defendants' expert testified that the nativity display did *not* pose a strike hazard because it is placed within "a reasonably safe position," (R-39, Taylor Dep. at 41, 64, 65 at Ex. 21), thus refuting Defendant Hoepfner's *only* safety concern. In fact, the *only* scenario that Defendant's expert could conjure up to *argue* that the nativity display could *possibly* pose a "safety concern" is, quite frankly, farfetched and improbable. The scenario is as follows: A vehicle travelling eastbound on Chicago Road, which has a speed limit of *30 mph*, must be travelling between *18 to 24 mph* (if the driver was travelling any faster—*i.e.,* the speed limit—or slower, there is no safety issue). *At exactly 3 seconds* from the intersection of Chicago and Mound Roads, the driver must *instantly* look at the nativity scene and then in the very next instant *look straight ahead* (not checking for traffic travelling north on Mound Road), while continuing to travel through the intersection. Meanwhile, a second vehicle travelling north on Mound Road must *ignore the steady red light* (the timing of the traffic lights is such that there is a built in delay to allow traffic to clear the intersections), *run the red light*, and then hit the eastbound driver. (R-39, Taylor Dep. at 19-52 at Ex. 21; R-40, Dep. Ex. 4 (Diagram of Intersection) at Ex. 26). There is *no other scenario* where the nativity display is

[13] Consequently, it was error for the district court to rely upon any road design manual or other written standards to conclude that Plaintiff's nativity scene was a safety hazard. (*See* R-47, Op. & Order at 36-37).

remotely involved in a traffic accident. (R-39, Taylor Dep. at 22 at Ex. 21 (acknowledging that there is "no other safety issue")). In fact, if all drivers obey the law, there will *never* be an accident (as the 63 year safety record of the nativity display shows). (R-39, Taylor Dep. at 25 at Ex. 21).

Moreover, in this scenario, which is the *only* hypothetical "safety" scenario presented by Defendants, the driver still has time to avoid an accident by checking for oncoming traffic travelling north on Mound Road after the driver has passed the nativity display. (R-39, Taylor Dep. at 52, 62-64 at Ex. 21). Thus, the scenario *fails* if the driver looks after passing the nativity display to see if traffic is approaching on Mound Road. Consequently, in Defendants' scenario, the driver is *not* looking for oncoming traffic because there is still time to check for traffic and conduct an evasive movement to avoid an accident if that was the driver's intention. In sum, this accident is going to occur whether or not the nativity display is present because the driver *never* intends to look for the oncoming Mound Road traffic. Contrary to the district court's opinion, this is hardly evidence of a compelling government interest sufficient to overcome Plaintiff's constitutional rights. (*See* R-47, Op. & Order at 34-39).

Plaintiff similarly hired a traffic safety expert, and his expert report, opinions, and relevant testimony were presented to the district court as well. (*See* R-40, Wiechel Dep. at 52-54, 110-16, Exs. 1, 2, 4 at Ex. 27). Contrary to the district court's conclusion, Plaintiff's expert did *not* agree that the nativity display caused any

legitimate safety concerns. (*See* R-47, Op. & Order at 36) (erroneously concluding that Plaintiff's expert "concurred" with Defendants' expert). In fact, in its opinion and order the district court selectively cites to only a portion of the report prepared by Plaintiff's expert. (*See* R-47, Op. & Order at 36). In doing so, the district court failed to include the expert's analysis and his conclusion (which are contained in the very section cited by the court) in which the expert states: "*The presence of the crèche does not obscure the visibility of an eastbound driver on Chicago Road a sufficient period of time to alter that driver's response*." (R-40, Wiechel Dep., Dep. Ex. 4 (Expert Rep.) at 6 at Ex. 27). In other words, there is *no* safety hazard. Moreover, it should be noted that during the district court's "personal site visit" (*see* R-47, Op. & Order at 36, n.15), the nativity scene was *not* on display. Indeed, unlike the thorough review conducted by Plaintiff's safety expert, who relied upon empirical data and relevant safety standards, the district court's site visit involved no detailed analysis whatsoever of the safety issues involved.

SUMMARY OF THE ARGUMENT

The First Amendment protects Plaintiff's right to display his nativity scene during the Christmas holiday season on a public median, which is a traditional public forum. Because Defendants formally denied Plaintiff's permit request to display his nativity scene based on the fact that the display conveyed a religious message, which is a content-based restriction, Defendants violated Plaintiff's right to freedom of

speech. Moreover, Defendants' *post facto* litigation strategy of alleging a "safety concern" for prohibiting Plaintiff's nativity display is without merit—let alone compelling. Indeed, Defendants' safety concerns are further undermined by their willingness to permit other displays that, according to the testimony of Defendant Hoepfner, cause the very same safety concerns as Plaintiff's display.

By banning Plaintiff's display because it conveyed a religious message and permitting others to display non-religious messages in the same forum, Defendants also violated the Establishment Clause and the Equal Protection Clause.

ARGUMENT

I. STANDARD OF REVIEW.

This court reviews the district court's grant of summary judgment *de novo*. *Watkins v. City of Battle Creek*, 273 F.3d 682, 685 (6th Cir. 2001). It may affirm only if the record, *read in the light most favorable to Plaintiff*, reveals no genuine issues of material fact and shows that Defendants were entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Upon its review of the record, this court must consider the evidence and draw all reasonable inferences in Plaintiff's favor. *Siggers-El v. Barlow*, 412 F.3d 693, 699 (6th Cir. 2005).

Additionally, because this case implicates First Amendment rights, this court must closely scrutinize the record, without *any* deference to the district court. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995)

(requiring courts to "conduct an independent examination of the record as a whole, without deference to the trial court" in cases involving the First Amendment); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (noting that in cases raising First Amendment issues appellate courts must make an independent examination of the whole record).

II. Defendants Violated Plaintiff's First Amendment Right to Freedom of Speech.

Plaintiff's First Amendment right to freedom of speech is protected from infringement by States and their political subdivisions, such as Defendants, by operation of the Fourteenth Amendment. *See Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).

Plaintiff's free speech claim is examined in essentially three steps. First, the court must determine whether the speech in question—the private display of a nativity scene—is protected speech. Second, the court must conduct a forum analysis as to the public property in question to determine the proper constitutional standard to apply. Finally, the court must then determine whether Defendants' policy decision comports with the applicable standard.

A. Plaintiff's Protected Speech.

The first question is easily answered. "[T]here 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." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J.). Supreme Court 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." *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *see also Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment."). And the Supreme Court has "long recognized that [the First Amendment's] protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Consequently, displaying religious symbols, such as a private nativity scene, is protected speech under the First Amendment. *Capitol Square Rev. & Adv. Bd.*, 515 U.S. at 760 (holding that the private display of a cross was protected speech); *Am. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1542 (6th Cir. 1992) (holding that the private display of a menorah was protected speech); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1166 (6th Cir. 1993) (same).

B. Forum Analysis.

To determine the extent of Plaintiff's free speech rights in this matter, the court must next engage in a First Amendment forum analysis. "The [Supreme] Court has adopted a forum analysis as a means of determining when the Government's interest

in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for [expressive] purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). Forum analysis has traditionally divided government property into three categories: traditional public forums, designated public forums, and nonpublic forums. *Cornelius,* 473 U.S. at 800. Once the forum is identified, the court must then determine whether the speech restriction is justified by the requisite standard. *Id.*

On one end of the spectrum lies the traditional public forum. Traditional public forums, such as streets, sidewalks, and parks, are places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Next on the spectrum is the designated public forum, which exists when the government intentionally opens its property for expressive activity. *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983). As the Supreme Court stated, "[A] public forum may 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*, 473 U.S. at 802. And at the opposite end of the spectrum is the nonpublic forum. The nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry*

Educ. Ass'n, 460 U.S. at 46.

The property at issue here is a *public* median, which, as a matter of Michigan law, is part of the public street. *See* Mich. Comp. Laws § 257.20. Moreover, *this* public median, unlike other medians in Macomb County, has many characteristics of a park. Nonetheless, it should be treated similar to a public street—that is, it is a traditional public forum as a matter of law.[14] *Ater v. Armstrong*, 961 F.2d 1224, 1226-27 (6th Cir. 1992) (treating medians as a traditional public forum for purposes of a First Amendment analysis); *see also Sloman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir. 1994) (stating that "[a]lthough officials may constitutionally impose time, place, and manner restrictions on political expression carried out on sidewalks and median strips, they may not discriminate in the regulation of expression on the basis of the content of that expression," thereby treating "median strips" as a traditional public forum for purposes of a First Amendment analysis) (internal quotations omitted) (emphasis added); *Acorn v. New Orleans*, 606 F. Supp. 16, 19-20 (E.D. La. 1984) (treating "neutral ground," which "is the median area in a divided street which separates traffic

[14] In *Snowden v. Town of Bay Harbor Islands, Fla.,* 358 F.Supp.2d 1178, 1193 (S.D. Fla. 2004), the court concluded that the median in question was not a traditional public forum, observing that it was "a rather small green space abutting two roadways, with no buffers such as sidewalks for protection or apparent invitation to the public." Nonetheless, the court held that the plaintiff demonstrated a likelihood of success on the merits of her free speech and equal protection claims based on the township's refusal to allow her to display her nativity scene on the median. *Id.* at 1201. In comparison, the median in the present case is buffered by a sidewalk and contains other displays and items, including park benches, all of which serve as an "invitation to the public."

flowing in opposite directions," as "a traditional public forum" for purposes of a First Amendment analysis) (emphasis added). As the Supreme Court stated, "[O]ur decisions identifying public streets and sidewalks as traditional public fora are *not accidental invocations of a 'cliché*,' but recognition that wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public. *No particularized inquiry into the precise nature of a specific street is necessary*; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) (internal quotations and citation omitted). Consequently, Sixth Circuit and Supreme Court precedent compel the conclusion that the public median at issue here is a traditional public forum[15]—contrary to the district court's conclusion. (R-47, Op. & Order at 22-333); *see also Parks v. City of Columbus*, 395 F.3d 643, 650 n.5 (6th Cir. 2005) ("[T]he City cannot transform a traditional public forum simply because it so desires.").

[15] Based on the Road Commission's practice of permitting unattended displays on this median pursuant to its permit process, the court could also conclude that Defendants created a *designated* public forum. *Cornelius*, 473 U.S. at 802 ("[A] public forum may 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."). Speech restrictions in a designated public forum are subject to strict scrutiny. *Id.* at 800 ("[W]hen the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.").

C. Application of the Appropriate Standard.

1. Defendants' Restriction Was Content-Based.

In a traditional public forum the government's ability to restrict speech is sharply limited. The government may enforce content-neutral, time, place, and manner regulations of speech if the regulations are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Perry Educ. Ass'n,* 460 U.S. at 45. Content-based restrictions on speech, however, are subject to strict scrutiny. *Cornelius*, 473 U.S. at 802. That is, "speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* at 800. For "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

In this case, Defendants' "formal denial" of Plaintiff's permit application was content-based. To determine whether a restriction is content-based, the courts look at whether it "restrict[s] expression because of its message, its ideas, its subject matter, or its content." *Consol. Edison Co. of N.Y. v. Public Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980). Here, Defendants' only *formal and expressed* reason (*i.e.*, their *actual* reason) for denying the permit was because Plaintiff was expressing "a religious message." (R-8, Satawa Decl. at ¶ 34, Ex. J; R-37, Dep. Ex. 12 (Road

Comm'n Formal Denial of Permit) at Ex. 9). This is a quintessential content-based restriction, and Defendants do not have a compelling reason for it.

2. No Compelling Reason for Defendants' Content-Based Restriction.

Defendants' *post facto* litigation strategy of alleging a "safety concern" for prohibiting Plaintiff's nativity display is without merit—let alone compelling. Indeed, Defendants' safety concerns are further undermined by their willingness to permit other displays that, according to the testimony of Defendant Hoepfner, cause the very same safety concerns as Plaintiff's nativity display.[16] As the Supreme Court stated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993), "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."

Similarly, Defendants' undifferentiated fear of an Establishment Clause violation does not provide a compelling reason to justify their content-based speech

[16] According to Defendant Hoepfner, who was testifying on behalf of the Road Commission pursuant to Fed. R. Civ. P. 30(b)(6), (R-37, Dep. Ex. 28 (Rule 30(b)(6) Deposition Notice) at Ex. 5), the only safety concern was that the nativity scene created a strike hazard, (R-37, Hoepfner Dep. at 45-46 at Ex. 2). Yet, other displays causing similar safety concerns are permitted. (*See* R-37, Hoepfner Dep. at 35 at Ex. 2).

restriction.[17] *See Capitol Square Rev. & Adv. Bd.*, 515 U.S. at 753 (holding that the Establishment Clause did not provide a sufficient basis for restricting private religious expression in a public forum); *Widmar,* 454 U.S. at 263 (holding that the fear of an Establishment Clause violation did not justify the speech restriction); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (same); *see also Am. United for Separation of Church & State*, 980 F.2d at 1538.[18]

In sum, Defendants did not have a compelling reason for denying Plaintiff's permit request, and this denial was based on the content of Plaintiff's speech in violation of the First Amendment.

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[17] In *Van Orden v. Perry*, 545 U.S. 677 (2005), a plurality of justices upheld the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol. Justice Breyer, in his concurring opinion, which provided the narrowest grounds for the decision, stated,

> [Forty] years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). . . . *[T]hose 40 years suggest more strongly than can any set of formulaic tests* that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over non-religion, to engage in any religious practice, to compel any religious practice, or to work deterrence of any religious belief.

Id. at 702 (internal quotations and punctuation omitted) (emphasis added). Similarly here, the 63 years that the nativity scene had been displayed without complaint forecloses any legitimate concern that it was perceived as a government endorsement of religion.

[18] As noted in the permit application, Plaintiff is "willing to post a sign at the display which states clearly that it is his private display." (R-8, Satawa Decl. at ¶ 32, Ex. I). *See Am. United for Separation of Church & State*, 980 F.2d at 1546 (noting the significance of disclaimer signs).

III. Defendants Violated Plaintiff's Right to the Equal Protection of the Law.

The relevant principle of law at issue here was articulated in *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972): "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more *controversial* views." (emphasis added). *See also Carey v. Brown*, 447 U.S. 455, 461-62 (1980). Indeed, in *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993), this court struck down on equal protection grounds a speech restriction that made distinctions between privately-sponsored and publicly-sponsored exhibits and displays. *See id.* at 1166 (stating that "the ordinance violates the Equal Protection Clause unless the distinction can be shown to be finely tailored to governmental interests that are substantial"). Similarly here, Defendants permit the publicly-sponsored displays of the City of Warren Historical Society, *inter alia*, even though Defendant Hoepfner testified that they cause the very same safety concerns as Plaintiff's nativity display (but noting that the gazebo is a "public structure"). (*See* R-37, Hoepfner Dep. at 35-37 at Ex. 2). *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546-47 (stating that when the government restricts conduct protected by the First Amendment but fails to restrict other conduct producing harm of the same sort, the interest given for the restriction is not compelling); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1166 (6th Cir. 1993)

("Because the City is so willing to disregard the traffic problems [by making exceptions], we cannot accept the contention that traffic control is a substantial interest."). Yet, Defendants banned Plaintiff's private nativity display because it was religious. Consequently, Defendants' discriminatory treatment of Plaintiff cannot withstand scrutiny under the First Amendment or the Equal Protection Clause.

IV. Defendants Violated the Establishment Clause.

The Supreme Court has consistently described the Establishment Clause as forbidding not only state action that promotes or "advances" religion, *see, e.g., Cnty. of Allegheny v. A.C.L.U.,* 492 U.S. 573, 592 (1989), but also actions that tend to "disapprove" of, "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("disapprove"); *Lynch*, 465 U.S. at 673 ("hostility"); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"). Defendants' policy decision disapproves of religion in violation of the Establishment Clause.

As the Supreme Court noted in *Epperson v. Ark.*, 393 U.S. 97, 104 (1968), "The First Amendment mandates governmental neutrality between religion and religion, *and between religion and nonreligion*." (emphasis added). Even *subtle departures* from neutrality are prohibited. *See, e.g., Church of the Lukumi Babalu Aye, Inc.,* 508 U.S. at 534. Indeed, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993), the Court stated: "In our Establishment Clause cases we have

often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion *or of religion in general*." (emphasis added). Thus, a policy decision that disfavors "religion in general," such as the one at issue here, violates the neutrality mandated by the Establishment Clause in violation of the Constitution.

In *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), the Court acknowledged that the government cannot "show[] hostility to religion, *thus preferring those who believe in no religion over those who do believe*." *Id.* at 225 (internal quotations and citation omitted) (emphasis added). And as Justice Breyer stated in his concurrence in *Van Orden v. Perry*, 545 U.S. 677, 699 (2005), "[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid."[19] (internal citations omitted). In this case, by siding with the "Freedom From Religion Foundation," Defendants are

[19] Justice Breyer also made the following relevant observation:

> [The removal of the religious symbol], based primarily on the religious nature of the tablets' text would, I fear, lead the law *to exhibit a hostility toward religion that has no place in our Establishment Clause traditions*. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby *create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid*.

Van Orden, 545 U.S. at 704 (emphasis added).

"preferring those who believe in no religion over those who do believe" and "promot[ing] the kind of social conflict the Establishment Clause seeks to avoid" in violation of the Constitution. (*See* R-38, Van Steelandt Dep. at 33-37 at Ex. 12; R-38, Dep. Ex. 24 (Letters from Comty. / Pub.) at Ex. 17) (setting forth the "social conflict" created by Defendants' policy decision).

Indeed, Defendants' policy decision restricting Plaintiff's private speech because it was religious violates the Establishment Clause as to its purpose and effect. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971) (describing test for Establishment Clause claims). "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid." *See Lynch*, 465 U.S. at 690 (O'Connor J., concurring).

A. The Purpose of the Speech Restriction Violates the Establishment Clause.

"While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards,* 482 U.S. at 586-87. The secular purpose requirement "reminds government that when it acts it should do so without endorsing [or disapproving of] a particular religious belief or practice . . . ." *Wallace v. Jaffree*, 472 U.S. 38, 75-76 (1985). And

"[t]he eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the *text*, *legislative history*, and *implementation* of the statute, or comparable *official act*." *McCreary Cnty. v. A.C.L.U.*, 545 U.S. 844, 862 (2005) (internal quotations and citation omitted) (emphasis added). In this case, the *text*, *legislative history*, and *implementation* of the challenged *official act*, as clearly evidenced by the written record and the transcript of the Board meeting, show that Defendants' *purpose* for denying Plaintiff's permit was because his nativity scene was religious in violation of the Establishment Clause.

B. The Effect of the Speech Restriction Violates the Establishment Clause.

The "effect" of Defendants' policy decision, irrespective of Defendants' alleged "purpose" for enforcing it, conveys a message of disapproval of religion in violation of the Establishment Clause. *See Lynch*, 465 U.S. at 690 (O'Connor J., concurring) ("The effect prong asks whether . . . the practice under review in fact conveys a message of . . . disapproval."). As the Supreme Court explained, when evaluating the effect of government action under the Establishment Clause, courts must ascertain whether the challenged action is "*sufficiently likely to be perceived*" as a disapproval of religion. *Cnty. of Allegheny*, 492 U.S. at 597 (citations omitted) (emphasis added); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307, n.21 (2000) ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions."). The clear *effect*

of Defendants' actions—as further evidenced by the overwhelming public reaction—conveys a message of disapproval of religion in violation of the Establishment Clause.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this court reverse the district court's grant of Defendants' motion for summary judgment, reverse the district court's denial of Plaintiff's motion for summary judgment, and enter judgment in Plaintiff's favor.

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 8,712 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise (P62849)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Description
R-1	Complaint
R-8	Motion for Temporary Restraining Order / Preliminary Injunction
	Exhibit 1 Declaration of Plaintiff John Satawa
	Exhibit A Letters to Warren Police Department
	Exhibit B Photograph of Nativity Scene
	Exhibit C Letter from Macomb County Road Commission Ordering the Removal of the Nativity Scene
	Exhibit D Letter from Macomb County Road Commission Regarding Permit Application
	Exhibit E Photographs of Median
	Exhibit F Photographs of Median: Gazebo
	Exhibit G Photographs of Median: Memorial Trees and Plaques
	Exhibit H Photograph of Median Sign
	Exhibit I Plaintiff's Permit Application
	Exhibit J Letter from Macomb County Road Commission: Formal Denial of Permit Application
R-13	Defendants' Response to Motion for Temporary Restraining Order / Preliminary Injunction

Exhibit A Declaration of Defendant Fran Gillet

Exhibit B Declaration of Defendant Robert Hoepfner

R-15 Reply in Support of Motion for Temporary Restraining Order / Preliminary Injunction

Exhibit 2 Declaration of Oscar Zamora

Exhibit A Letter from Warren Village Historic District Commission

R-24 Opinion and Order Addressing Plaintiff's Motion for Preliminary Injunction

R-25 Plaintiff's Response to Court's Show Cause Order

R-29 Order Vacating Show Cause Order

R-37 Plaintiff's Motion for Summary Judgment

Exhibit 1 Deposition Excerpts of Defendant Fran Gillett

Exhibit 2 Deposition Excerpts of Defendant Robert Hoepfner

Exhibit 3 Permit Application Form

Exhibit 4 Road Commission Policy

Exhibit 5 Rule 30(b)(6) Deposition Notice for Macomb County Road Commission

Exhibit 6 Deposition Excerpts of Plaintiff John Satawa

Exhibit 7 Photographs of Nativity Scene

Exhibit 8 St. Anne's Parish Record

Exhibit 9 Letter from Macomb County Road Commission: Formal Denial of Permit Application

	Exhibit 10	Written Complaint from Freedom From Religion Foundation
R-38	Exhibit 11	Letter from Macomb County Road Commission Ordering the Removal of the Nativity Scene
	Exhibit 12	Deposition Excerpts of Sue Van Steelandt
	Exhibit 13	Plaintiff's Permit Application (Incomplete)
	Exhibit 14	Letter from Macomb County Road Commission Regarding Permit Application
	Exhibit 15	Plaintiff's 2009 Permit Application
	Exhibit 16	Supplemental Declaration of Plaintiff with attached Permit Application
	Exhibit 17	Letters from Community / Public
	Exhibit 18	Declaration of Oscar Zamora
	Exhibit A	Letter from Warren Village Historic District Commission
R-39	Exhibit 19	Photographs of Displayed Items on Median
	Exhibit 20	Documents Regarding Sign and Gazebo Displays
	Exhibit 21	Deposition Excerpts of William C. Taylor, PhD
	Exhibit 22	MCL § 257.20 "Highway or Street"
	Exhibit 23	Email Regarding Recording of Board Meeting of March 6, 2009
	Exhibit 24	Transcript of Board Meeting of March 6, 2009

	Exhibit 25	Certification of Transcript of Board Meeting of March 6, 2009
R-40	Exhibit 26	Diagram of Intersection
	Exhibit 27	Deposition Excerpts of John F. Wiechel, PhD with attached Resume, Prior Expert Testimony, and Expert Report
R-45	Plaintiff's Reply in Support of Motion for Summary Judgment	
	Exhibit 29	Deposition Excerpts of Defendant Fran Gillett
R-47	Opinion and Order Regarding Cross-Motions for Summary Judgment	
R-48	Judgment	
R-49	Notice of Appeal	