

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

JOHN SATAWA,

Plaintiff,

v.

BOARD OF COUNTY ROAD  
COMMISSIONERS OF MACOMB  
COUNTY (“Macomb County Road  
Commission”); FRAN GILLET,  
individually and in her official capacity as  
Chairperson, Macomb County Road  
Commission; ROBERT P. HOEPFNER,  
individually and in his official capacity as  
County Highway Engineer, Macomb  
County Road Commission,

Defendants.

Case No. 2:09-cv-14190

Hon. Gerald E. Rosen

THOMAS MORE LAW CENTER  
Robert J. Muise, Esq. (P62849)  
24 Frank Lloyd Wright Drive  
P.O. Box 393  
Ann Arbor, MI 48106  
[rmuise@thomasmore.org](mailto:rmuise@thomasmore.org)  
(734) 827-2001

*Counsel for Plaintiff*

ALOIA & ASSOCIATES, P.C.  
Benjamin J. Aloia (P54424)  
Aaron M. Keyes (P68757)  
48 S. Main Street, Suite 3  
Mt. Clemens, MI 48043  
[aloia@aloiaandassociates.com](mailto:aloia@aloiaandassociates.com)  
(586) 783-3300

*Counsel for Defendants*

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**PLAINTIFF’S BRIEF IN RESPONSE TO DEFENDANTS’  
MOTION FOR SUMMARY JUDGMENT**

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## **ISSUES PRESENTED**

I. Whether the court's denial of Plaintiff's request for a temporary restraining order/preliminary injunction establishes the "law of the case" with respect to the court's resolution of the parties' cross-motions for summary judgment.

II. 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.

III. 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.

IV. 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.

**CONTROLLING AND MOST APPROPRIATE AUTHORITY**

*Americans United for Separation of Church & State v. City of Grand Rapids*,  
980 F.2d 1538 (6th Cir. 1992)

*Ater v. Armstrong*,  
961 F.2d 1224 (6th Cir. 1992)

*Capitol Square Review & Advisory Bd. v. Pinette*,  
515 U.S. 753 (1995)

*Carey v. Brown*,  
477 U.S. 455 (1980)

*Congregation Lubavitch v. City of Cincinnati*,  
997 F.2d 1160 (6th Cir. 1993)

*Frisby v. Schultz*,  
487 U.S. 474 (1988)

*Lynch v. Donnelly*,  
465 U.S. 668 (1984)

*Police Dept. of the City of Chicago v. Mosley*,  
408 U.S. 92 (1972)

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

*University of Texas v. Camenisch*,  
451 U.S. 390 (1981)

*Wilcox v. United States*,  
888 F.2d 1111 (6th Cir. 1989)

This case challenges a government policy decision that denied (and continues to deny)<sup>1</sup> Plaintiff the right to engage in constitutionally protected speech in a traditional public forum based on the content of his speech. The target of this policy decision is Plaintiff's private nativity scene, which had been displayed on a public median in Warren, Michigan, *without incident*, since 1945.

### **SUMMARY JUDGMENT STANDARD**

When reviewing Defendants' motion for summary judgment, this court must view the evidence, all facts, and inferences that may be drawn from the facts in the light most favorable to Plaintiff. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

### **STATEMENT OF MATERIAL FACTS**

#### **A. Introduction.**

To avoid needless repetition and excessive court filings, Plaintiff will not repeat here all of the material facts in this case. Rather, Plaintiff will rely on those facts and the supporting evidence presently in the record as set forth in his motion for summary judgment (Doc. Nos. 37-40), which was previously filed in this case on July 29, 2010.<sup>2</sup> Fed. R. Civ. P. 56(c) (stating that when deciding a motion for summary judgment, the court should consider "the pleadings, the discovery and disclosure materials on file, and any affidavits") (emphasis added).

#### **B. Summary of the Material Facts.**

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

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<sup>1</sup> Plaintiff submitted a permit application for the upcoming 2010 Christmas holiday season. Defendants have yet to approve it. (Satawa Supp'l Decl. at ¶ 2, Dep. Ex. 34 at Ex. 16).

<sup>2</sup> Exhibits 1 through 27 referenced in this response brief were previously filed in support of Plaintiff's motion for summary judgment. (Doc. Nos. 37-40). Exhibit 28 is an additional exhibit filed with this brief.

of Warren, Michigan. (Satawa Decl. at ¶ 1 at Ex. 1 to Pl’s Mot. for TRO/Preliminary Inj. (Doc. No. 8-3) (hereinafter “Satawa Decl.”)).

The Mound Road median is unique in that it is large (over 60 feet wide), it is open to the public, and it contains many unattended displays, as well as sidewalks and park benches.<sup>3</sup> For example, the median contains old wagons, farming equipment, and signs requesting donations displayed by the “Friends of the Village,” a private organization.<sup>4</sup> And the Macomb County Road Commission (“Road Commission”) permitted the City of Warren Historical Society (“Historical Society”), a public entity, to erect a gazebo and a courtyard on the median.<sup>5</sup> (See Hoepfner Dep. at 65 at Ex. 2; Satawa Decl. at ¶¶ 27-31, Exs. E, F, G, H).

During the 60-plus-year history of the crèche display, there has never been an accident attributed to it.<sup>6</sup> In fact, until December 2008, there has never been a single *complaint* about the display. (See 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

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<sup>3</sup> Under Michigan law, a median is considered a part of the street. Mich. Comp. Laws § 257.20; (see also Taylor Dep. at 54-55 at Ex. 21; Dep. Ex. 7 (Taylor) at Ex. 22).

<sup>4</sup> Despite having knowledge of the “Friends of the Village” displays, Defendant Hoepfner has *not* sent a letter demanding the removal of the items from the median *because, according to Hoepfner, he has “not received any complaints that the items are -- create a problem for anyone.”* (Hoepfner Dep. at 54-56 at Ex. 2; Dep. Ex. 16 at Ex. 19; see also Hoepfner Dep. at 57-60, 62-65 (acknowledging other displays on the median, but not requesting that they be removed); Dep. Exs. 17, 18, 20 at Ex. 19).

<sup>5</sup> The Road Commission approved the gazebo display over 20 years ago and continues to monitor the insurance requirements associated with the approved permit. (See Hoepfner Dep. at 65-72 at Ex. 2; Dep. Exs. 30, 31, 33 at Ex. 20).

<sup>6</sup> 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.*

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

*because he did not have a permit.*<sup>7</sup> (Satawa Decl. at ¶ 19; Hoepfner Dep. at 24-25 at Ex. 2). Plaintiff complied. (Satawa Decl. at ¶ 21; Hoepfner Dep. at 27 at Ex. 2).

Defendants' order to remove the crèche was in response to a written request they received from the "Freedom from Religion Foundation." The Freedom from Religion Foundation objected to the *religious* content of Plaintiff's display. (Gillett Dep. at 41-42, 44-45 at Ex. 1; Hoepfner Dep. at 20-21 at Ex. 2; Dep. Ex. 8 at Ex. 10).

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. (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. (Satawa Decl. at ¶ 24; Van Steelandt Dep. at 20-26, *see also* 42 at Ex. 12; Dep. Ex. 22 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." (Satawa Decl. at ¶ 25, Ex. D; Dep. Ex. 11 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

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<sup>7</sup> At no time prior to this lawsuit was Plaintiff ever informed by Defendants that his crèche caused any safety issues. (*See* Satawa Dep. at 55-56 at Ex. 6 (discussing only the permit); Hoepfner Dep. at 24-25 at Ex. 2 (same); Dep. Ex. 12 (Formal Denial Letter) at Ex. 9).

crèche), on public rights-of-way, including medians, in Macomb County.<sup>8</sup> (Satawa Decl. at ¶ 26; Hoepfner Dep. at 13-18, 48-49 at Ex. 2; *see also* Dep. Ex. 3 at Ex. 3; Dep. Ex. 7 at Ex. 4).

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.

(Hoepfner Dep. at 49 at Ex. 2; 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. (Satawa Decl. at ¶ 32, Ex.

D). Plaintiff's application also stated the following:

*Please advise if any insurance will be required, the reasons for said insurance, and the amount.*<sup>9</sup> 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.

(Satawa Decl. at ¶¶ 32, 33, Ex. I; Hoepfner Dep. at 29-30 at Ex. 2; Dep. Ex. 4 at Ex. 15).

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<sup>8</sup> In fact, the 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. (Hoepfner at 38 at Ex. 2; Dep. Ex. 4 at Ex. 15).

<sup>9</sup> 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. (Hoepfner Dep. at 66, 68 at Ex. 2; *see also* Dep. Ex. 7 at Ex. 4 (Road Commission Policy) (requiring permit holder to "obtain liability and bodily injury and property damage insurance")). Thus, Defendants' argument that "[i]t is the [Road Commission's] responsibility to avoid liability and/or responsibility for damage or danger caused by private installations in its rights of way which are a hazardous condition for the motoring public" (Defs.' Br. at 8) is a red herring.

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.*”<sup>10</sup> (Satawa Decl. at ¶ 34, Ex. J; Hoepfner Dep. at 43 at Ex. 2; Dep. Ex. 12 at Ex. 9). The Board had the authority to approve the permit, but chose not to.<sup>11</sup>

After the lawsuit was filed, Defendants asserted “safety concerns” as a basis for denying the permit. In fact, Defendants hired a “traffic safety expert” to offer opinions as to any safety concerns related to the crèche display.<sup>12</sup> Defendants’ expert testified that the crèche display did not violate any of the applicable safety standards. (Taylor Dep. at 12-13, 40-42 at Ex. 21). Defendants’ expert testified that the crèche display did not pose a strike hazard because it is within “a reasonably safe position.” (Taylor Dep. at 41, 64, 65 at Ex. 21). 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

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<sup>10</sup> Defendants’ decision to end Plaintiff’s Christmas tradition caused political divisiveness and social conflict in the community. (Van Steelandt Dep. at 33-37 at Ex. 12; Dep. Ex. 24 at Ex. 17).

<sup>11</sup> 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.

(Gillet Dep. at 30-31 at Ex. 1; Hoepfner Dep. at 39-42 at Ex. 2). Defendant Gillett acknowledged that she approved the denial of Plaintiff’s permit. (Gillet Dep. at 37 at Ex. 1).

<sup>12</sup> The “expert report” of Defendants’ witness was admittedly “incorrect” and subsequently modified to include the scenario described in this brief. (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. (Taylor Dep. at 30 at Ex. 21).

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. (Taylor Dep. at 19-52 at Ex. 21; Dep. Ex. 4 at Ex. 26). There is *no other scenario* where the crèche display is remotely involved in a traffic accident. (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).<sup>13</sup> (Taylor Dep. at 25 at Ex. 21).

## ARGUMENT

### I. It Is Reversible Error to Apply the “Law of the Case” Doctrine.

Defendants’ *entire* motion is predicated on their misapprehension of the “law of the case” doctrine. A preliminary decision on a request for an injunction is not binding at trial on the merits or, as here, when deciding a motion for summary judgment, and thus does not constitute the “law of the case.” *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (“[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.”); *Wilcox v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (holding that the trial court’s denial of a preliminary injunction did not establish the law of the case with respect to the court’s subsequent summary judgment determination); *Technical Publ’g*

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<sup>13</sup> Plaintiff similarly hired a traffic safety expert, and his expert report, opinions, and testimony excerpts are attached to Plaintiff’s motion for summary judgment at Exhibit 27. (Wiechel Dep. at 52-54, 110-16, Exs. 1, 2, 4 at Ex. 27).

*Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984) (“A factual finding made in connection with a preliminary injunction is not binding” on a motion for summary judgment); *City of Angoon v. Hodel*, 803 F.2d 1016, 1024, n.4 (9th Cir. 1986) (determinations corresponding to a preliminary injunction do not constitute law of the case).

In fact, to do as Defendants suggests here would constitute reversible error. *Wilcox*, 888 F.2d at 1114 (“[S]ince the district court erroneously applied the ‘law of the case’ doctrine in disposing of the summary judgment motion in favor of the IRS, the decision of the district court is REVERSED. . . .”).

## **II. The Undisputed Facts Compel this Court to Deny Defendants’ Motion and Grant Plaintiff’s Motion for Summary Judgment.**

It is evident why Defendants would like this court to consider the *incomplete* factual record that was presented *without the benefit of discovery* during the preliminary injunction motion: the subsequent record developed during discovery *compels* a ruling in Plaintiff’s favor. Indeed, the undisputed evidence demonstrates that Defendants’ “safety concern”—it’s only argument in this case—was asserted as a *post facto* litigation strategy designed to mask their content-based restriction on Plaintiff’s speech.

As the evidence shows, the alleged “safety concern” did not serve as the formal basis for denying Plaintiff’s permit request.<sup>14</sup> Moreover, the evidence shows that the only “safety concern” that Defendant Hoepfner arguably had in mind was the potential that the crèche could be a strike hazard—a “safety concern” he had for *all* of the other displays permitted on, *but not requested to be removed from*, the Mound Road median. And this safety concern was flatly rejected by Defendants’ own expert. (Taylor Dep. at 41, 64, 65 at Ex. 21) (testifying that the

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<sup>14</sup> Not one contemporaneously created document produced during discovery indicates that safety was a basis for denying Plaintiff’s permit request. Instead, the record shows that it was the content of Plaintiff’s speech that served as the basis for the denial of his permit.

crèche did not pose a strike hazard because it is within “a reasonably safe position”). “Sight lines” was never an issue. Defendant Hoepfner candidly testified as follows:<sup>15</sup>

Q: What was -- now, *prior to March 9 of 2009, did you do any safety study or safety evaluation?*

A: *No.*

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<sup>15</sup> Defendant Hoepfner was testifying on behalf of the Road Commission pursuant to Fed. R. Civ. P. 30(b)(6). (Dep. Ex. 28 at Ex. 5). The subject matter of this Rule 30(b)(6) testimony included, *inter alia*, “the safety factors, including data, considered by the Road Commission for reviewing and disapproving the ‘Application for Permit submitted by John Satawa to erect a nativity scene in the Mound Road right of way’ in Warren, Michigan” and “the safety factors, including data, considered by the Road commission for reviewing and approving the request(s) by the Warren Historical Village Commission to utilize the Mound Road right-of-way in Warren, Michigan, to erect and/or install items, including a permanent gazebo.” (Dep. Ex. 28 at ¶¶ 2.c., 2.d. at Ex. 5). Consequently, ***Defendants are estopped from asserting a contrary position in this litigation.*** In *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), the court provided the following comprehensive explanation regarding the testimony of a Rule 30(b)(6) witness:

The testimony elicited at the Rule 30(b)(6) deposition represents the knowledge of the corporation, not of the individual deponents. The designated witness is “speaking for the corporation,” and this testimony must be distinguished from that of a “mere corporate employee” whose deposition is not considered that of the corporation and whose presence must be obtained by subpoena. “Obviously it is not literally possible to take the deposition of a corporation; instead, when a corporation is involved, the information sought must be obtained from natural persons who can speak for the corporation.” The corporation appears vicariously through its designee. If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation. Thus, the duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved.

The Rule 30(b)(6) designee does not give his personal opinions. Rather, he presents the corporation’s “position” on the topic. Moreover, the designee must not only testify about facts within the corporation’s knowledge, but also its subjective beliefs and opinions. The corporation must provide its interpretation of documents and events. The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. ***Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of fingerprinting witnesses at the depositions. Truth would suffer.***

*Id.* at 361 (citations omitted) (emphasis added).

- 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.***

(Hoepfner Dep. at 45-46; *see also* 34-35 at Ex. 2) (emphasis added).

\* \* \* \*

- Q: Just so we're in the time frame, when you denied [Plaintiff's permit request].
- A: Right, ***I didn't deny it for sight problems. . . .***

(Hoepfner Dep. at 34 at Ex. 2) (emphasis added).

- Q: The gazebo that we referred to \* \* \* that gazebo that's in the Mound Road right-of-way, is it your view as you're sitting here today that's also a safety -- that that structure is unsafe?
- A: It would also -- ***it is a safety issue to me, yes.***
- Q: ***Similar to the nativity scene?***
- A: ***Yes.***
- Q: ***Has anyone from the Road Commission directed the removal of the gazebo?***
- A: ***No, we have not.***

(Hoepfner Dep. at 35 at Ex. 2 (emphasis added); *see also* Hoepfner Dep. at 36 at Ex. 2 (claiming that the gazebo is different because it is a "public structure"))).

More important, however, is the fact that this *post facto* "safety concern" is not legitimate, let alone compelling. As Defendants' expert acknowledges, Defendants' hypothetical "safety concern"<sup>16</sup> will occur regardless of whether the crèche is displayed because the driver

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<sup>16</sup> As noted previously, the first hypothetical scenario that Defendants' expert relied upon in his report was admittedly incorrect (Taylor Dep. at 15-18 at Ex. 21), causing him to "return to the drawing board" to come up with this latest scenario—a scenario that is so improbable and

travelling east along Chicago Road never cares to look for traffic travelling north along Mound Road in the first instance. (*See* Taylor Dep. at 52, 62-64 at Ex. 21). If the driver was concerned at all about the traffic, there is ample time after he passes the crèche to look and perform any necessary evasive maneuver.<sup>17</sup> Defendants' absurd scenario also requires a driver travelling north along Mound Road to run a red light that has been red for a significant period of time because the timing of the lights at this intersection—a factor that this court never considered in its preliminary ruling—is designed to ensure that traffic clears the intersections before the lights turn.<sup>18</sup> And as Defendants' expert testified, a driver travelling north along Mound Road would be an *alerted* driver to the presence of traffic signals due to the configuration of the road. Defendants' expert testified as follows:

- Q: Do you consider the nonalerted driver to be somebody who is not alert to the traffic signals?
- A: If they're not expecting a traffic signal along the road, yes.
- Q: ***And knowing how Mound Road is configured, would a driver based on your view traveling northbound on Mound Road, would that be a driver***

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fraught with absurd assumptions that it is simply not credible and certainly not evidence of a compelling interest sufficient to trump fundamental constitutional rights.

<sup>17</sup> In their motion, Defendants misrepresent the testimony of Plaintiff's expert. Defendants claim that Plaintiff's expert "also concurred with the Court's Opinion and Order," by selectively citing to the following statement in his report: "The crèche can also be a visibility obstruction in this situation." (Defs.' Br. at 10-11). What Defendants fail to present, however, is the expert's *analysis* regarding "the significance" of the presence of the crèche from a safety perspective. Plaintiff's expert concludes that any safety concerns are not legitimate because "[t]he presence of the crèche does not obscure the visibility of an eastbound driver on Chicago Road a sufficient period of time to alter the driver's response." (Defs.' Ex. E, SEA Rep. at 6). Therefore, there is no "safety concern." The testimony of Defendants' expert corroborates this conclusion, thus also defeating Defendants' *post facto* justification for suppressing Plaintiff's speech. (*See* Taylor Dep. at 52, 62-64 at Ex. 21).

<sup>18</sup> Defendants' expert testified as follows:

- Q: \* \* \* The light timing sequence at Chicago/Mound Road, that has built in extra time; does it not?
- A: It does, yes, right.
- Q: To accommodate your 2.5 second nonalerted driver; is that right?
- A: Correct.

(Taylor Dep. at 46 at Ex. 21).

*that in your view would be alerted to the fact that there's traffic signals along that road?*

A: *Yes.*

(Taylor Dep. at 45 at Ex. 21) (emphasis added).

Furthermore, the evidence developed during discovery demonstrates that Defendants were less than forthright in their sworn affidavits presented to this court in their opposition to Plaintiff's request for a preliminary injunction. In these affidavits, both Defendants Gillet and Hoepfner told this court that 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." (Gillett Decl. at ¶ 9 at Ex. A (Doc. No. 13); Hoepfner Decl. at ¶ 26 at Ex. B (Doc. No. 13) (emphasis added). However, the actual record reveals that at this *public* Board meeting, the only basis for denying the permit application was the basis provided by the Road Commission's attorney, which was expressed in the formal denial letter. And that basis was the fact that Plaintiff's crèche conveyed a *religious message*.

Here is what was *actually* "addressed with the Board":

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.

(Gillett Dep. at 24-26, 45-46, 53-55 at Ex. 1; Dep. Ex. 9 at Ex. 23; Tr. at Dep. Ex. 13 at Ex. 24 (emphasis added); Tr. Cert. at Ex. 25).

In conclusion, Defendants should not be permitted to trump fundamental constitutional rights by simply fabricating an improbable and utterly absurd hypothetical “safety concern”; otherwise, the public forum doctrine as applied to public streets and sidewalks will be rendered meaningless.

In the final analysis, the material facts demonstrate the following:

- Plaintiff desires to continue his 60-year tradition of displaying a crèche on the Mound Road median, *which is a traditional public forum*, during the Christmas season;
- Defendants have in place a permit application process whereby a private citizen can request a permit to temporarily display or erect an item in a county right-of-way;
- Plaintiff submitted a permit application pursuant to Defendants’ permit process;
- The Road Commission had the authority to approve Plaintiff’s permit application;
- Defendants denied Plaintiff’s permit request because his proposed crèche display conveys a religious message;
- There was no legitimate—let alone compelling—“safety concern” for denying Plaintiff’s permit request.

### **III. Defendants Violated Plaintiff’s First Amendment Right to Freedom of Speech.**

Plaintiff’s free speech claim is examined in three steps. First, the court must determine whether the speech in question—the private display of a crèche—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. And third, the court must then determine whether Defendants’ policy decision comports with the applicable standard. *Parks v. City of Columbus*, 395 F.3d 643, 647 (6th Cir. 2005) (setting forth the three-part analysis).

**A. Protected Speech.**

The first question is easily answered. U.S. 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). And the 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 crèche, 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); *Americans 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. “[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.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). There are generally three types of forums: the traditional public forum, the designated public forum, and the nonpublic forum. *See id.*

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, similar to a

public street or sidewalk, a median is a traditional public forum, as the Sixth Circuit and other courts recognize. *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); *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 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) (citation omitted). Consequently, Sixth Circuit and Supreme Court precedent compel the conclusion that the public median at issue here is a traditional public forum.<sup>19</sup>

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<sup>19</sup> Based on the Road Commission’s practice of permitting unattended displays on this median, 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.* (“[W]hen the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a

### C. Application of the Appropriate Standard.

#### 1. Content-Based Restriction.

In a traditional public forum, 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.<sup>20</sup> *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.*; see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

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.” *Consolidated Edison Co. of N.Y. v. Public Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980). Here, Defendants’ *formal* reason (i.e., their *actual* reason) for denying the permit was because Plaintiff was expressing “a religious message.” This is a quintessential content-based restriction, and Defendants do not have a compelling reason for it. Moreover, because the restriction is content-based, whether “alternative channels of communication” are available is irrelevant. *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 607 (6th Cir. 2005) (“[B]ecause we have already found that the Ordinance is not narrowly tailored, whether the City of Dearborn has provided ample alternatives of communication is now irrelevant in this case. . . .”); *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) (“[L]aws

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compelling governmental interest.”).

<sup>20</sup> Defendants’ slippery slope argument is unavailing. (Defs.’ Br. at 12). Finding the challenged policy decision at issue here unconstitutional does not prevent Defendants from enacting or enforcing a *constitutional* time, place, and manner restriction to promote its *legitimate* interests.

regulating public fora cannot be held constitutional simply because they leave potential speakers alternative fora for communicating their views.”).

## 2. No Compelling Reason for Defendants’ Content-Based Restriction.

Defendants’ *post facto* litigation strategy of alleging a “safety concern” for prohibiting Plaintiff’s crèche display is without merit—let alone compelling. Defendants’ safety concerns are further undermined by their willingness to permit other displays that, according to Defendant Hoepfner, cause the very same safety concerns as Plaintiff’s crèche.<sup>21</sup> *See 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 (or valid purpose) to justify their content-based speech restriction.<sup>22</sup> *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 v. Vincent*, 454 U.S. 263, 263 (1981) (holding that the fear of an Establishment Clause violation did not justify the speech restriction); *Lamb’s Chapel v. Center*

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<sup>21</sup> According to Defendant Hoepfner, who was testifying on behalf of the Road Commission, (Dep. Ex. 28 at Ex. 5), the only safety concern was that the crèche created a strike hazard, (Hoepfner Dep. at 45-46 at Ex. 2). Yet, other displays causing similar safety concerns are permitted. (*See* Hoepfner Dep. at 35 at Ex. 2).

<sup>22</sup> 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 that “those 40 years suggest more strongly than can any set of formulaic tests” that the challenged display did not violate the Establishment Clause. *Id.* at 702 (internal punctuation omitted) (emphasis added). Similarly here, the 63 years that the crèche had been displayed without complaint forecloses any legitimate concern that it was perceived as a government endorsement of religion.

*Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (same); *see also Americans United for Separation of Church & State*, 980 F.2d at 1538.<sup>23</sup>

In sum, Plaintiff is entitled to declaratory and injunctive relief and nominal damages.<sup>24</sup>

#### **IV. Defendants Violated Plaintiff’s Right to the Equal Protection of the Law.**

In *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), the Court stated, “[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).

In *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993), the Sixth Circuit 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 display of the Historical Society (justifying it as a “public structure”), even though Defendant Hoepfner testified that it causes the very same safety concerns as Plaintiff’s crèche. *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

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<sup>23</sup> Plaintiff is “willing to post a sign at the display which states clearly that it is his private display.” (Satawa Decl. at ¶ 32, Ex. I). *See Americans United for Separation of Church & State*, 980 F.2d at 1546 (noting significance of disclaimer signs).

<sup>24</sup> “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury” sufficient to warrant injunctive relief in this case. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And Plaintiff is entitled to nominal damages for the past loss of his constitutional rights as a matter of law. *See Carey v. Phipus*, 435 U.S. 247, 266-67 (1978); *Floyd v. Laws*, 929 F.2d 1390 (9th Cir. 1991) (holding that nominal damages must be awarded as a matter of law upon finding a constitutional violation).

to restrict other conduct producing harm of the same sort, the interest given for the restriction is not compelling). Yet, Defendants banned Plaintiff's private display because it was religious. Consequently, Defendants' discriminatory treatment of Plaintiff cannot withstand scrutiny under the First Amendment or the Equal Protection Clause.

#### V. Defendants Violated the Establishment Clause.

The Establishment Clause forbids government actions that "disapprove" of, "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("disapprove"); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("hostility"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"). "The First Amendment mandates governmental neutrality between religion and religion, *and between religion and nonreligion.*" *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (emphasis added); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (stating that the Establishment Clause "forbids an official purpose to disapprove of . . . religion in general").

In *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), the Court stated 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); *see also Van Orden*, 545 U.S. at 699 ("[Purging religion] from the public sphere . . . 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.") (Breyer, J., concurring) (internal citations omitted).

By siding with the Freedom from Religion Foundation, Defendants are "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." (Van Steelandt Dep. at 33-37 at Ex. 12; Dep.

Ex. 24 at Ex. 17 (setting forth the “social conflict” created by Defendants’ decision)); *see Johnson v. Poway Unified Sch. Dist.*, No. 07cv783 BEN (NLS), 2010 U.S. Dist. Lexis 25301, at \*54-59 (S.D. Cal. Feb. 25, 2010) (censoring private speech because it expressed a Christian viewpoint violated the Establishment Clause) (attached to this response as Exhibit 28).

In sum, 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) (emphasis added).

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

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 County v. A.C.L.U.*, 545 U.S. 844, 862 (2005) (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 crèche display was because it 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., *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 597 (1989) (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**

Plaintiff respectfully requests that this court deny Defendants’ motion.

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Robert J. Muise

Robert J. Muise, Esq. (P62849)

**CERTIFICATE OF SERVICE**

I hereby certify that on August 19, 2010, a copy of the foregoing PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

THOMAS MORE LAW CENTER

/s/ Robert J. Muise

Robert J. Muise, Esq. (P62849)