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 REPLY BRIEF

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INTRODUCTION

This case presents the question of whether the government's alleged, *post-facto* safety concerns that are *illegitimate* and *invoked as a litigation strategy* provide a compelling interest sufficient to permit a content-based restriction on a private citizen's religious speech in a traditional public forum. The answer to this question must be no, lest our longstanding First Amendment protection for private religious speech in a public forum be rendered a nullity and the right to freedom of speech itself become so feeble as to be cast aside by any government protestation of safety, whether legitimate or not.

At issue here is the constitutionality of Defendants' 2009 decision to deny Plaintiff a permit to display his private nativity scene on a large public median in the City of Warren, Michigan because the display conveyed a "religious message." Plaintiff's nativity scene had been displayed on this median during the Christmas holiday season since 1945 without complaint or incident. Defendants' decision, which is contrary to controlling law, ended a *63-year* Christmas holiday tradition.

In the final analysis, Plaintiff is asking this court to not only restore this cherished holiday tradition, but to restore the protections afforded private citizens by our Constitution.

SUMMARY OF MATERIAL FACTS

Fundamentally, Defendants' view of the facts is contrary to what the record

yields. Moreover, for purposes of this appeal (and the motion below), the court is required to view the material facts and all reasonable inferences drawn from these facts in Plaintiff's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (holding that when reviewing a motion for summary judgment, the court must view the evidence, all facts, and inferences that may be drawn from the facts in the light most favorable to the non-moving party). Consequently, not only do the material facts show that it was error to deny Plaintiff's motion for summary judgment, at a minimum, they show that it was plain error to grant summary judgment in Defendants' favor.

A summary of the material facts follows.

- For over 60 years, Plaintiff and his family displayed a nativity scene (crèche) during the Christmas holiday season on the public median between Mound and Chicago Roads in the City of Warren, Michigan. (R-8, Satawa Decl. at ¶¶ 1-3 at Ex. 1 to Pl's Mot. for TRO/Prelim. Inj. (hereinafter "Satawa Decl.")).

- The Mound Road median is unique in that it is *very large* (over 60 feet wide), it is *open to the public*, it has *sidewalks*, and it *contains many unattended displays*, as well as *park benches*. The median contains old wagons, farming equipment, and signs requesting donations displayed by the "Friends of the Village," a private organization. (R-8, Satawa Decl. at ¶¶ 27-31, Exs. E, F, H, I; R-38, Dep. Ex. 4 (Pl.'s Permit Application) at Ex. 15; R-39, Dep. Ex. 16 (Photographs) at Ex. 19).

- Despite having knowledge of the "Friends of the Village" displays, Defendant Hoepfner did not send any letters demanding the removal of these items from the median *because, according to Hoepfner, he had "not received any complaints that the items are -- create a problem for anyone*."[1] (R-37, Hoepfner Dep. at 54-60, 62-65 at Ex. 2) (acknowledging other displays on the median, but not requesting that they be removed) (emphasis added).

- The Road Commission permitted the City of Warren Historical Society ("Historical Society"), a public entity *that is unaffiliated with the Road Commission* (*i.e.*, this is not the Road Commission's "speech") to erect a gazebo and a courtyard on the median—structures that invite pedestrians to sit and visit.[2] (R-37, Hoepfner Dep. at 65 at Ex. 2; R-8, Satawa Decl. at ¶¶ 27-31, Exs. E, F, G, H). Consequently, Defendants' claim that they do "not want people sitting in the middle of a median of Mound Road" (Defs.' Br. at 33) is belied by the facts and their very own actions.

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[1] Defendants disingenuously assert that the "Friends of the Village" organization "has placed these items *to the dismay* of the [Road Commission] who has not permitted the installation of these items" (Defs.' Br. at 15) (emphasis added) and that since the Road Commission "is now on notice [it] has requested that these items be removed" (Defs.' Br. at 35). As noted above, Defendants' assertions are discredited by Defendant Hoepfner's deposition testimony, which was taken in *April 2010*. Indeed, Defendant Hoepfner had "notice" of these displays when he was informed of Plaintiff's crèche in *December 2008*. Yet, as his testimony reveals, he did not order these items removed because no one was complaining about them. It was not until Defendants (and their counsel) realized that the presence of these displays was harming their case that they became interested in seeking their removal.

[2] The Road Commission approved the gazebo display over 20 years ago and continues to monitor the insurance requirements associated with the approved permit. (R-37, Hoepfner Dep. at 65-72 at Ex. 2; Dep. Exs. 30, 31, 33 at Ex. 20).

- The Mound Road median does not separate an interstate highway nor is it a cordoned off median that is part of an expressway. In fact, there are numerous shops, businesses, and buildings along Mound Road. Pedestrians have access to these shops and buildings via sidewalks that run the length of the road. (R-8, Satawa Decl. at ¶¶ 27-31, Exs. E, F, H, I; R-38, Dep. Ex. 4 (Pl.'s Permit Application) at Ex. 15; R-39, Dep. Exs. 16-20 (Photographs) at Ex. 19). Moreover, Plaintiff's crèche does not face Mound Road—it faces Chicago Road, which has a speed limit of 30 mph. (R-8, Satawa Decl. at Ex. I; R-38, Dep. Ex. 4 (Pl.'s Permit Application) at Ex. 15).

- During the 60-plus-year history of the crèche display, there has never been an accident attributed to it.[3] In fact, until December 2008, there had never been a single *complaint* about the display. (R-37, Gillett Dep. at 37-45 at Ex. 1).

- In December, 2008, Plaintiff's longstanding Christmas tradition ended when the Road Commission, through Defendant Hoepfner, ordered Plaintiff to remove his crèche within 30 days *because he did not have a permit*. (R-8, Satawa Decl. at ¶ 19; R-37, Hoepfner Dep. at 24-25 at Ex. 2). Plaintiff complied. (R-8, Satawa Decl. at ¶ 21; R-37, Hoepfner Dep. at 27 at Ex. 2).

- Defendants' order to remove the crèche was in response to a written request

[3] Defendants' expert, Dr. William Taylor, testified as follows:

Q: Are there any of the traffic accidents that you've listed here, 197, do you have any information that *any of those were attributed to the display of the crèche?*

A: *No.*

(R-39, Taylor Dep. at 38-39 at Ex. 21) (emphasis added).

they received from the *Freedom from Religion Foundation*. The *Freedom from Religion Foundation* 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; Dep. Ex. 8 (*Freedom from Religion Foundation* Complaint) at Ex. 10). A reasonable trier of fact could infer that Defendants were siding with the *Freedom from Religion Foundation*, which is an organization that is known for its hostility toward religion. The general public certainly perceived this to be the case based on the number and types of complaints received by the Road Commission as a result of its decision to end this Christmas tradition. (Van Steelandt Dep. at 33-37 at Ex. 12; Dep. Ex. 24 (Letters from Community / Public) at Ex. 17).

- In January 2009, Plaintiff went to the office of the Road Commission to obtain a permit to display his crèche *per the letter he received from Defendant Hoepfner*. (R-8, Satawa Decl. at ¶ 22). While at the office, a Road Commission employee provided Plaintiff with a permit application, asked him to provide some contact information for the application, and then directed him to sign and date it. Plaintiff complied and submitted the application as directed. Plaintiff was told that he would receive a letter in 2 to 3 weeks with a response from the Road Commission. (R-8, Satawa Decl. at ¶ 24; R-38, Van Steelandt Dep. at 20-26, *see also* 42 at Ex. 12; R-38, Dep. Ex. 22 (Pl.'s Incomplete Permit Application) at Ex. 13).

- On or about February 7, 2009, Plaintiff received a letter from the Road

Commission *with an enclosed copy of a permit application*. 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 Commission Letter) at Ex. 14).

- The application provided by the Permit Department is the one used to request a permit to construct or install structures or other items, including temporary structures (such as Plaintiff's crèche), on public rights-of-way, including medians, in Macomb County. (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 Application Form) at Ex. 3; R-37, Dep. Ex. 7 (Road Commission Policy) at Ex. 4). This permit application was completed, in part, by the Permit Department, which 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 Dep. at 38 at Ex. 2; R-38, Dep. Ex. 4 (Pl.'s Permit Application) at Ex. 15) (emphasis added). Defendant Hoepfner testified on behalf of the Road Commission 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 at Ex. 5) (emphasis added).

- Pursuant to the Road Commission's letter and policy, on February 12, 2009, Plaintiff submitted a permit application *that set forth the details of his proposed crèche display, 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*. (R-8, Satawa Decl. at ¶ 32, Ex. I). In fact, in his application, Plaintiff *expressly stated and emphasized the following*: "As demonstrated by the photographs, there are no obstructions to vehicular or pedestrian traffic or any other safety concerns caused by the display." (R-8, Satawa Decl. at ¶¶ 32, 33, Ex. I). Thus, Plaintiff's permit application addressed *first and foremost* the issue of safety. Indeed, safety was the primary emphasis of his application. Consequently, Defendants' claim that they *only* addressed the content of Plaintiff's speech in their "formal denial" letter (*i.e.*, the permit was denied because Plaintiff's display was conveying a "*religious message*")—while not even hinting at safety as a concern—"because Plaintiff had focused on his First Amendment rights when submitting his application" (Defs.' Br. at 25) is demonstrably false.

- Plaintiff's application also stated the following:

> *Please advise if any insurance will be required, the reasons for said insurance, and the amount*.[4] Applicant is willing to pay all *reasonable*

[4] Similar to how Defendants treat the Historical Society and its gazebo display, 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; *see also* R-37, Dep. Ex. 7 at Ex. 4 (Road Commission Policy) (requiring permit holder to "obtain liability and bodily injury and property damage

> 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 Permit Application) at Ex. 15).

- On March 9, 2009, the Road Commission issued a "formal denial" of Plaintiff's permit application. According to this denial, *which is the* _*only*_ *formal explanation provided by Defendants for denying Plaintiff's permit request*, the basis for the denial was because the crèche "_***displays a religious message***_." (R-8, Satawa Decl. at ¶ 34, Ex. J; R-37, Hoepfner Dep. at 43 at Ex. 2; R-37, Dep. Ex. 12 (Formal Denial Letter) at Ex. 9). And as Defendant Hoepfner acknowledged, the "_*purpose of the letter*_" was to _[g]*ive*[*e*] *the Road Commission's reasons for denying Mr. Satawa's permit*_." (R-37, Hoepfner Dep. at 43 at Ex. 2) (emphasis added).

- The Road Commission board had the authority to approve the permit, but chose not to.[5] And the transcript of the formal board meeting at which Plaintiff's permit was

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insurance")).

[5] 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 _denial_ of Plaintiff's permit. (R-37, Gillet Dep. at 37 at Ex. 1).

discussed makes it clear that the reason for denying Plaintiff's permit is the reason set forth in the "formal denial" letter (*i.e.*, because the display conveyed a "religious message"). Here is what Defendant Hoepfner said during the hearing: "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*." (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). Thus, in light of the "formal denial" letter and the transcript of this official hearing, a reasonable trier of fact could certainly conclude that the reason for denying the permit was the content of Plaintiff's message and not Defendants' *post-facto* safety concerns, which appear nowhere in the record except by way of Defendants' self-serving statements. In fact, it is undisputed that *at no time prior to this lawsuit was Plaintiff ever informed by Defendants that his crèche caused any safety issues*. (*See* R-8, 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). Indeed, it is understandable why Defendants and their counsel now want to retreat from their "official" position expressed in their denial letter: it is indefensible as a matter of law.

- *After* the lawsuit was filed, Defendants asserted "safety concerns" as a basis for

denying the permit. As demonstrated by the following undisputed record evidence, these concerns are without merit:

- Defendants' very own expert[6] testified that the crèche display did *not* violate any of the *applicable safety standards*. (R-39, Taylor Dep. at 12-13, 40-42 at Ex. 21). This testimony refutes Defendants' claim that the Michigan Road Design Manual provides justification for their decision. (*See* Defs.' Br. at 38).

- Defendants' expert testified that the crèche display did *not* pose a strike hazard because it is within "*a reasonably safe position*." (R-39, Taylor Dep. at 41, 64, 65 at Ex. 21) (emphasis added). This testimony refutes the *only* safety concern that Defendant Hoepfner claimed as the basis for denying Plaintiff's permit (*i.e.*, that it was a strike hazard)—a safety concern that he also admitted was the same concern he had for the gazebo and the other displays that remained on the median. (R-37, Hoepfner Dep. at 35 at Ex. 2) (admitting that the other displays posed strike hazards). Defendant Hoepfner 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*.

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[6] The "expert report" of Defendants' witness was admittedly "incorrect" and subsequently modified during the expert's deposition. (R-39, Taylor Dep. at 15-18 at Ex. 21).

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). Moreover, Defendant Hoepfner 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) (emphasis added).

○ In fact, the *only* scenario that Defendants' expert could conjure up to *argue* that the crèche could *possibly* pose a "safety concern" is hypothetical and improbable, as the unblemished, 60-year safety record of the crèche display demonstrates. Defendants' hypothetical 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 crèche 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 crèche display is 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 crèche display shows. (R-39, Taylor Dep. at 25 at Ex. 21). Consequently, Defendants' claim that "the crèche becomes problematic in a scenario where the crèche impedes the view of [a] *defensive* eastbound Chicago Road driver who looks over to the oncoming northbound Mound Road lanes" (Defs.' Br. at 39) (emphasis added) is false. Defendants' driver—if he is defensive—has time to see the northbound Mound Road traffic *after* passing the crèche to avoid *any* accident. Consequently, Defendants' scenario only works if the driver never intends to check for northbound traffic. That is, *Defendants' accident scenario is going to occur whether or not the crèche is on display*.

- Contrary to Defendants' claim (*see* Defs.' Br. at 40, 48), Plaintiff's expert did not agree with the shoddy analysis of Defendants' expert and in fact testified that the crèche display was ***not*** a safety hazard. Plaintiff's expert opined as follows: "*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). And this opinion is supported

by the testimony of Defendants' expert, as noted above.

ARGUMENT

I. Under a Proper Forum Analysis, the Median at Issue Is a Traditional Public Forum.

There is no question that this court must conduct a forum analysis to resolve Plaintiff's First Amendment freedom of speech claim. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) ("[T]he [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."). And controlling case law compels the conclusion that the Mound Road median is a traditional public forum for purposes of this analysis. *Ater v. Armstrong*, 961 F.2d 1224, 1126-27 (6th Cir. 1992) (treating medians as a traditional public forum for purposes of a First Amendment analysis).

As the U.S. 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 '[w]herever 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*; <u>all</u> 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) (citation omitted) (emphasis added). Defendants cannot change this fact by fiat. *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.").

Indeed, the cases cited by Defendants confirm the conclusion that the Mound Road median should be regarded as a traditional public forum. In *ACORN v. Phoenix*, 798 F.2d 1260, 1266-67 (9th Cir. 1986), *overruled in part by Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, Nos. 06-55750, 06-56869, 2011 U.S. App. LEXIS 19212, at *22, n.5 (9th Cir. Sept. 16, 2011) (overruling *ACORN* "to the extent that it construed a substantially identically worded ordinance as facially restricting only solicitation conduct") (*see* Defs.' Br. at 30) (citing *ACORN*), the Ninth Circuit stated, "A pedestrian ordinarily has entitlement to be present upon a sidewalk or on the grounds of a park and thus is generally *free at all times to engage in expression and public discourse at such locations*." (emphasis added). Here, Plaintiff's crèche is not displayed in the middle of the road. It is on the median side of a public sidewalk. *ACORN* addressed an ordinance that prohibited individuals from soliciting contributions from occupants who were in their vehicles (*i.e.*, the solicitors were walking into the street). *ACORN* does not support Defendants' position.

In *Snowden v. Town of Bay Harbor Islands, Fla.,* 358 F. Supp. 2d 1178, 1193 (S.D. Fla. 2004), (Defs.' Br. at 30-31), a case that was litigated by the Thomas More Law Center, 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 Mound Road median is buffered by a sidewalk and contains other displays and items, including park benches and a gazebo, all of which serve as an "invitation to the public." Thus, *Snowden* supports a conclusion that the Mound Road median is a traditional public forum.

Finally, the Fourth Circuit's decision in *Warren v. Fairfax Cnty.*, 196 F.3d 186 (4th Cir. 1999), (Defs.' Br. at 31), which found the median in question to be a public forum, further supports Plaintiff's position. The fact that the court in its *dicta* excluded median strips on interstate highways and other similar cordoned off expressways does nothing to change the result in this case. *See id*. at 196, n.9. As noted, the intersection of Chicago Road and Mound Road is not an interstate highway by any stretch of the imagination. Mound Road is lined with shops and other businesses, unlike an expressway. And the median in question has sidewalks, park benches, a gazebo, and other displays, unlike a cordoned off median along an interstate highway.

In sum, this court would have to rewrite decades of forum analysis jurisprudence and ignore this court's precedent, *see Ater*, 961 F.2d at 1126-27, to

conclude that the Mound Road median is anything but a traditional public forum.

II. Defendants' Content-Based Speech Restriction Cannot Withstand Strict Scrutiny.

As an initial matter, controlling law establishes that Plaintiff's crèche display constitutes speech protected by the First Amendment. *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (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); *see also Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding the display of the crèche). Defendants concede this fact. (Defs.' Br. at 27) ("The Defendants do not dispute that the display of a Nativity scene is an act of constitutionally protected religious expression.").

In a traditional public forum, Defendants' ability to restrict Plaintiff's private religious speech is sharply limited. *See Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (striking down a city ordinance and stating that "[c]onstitutional concerns are heightened further where, as here, the [challenged ordinance] restricts the public's use of streets and sidewalks for political speech"). Defendants 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 v. Perry Local Educators, 460 U.S. 37, 45 (1983). 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 (emphasis added). Indeed, "strict scrutiny"—which is the highest level of scrutiny applied when reviewing the constitutionality of a government action that infringes a fundamental right—is an exceedingly difficult standard to meet, and for good reasons. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."). Simply claiming "safety concerns," as in this case, does not rise to the level required to justify the government's denial of a private citizen's fundamental right to freedom of speech—nor should it ever.

Here, Defendants' "formal" reason for denying Plaintiff's permit was content-based (*i.e.*, because Plaintiff's display conveyed a "religious message"). (R-37, Dep. Ex. 12 (Formal Denial Letter) at Ex. 9; R-37, Hoepfner Dep. at 43 at Ex. 2 (admitting that the "purpose of the letter" was to "[g]ive the Road Commission's reasons for denying Mr. Satawa's permit")). Consequently, Defendants' decision to deny Plaintiff a permit to display his crèche must be reviewed under the highest level of scrutiny.

The record here, particularly when viewed in the light most favorable to Plaintiff, does not support a finding that Defendants' decision satisfied strict scrutiny. It can't be, as the district court ultimately found and as Defendants argue here, that strict scrutiny is such a simple standard for the government to meet that any claim of "safety" would satisfy it. As demonstrated above and in further detail in Plaintiff's opening brief, Defendants' *post facto* "safety concerns," which were no doubt invoked as part of a litigation strategy, do not rise to the level of a compelling interest based on the facts of this case. (*See, e.g.,* R-37, Hoepfner Dep. at 34 at Ex. 2 (admitting that he didn't deny the permit request "for sight problems")). Indeed, these alleged concerns are <u>not</u> *legitimate*, let alone substantial or compelling, and are thus insufficient to justify Defendants' content-based restriction.

As the record shows, in December 2008, Defendants received a demand letter from the *Freedom from Religion Foundation*.[7] The *Freedom from Religion Foundation* objected to the *religious message* conveyed by Plaintiff's crèche—the letter raised no safety concerns. Upon receipt of this letter, Defendant Hoepfner sent a Road Commission inspector to investigate whether the crèche was displayed as

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[7] The *Freedom from Religion Foundation* has as its stated "purpose . . to protect the fundamental constitutional principle of separation of church and state." (R-37, Dep. Ex. 8 (*Freedom from Religion Foundation* Complaint) at Ex. 10). *But see A.C.L.U. v. Mercer Cnty.,* 432 F.3d 624, 638-39 (6th Cir. 2005) ("[T]he ACLU makes repeated reference to 'the separation of church and state.' This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state. Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion.") (citations omitted).

alleged. The inspector confirmed the allegation and found Plaintiff's contact information on the display. Defendant Hoepfner subsequently contacted Plaintiff and sent him a letter, informing Plaintiff that because *he did not have a permit*, the crèche must be removed. (N.B., *no mention of safety*). Plaintiff complied.

As a result of Defendant Hoepfner's letter, Plaintiff went to the Road Commission to get a permit for the 2009 Christmas holiday season. While at the Road Commission's permit department, Plaintiff filled out an application for a permit *per the instructions he was given*. A couple of weeks later, Plaintiff received a letter from the Road Commission, informing him that his application was incomplete. The Road Commission did not tell Plaintiff that his request was not allowed as a matter of policy or that safety concerns prohibited the Road Commission from issuing a permit for his proposed crèche display. Instead, *another* permit application was sent along with the letter. And this application *was completed in part by the Road Commission*, which noted on the application that *it was for a permit to display a nativity scene on the Mound Road median*. At this point, if this court were to accept Defendants' argument that no permits will ever issue allowing for private displays on county medians, then the Road Commission was undoubtedly engaging in a cynical form of gamesmanship with Plaintiff.[8] Or worse yet, accepting Defendants' claim that they have plenary

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[8] Moreover, Defendants' claim that they will seek the removal of the other displays on the median (Defs.' Br. at 35) is, once again, nothing more than a litigation strategy. Indeed, they gave Plaintiff 30 days to remove his display after receiving the *Freedom*

authority over all activity occurring on the county roads and rights-of-way (traditional public forums), including expressive activity, would essentially erase decades of case law by doing away with the public forum doctrine. (Defs.' Br. at 9) (claiming "absolute" authority over the roads). But there is a permit process that allows for private displays on county medians—displays such as Plaintiff's crèche.[9] In fact, the process also allows for requests from public entities, such as the City of Warren Historical Society.[10] As a result, Plaintiff submitted his permit application pursuant to

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from Religion Foundation letter. Yet, more than a year and a half later, Defendants had still not taken *any* action with regard to the other displays. (R-37, Hoepfner Dep. at 54-56 (admitting that he has not sent letters demanding the removal of the items displayed by the "Friends of the Village" because he has "not received any complaints that the items are - - create a problem for anyone"); *see also* 72 (admitting that the policy is to order removal in 30 days) at Ex. 2).

[9] Defendant Hoepfner testified on behalf of the Road Commission 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 at Ex. 5) (emphasis added). Thus, there was no special exception required for Plaintiff, as Defendants erroneously suggest. (Defs.' Br. at 19) (stating that the Road Commission "could not make an exception" for Plaintiff's display because "to do so would deviate from their policy in order to endorse religion in violation of the *Establishment Clause of the First Amendment*").

[10] As Defendant Gillett acknowledged, the publicly-sponsored items on display do not convey a message on behalf of the Road Commission. (R-45, Gillett Dep. at 71-73 at Ex. 29). Consequently, this is not a case where the government is using its own property to convey its own message. Thus, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), is not applicable. Instead, this is a situation similar to the one set forth in *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993), in which the court struck down a speech restriction that made distinctions between privately-sponsored (not permitted) and publicly-sponsored (permitted) exhibits and displays in a public forum.

Road Commission procedures—procedures that allowed for the continuous display of a large gazebo that Defendant Hoepfner claimed posed a strike hazard for vehicles. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546-47 (1993) (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.").

In response to Plaintiff's application request, Defendants sent a "formal denial" letter, which set forth the basis for rejecting the application. (R-37, Hoepfner Dep. at 43 at Ex. 2) (admitting that the "purpose of the letter" was to give the "reasons for denying Mr. Satawa's permit"). Noticeably absent from the "formal denial" was *any* claim that the basis for the denial was safety.[11] Instead, the *only* stated basis for the denial was because Plaintiff's display conveyed a "religious message." Thus, *not once* was safety ever raised as a concern to Plaintiff during his numerous contacts with Defendants. *Not one* contemporaneously made document supports Defendants' self-serving contention that safety was ever an issue. *Not one* comment made during the

[11] Defendant Hoepfner's claim that he wished he had written the letter differently is a self-serving, *post facto* rationalization and should be rejected as such. (*See* Defs.' Br. at 44). Indeed, a reasonable trier of fact would reject such a claim in light of the evidence.

board meeting, as evidenced by the recording of that meeting, addressed safety. *See McCreary Cnty. v. A.C.L.U.*, 545 U.S. 844, 871 (2005) (rejecting "new statements of purpose . . . presented . . . as a litigating position"). And, to put it bluntly, Defendants' single, *post facto* safety concern, *which was identified by their expert for this litigation*, is absurd (and certainly not compelling).

In the final analysis, simply claiming that something is a legitimate safety concern does not make it so, nor does it automatically make it a compelling interest that trumps fundamental constitutional rights. While safety is a valid interest—Defendants' artificial safety concerns are *not*. Consequently, Defendants' content-based restriction on Plaintiff's speech cannot survive strict scrutiny under the First Amendment.

III. Defendants' Restriction on Plaintiff's "Religious" Speech Violates the Equal Protection Clause.

Government action that discriminates against a person based on the exercise of his fundamental right to freedom of speech, as in this case, violates the equal protection guarantee of the Fourteenth Amendment. *See Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause . . . 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."); *Carey v. Brown*, 447 U.S. 455 (1980) (same).

In *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1166 (6th Cir.

1993), this court held that a speech restriction which made distinctions between *privately*-sponsored and *publicly*-sponsored exhibits and displays violated the Equal Protection Clause because the distinctions were not shown "to be finely tailored to governmental interests that are substantial." Here, Defendants granted a permit to the Historical Society to allow it to erect a publicly-sponsored display, even though Defendant Hoepfner testified that the display caused the very same safety concerns as Plaintiff's crèche. (*See* R-37, Hoepfner Dep. at 35-37 at Ex. 2). Yet, Defendants denied Plaintiff a permit because his private nativity display conveyed a "religious message."

In sum, Defendants' discriminatory treatment of Plaintiff cannot withstand scrutiny under the First Amendment <u>or</u> the Equal Protection Clause of the Fourteenth Amendment.

IV. Defendants' Restriction on Plaintiff's "Religious" Speech Violates the Establishment Clause.

The facts of this case compel one conclusion: Defendants' restriction on Plaintiff's speech because it conveyed a "religious message" violates the Establishment Clause.

In *Cnty. of Allegheny v. A.C.L.U.,* 492 U.S. 573, 597 (1989), the Supreme Court explained, "Since *Lynch*, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether 'the challenged governmental action is <u>*sufficiently likely to be perceived*</u> . . . as a

disapproval, of their individual religious choices.'" *Id.* at 597 (citations omitted) (emphasis added). And in *Epperson v. Ark.*, 393 U.S. 97, 104 (1968), the Court stated, "The First Amendment mandates governmental neutrality between religion and religion, *and between religion and nonreligion*." (emphasis added). According to the Court, even *subtle departures* from this neutrality are prohibited. *Church of the Lukumi Babalu Aye, Inc.,* 508 U.S. at 534; *see also id.* at 532 ("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."). Thus, consistent with the Establishment Clause, the government may not take action that shows preference toward "*those who believe in no religion over those who do believe*." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (internal quotations and citation omitted) (emphasis added).

Here, the evidence shows that Defendants took action that favored those "who believe in no religion," (*i.e.*, the *Freedom from Religion Foundation*), to the detriment of those "who do believe," (*i.e.*, Plaintiff). There can be no serious dispute that on the record of this case, Defendants' decision to end a 63-year, Christmas holiday tradition based on one anonymous complaint submitted by the *Freedom from Religion Foundation* was "sufficiently likely to be perceived"—and in fact was so perceived by the community—to convey a message of disapproval of religion in violation of the Establishment Clause. *See Lynch*, 465 U.S. at 690 (O'Connor J., concurring) ("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."). And this conclusion is further buttressed by Defendants' "formal denial" letter, which expressly stated that it was denying Plaintiff's permit request based on the fact that the crèche conveys a "religious message."

CONCLUSION

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 6,659 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 October 21, 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	