Nos. 21-3079; 21-3081

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE SATANIC TEMPLE, INC.
Plaintiff / Appellant

v.

CITY OF BELLE PLAINE, MN,
Defendant / Appellee.

On Appeal from the United States District Court
for the District of Minnesota

Case Nos. 0:19-cv-1122 and 0:21-cv-336

Hon. Wilhelmina Wright, U.S. District Judge, presiding

Reply brief for The Satanic Temple, Inc.

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1: *Satanic Temple I* adequately pleaded its claims.

1.1: The City violated TST's free speech rights.

1.1.1: The City opened a limited public forum.

We all agree that the City created a limited public forum. But this case is about the forum's closure, not its opening. Indisputably, the City burdened TST's speech by closing the forum. The free speech counts ask *why* the City burdened TST's speech. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994).

As pleaded, the City closed the forum either to silence TST's unpopular "controversial but constitutionally protected religious viewpoints" (*i.e.*, closing the forum was a content-based restriction). (**App. 13; 0:19-cv-1122, R. Doc. 1, at 13**). Or, the closure was an overkill effort to deter vandalism (*i.e.*, the closure was not "narrowly tailored" to serve a "significant government interest.") (**App. 76-77; 0:19-cv-1122, R. Doc. 43, at 5-6**).

Either way, the City bore the burden to prove why it burdened TST's undisputedly-protected speech. *United States v. Playboy Ent.*

Grp., Inc., 529 U.S. 803, 816 (2000). The District Court erred by requiring that TST's complaint disprove the City's case.

1.1.2: Closing it was viewpoint discrimination.

As pleaded, the City closed the forum to disfavor "ideas that offend," which violates the First Amendment. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017). The City's response repeatedly ignores the allegations of the complaint. This runs afoul of the legal standard, which requires that all facts be deemed true at this stage. *Friends of Lake View School District Incorporation No. 25 of Phillips County v. Beebe*, 578 F.3d 753, 757–58 (8th Cir. 2009).

1.1.2.1: Only TST was affected by the closure.

The City denies that the Recission Resolution targeted TST for suppression. Response at 21. Recall, the City only permitted one other display (the Christian monument), and that was removed at the City's surreptitious beckoning before the Recission Resolution. (**App. 7; 0:19-cv-1122, R. Doc. 1, at 7-8**). *Satanic Temple I* pleaded that the Recission Resolution specifically targeted TST's Display

because the closure affected only TST's Display.

1.1.2.2: Cities cannot close forums to suppress ideas.

The City claims it can shut down its forum to exclude a particular viewpoint because it also precludes all other viewpoints. Response at 19-20, 22. The City is egregiously wrong.

The First Amendment's prohibition against government censorship of private speech carries full force, even when the government has opened its property to accommodate that speech. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828–30 (1995). The government does not have to use its property to accommodate private speech; but when it does, it must do so in line with First Amendment values. *Id.* Thus, a government cannot eliminate a forum because it does not like the speech taking place in it. *Student Gov't Ass'n v. Bd. of Trustees of Univ. of Massachusetts*, 868 F.2d 473, 480 (1st Cir. 1989); *see also Missouri Knights of the Ku Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347, 1352 (W.D. Mo. 1989). The City could not, consistent with the First Amendment, restrict TST's

right to speak because of a reaction to TST's speech. *Cohen v. California*, 403 U.S. 15, 21 (1971); *Lewis v. Wilson*, 253 F.3d 1077, 1081 (8th Cir. 2001) .

The City's argument reduces to a suggestion that facial neutrality defeats a claim of pretext as a matter of law. The City is wrong. *City of Austin, Texas v. Reagan Nat'l Advert. Of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022). As pleaded, the City's evenhandedness in closing the forum was pretextual and, in reality, viewpoint discrimination caused the closure. (**App. 9-10; 0:19-cv-1122, R. Doc. 1, at 9-10**).

And it is worse, not better, that the City goaded the Christians into exiting the forum to create a pretext of evenhandedness. The First Amendment solution to speech you don't like is *more* speech, not less. *E.g. 281 Care Comm. v. Arneson*, 766 F.3d 774, 793 (8th Cir. 2014). If people did not like TST's viewpoint, the First Amendment solution was to encourage more displays, not exclude all of them.

1.1.2.3: The text of the closure is afforded no deference.

Relatedly, the City argues that the self-serving text of the

Recission Resolution should constrain the analysis. Response at 23; see also 27-28. Not so. The question is whether the City closed the forum to prevent TST's message. *Rosenberger*, 515 U.S. at 829. That is a fact question. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985). The City bears the burden of proof. *Playboy*, 529 U.S. at 816. Thus, where there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, that restriction may still be content-*based*. *Austin*, 142 S. Ct. at 1475.

It is no defense that the Recission Resolution was "facially" neutral, because the City must prove that it is "factually" neutral. The District Court wrongly relieved the City of its burden of proof on that question, so this Court should reverse and remand for trial proceedings on the free speech counts.

1.1.3: Closing it was an overbroad speech restriction.

Assuming without conceding that it was a complete coincidence the City began taking steps to close the forum immediately after

learning TST was ready for their equal access to the "free speech zone," the free speech counts also attacked whether excluding all private monuments was "narrowly tailored" to the interest of deterring vandalism. *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1219 (8th Cir. 1998). [1]

The City responds that *Krantz* is inapposite because it did not involve the closure of a limited public forum. Response at 22. But that is a distinction without a difference because *Krantz*, like this case, is about a speech restriction. As the Supreme Court just reiterated, content neutrality is only the first step of the speech restriction analysis. *Austin*, 142 S.Ct. at 1475-76. Even if a speech restriction is content-neutral, it must still be supported by a "significant" justification, and it must be "narrowly tailored" to that end. *Id.*

The City complains that *Krantz* is about pamphlets on cars, whereas this case is about monuments in parks. But the pamphlets in *Krantz* and the displays here are both protected, private speech.

[1] Yes, there were more pretexts than deterring vandalism. Response at 23. But that says nothing of "narrow tailoring," which is at issue.

(**App. 30; 0:19-cv-1122, R. Doc. 1-1, at 3**) ("Displays constitute the speech of the owners of the display, and not the City.")

Regardless whether it takes the form of ephemeral utterances in the wind, or radio waves intelligible only with thanks to modern technology, or bits of carbon on scraps of paper, or even (as here) a big metal cube bolted into the land, speech is speech. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 475 (8th Cir. 2010). And when the City opened this forum for the contemplated purpose of accommodating "private speech," like the Display, the City created for itself a set of First Amendment obligations. *Rosenberger*, 515 U.S. at 828–30. To justify any speech restrictions, the City had to prove (1) the restriction was not made because of the underlying viewpoint or message; and (2) the restriction was "narrowly tailored" to further a "significant governmental interest." *Playboy*, 529 U.S. 803, 816; *Austin,* 142 S. Ct. 1464 .

The City created a "free speech zone" for the ostensible purpose of promoting private speech. That was against the live-broadcast advice of counsel, but it was within the City's rights to do so. What

was not within the City's rights was to regulate that forum in a way that favors "some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). In contravention of the Free Speech Clause and Minnesota's analog, the City "shut off discourse solely to protect others from hearing it." *Cohen*, 403 U.S. at 21. The District Court did not hold the City to its duty to refrain from censorship, so this Court must reverse and remand for trial proceedings.

1.2: The City violated TST's free exercise rights.

1.2.1: The City engaged in status-based discrimination.

1.2.1.1: TST's Display was "religious."

The opening brief explains why the District Court erred in failing to find that the Display was "religious expression," such that the City violated the Free Exercise Clause when it excluded the Display from the Park.

The City defends the dismissal because the District Court found that the Display was not "central" or "fundamental" to TST's

beliefs. But the City has no answer for the point that the Supreme Court has "Repeatedly and in many different contexts … warned that courts must *not* presume to determine the place of a particular belief in a religion." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990) (collecting cases) (emphasis added).

Nor is there any ground to affirm the finding that the City did not prevent TST from expressing adherence to its faith. Response at 16, 18. One expresses adherence to their faith through religiously-motivated expressive activity. *See Cantwell v. State of Connecticut*, 310 U.S. 296, 304 (1940). TST's Display was an expression of its faith because it prominently features symbols of religious significance to TST. (**App. 35; 0:19-cv-1122, R. Doc. 1-1, at 8.**) When the City prevented the Display, it burdened TST's religious expression. That triggers strict scrutiny, irrespective of even *bona fide* neutrality. *Smith*, 494 U.S. at 881.

1.2.1.2: If neutrality applies, the City was not neutral.

Neutrality is irrelevant because this is a hybrid-rights case. *Smith*,

494 U.S. at 881. The City responds by denying that TST's free exercise rights are even at issue. Response at 20. As its sole citation, the City offers up the order at issue. The same one on de novo review. Circular arguments are not productive. The City does not respond to the points and authorities of the opening brief because there is no meritorious response.

1.2.2: Motive aside, TST's religion was suppressed.

Nor does the City respond to the opening brief's point that the closure violated TST's more expansive free exercise rights under Minnesota's Constitution.

The City intervened to preclude a particular religion from expressing its ideology. It might as well have banned prayer. The Court should reverse and remand for trial proceedings on the free exercise counts.

1.3: The City violated the Equal Protection Clause.

The opening brief assigned error to dismissing the Equal Protection Clause count by recharacterizing the theory of the complaint.

In response, the City repeats the tactic of reframing the complaint from taking issue with "Satanism vs. Christianity" to "foreign vs. local" lines. Response at 25. The plaintiff is the sole master of their theory for relief, not the defendant. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). As pleaded, the Recission Resolution was impermissible line-drawing along religious lines, not geographic lines.

The City emphasizes that it did not authorize the initial emplacement of the Christian monument. Response at 25. That is irrelevant. The City opened the forum to accommodate the Christian monument, but only for so long as the Christians had exclusive access to the public square. (**App. 388-89; 0:21-cv-336, R. Doc. 1, at 32-33.**) ("basically so the Cross could stay in the Park.") As soon as the Satanists were ready for their constitutionally-guaranteed equal access to the "free speech zone," the City closed the forum. (**App. 370-371; 0:21-cv-336, R. Doc. 1, at 14-15**) ("[H]ow can we up here be assured that, number one, these [Satanic] monuments won't go into that Park?") If only one side gets equal rights, that isn't Equal Protection.

The City misstates the record when it claims its Rule 30(b)(6) deponent testified "the City Council did not have any meeting on or about July 10, 2017." Response at 26-27. The transcript says:

> Q: "Was any number of city council members meeting on July 10th?"
>
> A: "Not to my knowledge."

(**CityApp_286-87; 0:19-cv-1122, R.Doc. 104 at 5-6**) (Meyer Dep. 17:25-18:2). "Not to my knowledge" is not "No." So, maybe the City Council did not meet *as a body*, but one or two councilors met with the Veteran's Group. Or maybe that meeting didn't happen on July 10, maybe it took place on July 9 or July 11. Or maybe the City Council did meet as a body, and nobody told the 30(b)(6) deponent. Or maybe the City Administrator simply lied under oath. All we can say for sure is that two days after Mayor Meyer's proposed date for a workshop meeting with the Veterans Group to "discuss the whole public forum issue again" (**App. 320; 0:19-cv-1122, R. Doc. 94-2, at 144**), the City Administrator informed the City's insurer that the plan was to exclude TST's Display from the Park by shutting down

the forum. (**App. 323; 0:19-cv-1122, R. Doc. 94-2, at 147**). TST can't prove how that plan came together, yet. But that is why we have discovery.

When the complaint pleaded that City officials "surreptitiously urged the Belle Plaine Veterans Club to dismantle its display … [for] a veneer of evenhandedness" (**App. 8; 0:19-cv-1122, R. Doc. 1, at 8**) and that the real reason they closed the forum was out of "animus towards Plaintiff's religion" (**App. 12; 0:19-cv-1122, R. Doc. 1, at 12**), or to harm a politically unpopular group (**App. 14-15; 0:19-cv-1122, R. Doc. 1, at 14-15**), or to acquiesce to a foreseen "community opposition grounded in anti-Satanist animus" (**App. 18; 0:19-cv-1122, R. Doc. 1, at 18**), it stated an Equal Protection claim.

The City also protests that the Court should not consider the press release which admits that the City closed the forum to silence a controversy. Response at 28. That press release was a "contemporary statement" by members of the decision-making body, which is "highly relevant" to determining whether "invidious discriminatory purpose was a motivating factor" behind the Recission Resolution.

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977). The Court should reverse and remand for trial proceedings on the equal protection count.

1.4: The City violated TST's RLUIPA rights.

The opening brief assigns error to the dismissal of the RLUIPA count. The City contests that the Recission Resolution was a "land use regulation," but it offers no competing view. The Recission Resolution was a "land use regulation" because it "regulates" how the Park (*i.e.*, "land") is used. 42 USC § 2000cc-5(5). Particularly, the Recission Resolution outlawed specifically-described "private speech" from a public park.

In response to the point that the Permit was an easement, the City incorporates its District Court briefing by reference. Response at 29. This is forbidden. Eighth Cir. R. 28A(k). Even still, the Permit was an "express easement," as it was a written property interest in land owned by another person. Black's Law Dictionary, EASEMENT (11th ed. 2019). Or, it was a "special use permit" because it

was a special exemption to a zoning ordinance which authorizes the use of property in a particular way. Black's Law Dictionary, SPECIAL-USE PERMIT (11th ed. 2019).

Either way, the Permit vested TST with a real property interest, the purpose of which was to exercise TST's religious beliefs. When the City restricted TST's use of the land, it restricted TST's religious exercise. That violated TST's RLIUPA rights. The Court should reverse and remand for trial proceedings on the RLIUPA claim.

2: *Satanic Temple II* adequately pleaded its claims.

2.1: The constitutional claims were not res judicata.

Rather than respond to the extensive points and authorities substantiating the position that the Magistrate's order lacked the requisite "finality," such that it could preclude *Satanic Temple II*, the City approvingly recites what the District Court did. Response at 57-60. Again, that is just circular reasoning. At issue is whether the District Court followed the law. It is inadequate to proffer that the District Court acted correctly because the District Court acted at all. To hold

otherwise would require rewriting the standard of review. *St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.*, 457 F.3d 766, 770 (8th Cir. 2006) (the standard is "de novo," zero deference).

Rather than address the opening brief, the City redirects to whether the District Court abused its discretion in refusing leave to amend in the first place. Response at 30-40. The City omits that TST alternatively asked for a nonsuit so that everything could be heard at once. (**App. 133-136; 0:19-cv-1122, R. Doc. 65, at 12-15.**)

Even if the Magistrate properly denied the motion, the Magistrate's authority was hard-capped at limiting the issues in *Satanic Temple I* to what survived the order of dismissal. But because the non-surviving claims were dismissed "without prejudice," TST had a vested right to file *Satanic Temple II*. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001); Black's Law Dictionary, DISMISSED WITHOUT PREJUDICE (11th ed. 2019).

The Magistrate saw fit to deny TST the opportunity to present all of the claims at once. The opening brief assumed *arguendo* that this was within the Magistrate's discretion. But because the parties

did not consent to disposition-by-magistrate, it was categorically outside the Magistrate's lawful power to preclude *Satanic Temple II*. 28 USC § 636; *Bottling Co. v. Pepsico, Inc.*, 5 F.4th 917, 924 (8th Cir. 2021). The District Court erred as a matter of law by "contorting" a dismissal without prejudice into one with prejudice. *Kulinski v. Medtronic Bio–Medicus, Inc.*, 112 F.3d 368, 373 (8th Cir.1997). The Court should reverse the order of dismissal in *Satanic Temple II* and remand for trial proceedings on all counts.

2.2: The City violated TST's rights of free speech.

The opening brief assigned error to dismissing the Free Speech Clause count from *Satanic Temple II*. The City's response ignores the new allegations and supporting evidence. The Court should reverse and remand for trial proceedings of the free speech claim.

2.3: The City violated TST's free exercise rights.

The opening brief assigned error to dismissing the free exercise counts from *Satanic Temple II*. The City's response ignores the new allegations and supporting evidence. The Court should reverse and

remand for trial proceedings of the free exercise claims.

2.4: The City violated the Establishment Clause and Minnesota's analog.

The City violated the Establishment Clause and Minnesota's analog by opening the forum to accommodate Christianity but closing it to exclude Satanism.

2.4.1: The City endorsed Christianity.

The City endorsed Christianity by opening the forum "basically, so the Cross could stay in the Park." (**App. 388-89; 0:21-cv-336, R. Doc. 1, at 32-33**). In response, the City doubles down on the false notion that coercion is elementally required in a religious monuments case. Response at 35-36. As sole "authority," the City references the District Court's errant reliance on the *Van Orden* plurality. *See Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

There are two problems. First, the City disregards the opening brief's point that the *Van Orden* plurality opinion is not law. *Marks v. United States*, 430 U.S. 188, 193 (1977). Second, the test is

preference, not coercion. *McCreary County v. ACLU*, 545 U.S. 844, 880 (2005); *Van Orden v. Perry*, 545 U.S. 677, 698 (Breyer, J., concurring). Only if the City's monument scheme had existed for decades without religious strife does it receive a presumption of constitutionality. *Van Orden*, 545 U.S. at 702-03 (Breyer, J., concurring); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2081–82 (2019).

This scheme was in place for months (not decades) and the Mayor stated on live television (in the midst of religious strife) that the City opened the "free speech zone" for the contemplated purpose of giving one, favored, religious display exclusive access to the public square. (**App. 388-89; 0:21-cv-336, R. Doc. 1, at 32-33**) ("basically, so the Cross could stay in the Park.") We have the Establishment Clause to prevent this very fact pattern. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) ("political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.")

The City wrongly minimizes TST's member's offense at the Christian monument. Response at 35-36. TST only has standing to

raise the Establishment Clause problem because it has a member who saw it in person and was offended. *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015 (8th Cir. 2012). *Satanic Temple II* specifically pleaded the facts around this member to show standing.

The allegations around the member also further show that this Park was a poignantly religious issue in the town. Nothing can better illustrate the point that the City "weighed in on one side of a religious debate" than someone getting run out of town for not agreeing with a majoritarian religious viewpoint. (**App. 365-366; 0:21-cv-336, R. Doc. 1, at 9-10**). Again, the Establishment Clause is supposed to prevent this very fact pattern. *McCreary Cnty.*, 545 U.S. at 876.

And, while true that the City did not *initially* authorize installing the Christian monument, it also did not take the monument out of the Park until after it was threatened with litigation. (**App. 365; 0:21-cv-336, R. Doc. 1, at 9**). But the City wanted the Cross to "stay in the Park," so it opened the forum. (**App. 388-89; 0:21-cv-336, R. Doc. 1, at 32-33.**) As pleaded, it is no coincidence that the

City closed the forum once a disfavored religion demanded equal access. (**App. 392-397; 0:21-cv-336, R. Doc. 1, at 36-41**). The City's actions were tainted with denominational preference, which violates the Establishment Clause. *McCreary Cnty.*, 545 U.S. at 876.

The City misstates the record by claiming that Councilor Stier did *not* receive assurances that no Satanic monuments would go into that Park. Response at 36-37; *contra.* (**App. 370-371; 0:21-cv-336, R. Doc. 1, at 14-15**). On the table was a proposal, and Councilor Stier asked for assurances that, as proposed, no Satanic monuments would go into that Park. (**Id.**) The drafter of the proposal said:

> There is [sic] specific criteria . . . [that] the monument would be consistently seen in other memorial parks. A Satanic statute is not consistently seen in other memorial parks. Your foxhole, for an atheist foxhole thing, is not consistently seen in other memorial parks.

(**Id.**) True, the City Attorney advised the Council that approving the proposal as written was wildly unconstitutional, and if the City opened the Park, the City would be constitutionally *required* to give Satanists equal access to the forum as the Christians. (**Id.**). And, in

modifying the proposal into the Enacting Resolution, the City smartly removed the parts that were a blatant effort "to prevent certain religions from speaking." (**App. 371** and **452; 0:21-cv-336, R. Doc. 1, at 15** and **R. Doc. 1-1, at 35**). But Satanists never did get equal access to that forum. This is more of the same pretext issue.

2.4.2: Motive aside, Christianity was treated better.

The opening brief assigned error to dismissing the Minnesota no-preference count from *Satanic Temple II*, particularly without an analysis. The City's response disregards the argument.

The City violated the Establishment Clause by intentionally opening the Park to give Christians exclusive access to the public sphere, and then closing the Park to exclude Satanists from equal access. The City violated the no-preference clause by giving Christians *any* better treatment than Satanists. The Court should reverse and remand for trial proceedings of the Establishment Clause claim and the Minnesota no-preference claim.

2.5: The City violated the Equal Protection Clause and Minnesota's analog.

Rather than respond to the points and authorities in the opening brief, the City again approvingly recites what the District Court did without discussion as to why it was acceptable. Response at 37-39. Same as in *Satanic Temple I*, the City obfuscates the "Satanism vs. Christianity" delineation of the complaint into a more favorable "local vs. foreign" dichotomy. The plaintiff, not the defendant, controls the legal theory for relief. *Caterpillar*, 482 U.S. at 392.

Interestingly, the City also repeats the District Court's error of ignoring the more expansive equal protection rights under Minnesota's Constitution. Minn. Const. art. 1 § 2. So even if *Satanic Temple II* did not adequately plead an Equal Protection Clause count, there is still a need to remand for trial proceedings on the state law claim.

2.6: The City withheld a meaningful notice and hearing.

TST was entitled to notice and a hearing before the City could terminate the Permit. The City responds, without authority or discussion, that the Permit was not an easement. Response at 40. The

City offers no counter-point, it just denies that the Permit was an easement. Even the District Court found that the Permit was an express easement. (**Ad. 18; 0:19-cv-1122, R. Doc. 46, at 18**).[2]

Because TST had a right to install the Display in the Park for one year (because of the Permit, which was an easement), TST was entitled to notice and a hearing before the City could take that right away. *United States v. Mosbrucker*, 340 F.3d 664, 666 (8th Cir. 2003). Or, if it was a special use permit, TST still was entitled to notice and a hearing. *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712 (Minn. 1978). TST did not get notice or a hearing. That is a procedural due process violation.

The City also responds that the Permit holder was Reason Alliance, not TST. Response at 40. That is a non-issue. We solved for that by asking the District Court for leave to add or substitute Reason Alliance as plaintiff (as appropriate), if the District Court found Reason Alliance was a necessary party or the real party in interest.

[2] The opening brief miscited this finding at **Ad. 10**. The correct citation is **Ad. 18**.

(**App. 608; 0:21-cv-336, R. Doc. 23, at 38**). The Court should either dispose of the argument or order that it be resolved on remand.

3: It was error to grant the City summary judgment.

3.1: The promise was for one year, not "up to" one year.

The opening brief assigns error to the District Court including the terms of the Enacting Resolution in construing the "promise." The Permit, alone, is the promise. If TST never got the Permit, TST would not have a promissory estoppel claim.

The City wrongly defends the decision to consider the Enacting Resolution as part of the "promise." A "promise" must be "addressed" to the "promisee." Restatement (Second) of Contracts § 2(3), cmt. *g* (1981). As a legislative act, the Enacting Resolution can only be a promise if there is a "clear indication that the legislature intends to bind itself contractually." *Meriwether Minnesota Land & Timber, LLC v. State*, 818 N.W.2d 557, 564 (Minn. Ct. App. 2012); Restatement (Second) of Contracts § 5(1) (1981).

Because governments do not generally address statutes to

particular parties, there is a "well-established presumption" that legislation is not a promise, and therefore is not a predicate for promissory estoppel. *Id.* As the proponent of the claim that the Enacting Resolution was the "promise," the City needed to bring a record to overcome the presumption. No evidence of record supports the notion that the Enacting Resolution was "addressed" to TST.

The only "manifestation of an intention to act or refrain from acting in a specified way" which the City "addressed" to TST was the Permit. (**App. 31; 0:19-cv-1122, R. Doc. 1-1, at 4.**) Thus, the Permit is the promise.

As the only promise, the Permit's terms, alone, form the predicate for promissory estoppel relief. Restatement (Second) of Contracts § 5(1) (1981). The Permit, by its own terms, is not optional. Restatement (Second) of Contracts § 2, cmt. *e* (1981). It states that TST's right "to emplace a display within the Limited Public Forum" is "good for one year." **(Id.)** The promissory estoppel count seeks to enforce that unqualified promise as written.

The City responds that there is a "heavy burden" before a

plaintiff may obtain estoppel relief against a government. Response at 47. That refers to TST's maybe-burden to show "some element of fault or wrongful conduct." *Brown v. Minnesota Dep't of Pub. Welfare*, 368 N.W.2d 906, 910 (Minn. 1985). Wrongful conduct answers whether there was an "injustice," not whether there was a "promise."

The City points out that TST's director agreed to comply with the Enacting Resolution. Response at 47-48. The Enacting Resolution only establishes a protocol by which an applicant seeks a permit. The Enacting Resolution is not addressed to TST, nor any other promisee. It is not a "promise." TST complied with the protocol set forth in the Enacting Resolution by filling out the application in proper form and proposing a display, all within the parameters of the Enacting Resolution. Hence the Permit. (**Id.**)

The City mischaracterizes the record by suggesting there was no permit language; or, if there was, the right to emplace a display for one year was not "*guaranteed*." Response at 48 (emphasis in original). The Permit explicitly identifies itself as a "permit," and

explicitly *"guarantees"* TST a right to participate in the forum for one year. **(Id.)** ("This permit is good for one year.")

Last, the City cries foul at the notion of being held to the clear and definite terms of an express promise, made by the City's authorized agent, in the course and scope of their agency, on the City's letterhead, where the said promise was made pursuant to legislation, where said legislation explicitly authorized the City Administrator to issue like promises, and the said promise was made because the City "approved" TST's "request for a permit." **(Id.); (App. 28-30; 0:19-cv-1122, R. Doc. 1-1, at 1-3**); compare Response at 49 ("That cannot be the law.")

Indeed, it *is* the law that "a principal is bound by the acts of its agent." *Norby v. Bankers Life Co. of Des Moines, Iowa*, 304 Minn. 464, 468, 231 N.W.2d 665, 668 (1975); see also Restatement (Third) Of Agency § 6.01, cmt. *b* and illustration 2 (2006).

3.2: TST "relied" on the permit by building the Display.

The opening brief assigned error to the District Court's finding

that it was unreasonable for TST to undertake any efforts to emplace the Display in the Park after receiving the Permit.

The City reiterates the false suggestion that it reserved the right to close the forum as part of the promise. Response at 50-51. As discussed at § 3.1, the Permit is the "promise" and the Permit does not, by its own terms, reserve the right to close the forum during the one-year period that TST may emplace its Display in the Park.

Relatedly, the City mischaracterizes the record by suggesting TST's witnesses "admitted" Belle Plaine could terminate the Permit. Response at 45. Each witness testified that Belle Plaine could not lawfully terminate the Permit because that would run afoul of TST's First Amendment rights. (**App. 189-90; 0:19-cv-1122, R. Doc. 94-2, at 13**) (Greaves depo. at 43:25-44:4, 47:5-11); (App. 208; **0:19-cv-1122, R. Doc. 94-2, at 32**) (Jarry depo. at 45:14-46:14); (App. 226; **0:19-cv-1122, R. Doc. 94-2, at 50**) (TST depo. at 110:2-3-111:9); Restatement (Second) of Contracts § 178 (1981).

Besides, "general statements of discretion" will not render a promise insufficiently definite. *Hall v. City of Plainview*, 954 N.W.2d

254, 262 (Minn. 2021). Even though the City made an extrinsic "general statement of discretion" to close the forum with at least ten days' notice, the record shows that TST reasonably believed that the City would not close the forum in violation of its First Amendment rights.

The City also responds that TST could not have detrimentally relied on the Permit because TST designed the Display before receiving the Permit. Response at 52. The City does not address the preemptive point that this conflates detrimental reliance with contract consideration. Opening brief at 81-82. "Detrimental reliance" includes continuing conduct started before the promise. Restatement (Second) of Contracts § 90, Illustration 17 (1981).

Further, that argument contorts the record. A design was necessary for the application. (**App. 33; 0:19-cv-1122, R. Doc. 1-1, at 6**) ("Please include a drawing or picture of the display.") On February 21, TST commissioned the *design* (not the construction) because TST "took the understanding from the February 6 meeting that the Park was definitely going to be opened to private donations of

religious monuments" and was under the impression that "time was a critical factor." (**App. 231; 0:19-cv-1122, R. Doc. 94-2, at 55**); see also (**App. 201-02; 0:19-cv-1122, R. Doc. 94-2, at 25-26**) (Greaves Depo. at 153:13-154:7) (the Display had to be specially designed to meet the City's "idiosyncratic" design requirements).[3] TST did not commission the *construction* of the Display until after receiving the Permit. (**App. 385; 0:21-cv-336, R. Doc. 1, at 29.**)

The City also argues TST did not "detrimentally" waste time, effort, and expense in constructing the Display because TST received more donations to create the Display than it expended in creating the Display. Response at 52. The response ignores the preemptive point that this finding took the record in the light least favorable to TST. Opening brief at 82. The donors funded the Display on the expectation that it would be displayed in the Park, not in the Salem Art Gallery. (**App. 225-26; 0:19-cv-1122, R. Doc. 94-2, at 49-50**)

[3] The Enacting Resolution required that all Displays be no larger than the Christian monument, at 2' x 3'. (**App 29; 0:19-cv-1122, R. Doc. 1-1, at 2**); and (**App. 363; 0:21-cv-336, R. Doc. 1, at 7**).

(TST Depo. at 109:13-110:5). When TST failed to effectuate the donors' intent, that caused reputational harm to TST. (**Id.**) That reputational harm was "detrimental" to TST because it would not have occurred but for TST soliciting donations to construct the Display in reliance on the Permit.

The City also suggests that, because there is not a contract, there cannot be promissory estoppel. Response at 53. If there is a valid contract, then there is no promissory estoppel. *Greuling v. Wells Fargo Home Mortg., Inc.*, 690 N.W.2d 757, 761 (Minn. Ct. App. 2005).

Taking the record in the light most favorable to TST, TST detrimentally relied on the Permit by constructing the Display, in reasonable reliance on the City's promise to allow that Display to be emplaced in the Park for one year. When the City later refused to allow the Display in the Park, TST's efforts in creating the Display were wasted. TST's wasted efforts were "detrimental reliance."

The City does not respond to the opening brief's point that it was error for the District Court to accuse TST of misrepresenting the scope of the Permit when there was not one iota of evidence to

support the finding. Opening brief at 82-83. That ran afoul of the legal standard, which requires the record to be taken in the *best* light for the non-movant. *Lincoln Ben. Life v. Wilson*, 907 F.3d 1068, 1074 (8th Cir. 2018). The District Court did the opposite.

3.3: The City closed the forum in bad faith.

The opening brief assigned error to the District Court's finding that no "injustice" resulted from the City refusing to allow the Display in the Park during the one-year period the Permit was good for.

When the Court takes the record in the light most favorable to TST, as is required, it will find at least five grounds for "injustice:"

(1) TST wasted efforts in creating the Display;

(2) TST suffered reputational harm for securing donations to create the Display but failing to emplace it in the Park;

(3) In bad faith, the City delayed the installation for the purpose of preventing the Display from entering the Park;

(4) In bad faith, the City misled TST into believing installation was proceeding as normal while scheming to stop it; and

(5) The City purposefully excluded a disfavored religion from equal access to the public square as a favored religion.

The City responds that it was not unjustly enriched. Response at 54. Irrelevant. "Injustice" considers more public policies than unjust enrichment. Opening brief at 86-87; *Meriwether*, 818 N.W.2d at 569.

The City responds that TST would have remained the owner of the Display even if the City adhered to its word. Response at 54. Similarly, the City says TST would be in the same position today if the City had adhered to its promise (the Display wouldn't be in the Park). Response at 56. The City ignores the record. If the City had not reneged on the Permit, then TST would not have squandered its resources, TST would not have suffered reputational harm, the City would never have acted in bad faith, and the City would not have broadcast that it may–with apparent impunity–call a vote on whether a disfavored religion should have the right to equal treatment under the law. *Contra. W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (we have the Bill of Rights to *prevent* fundamental rights from being subject to a vote).

Although not addressed anywhere in its argument, the City mischaracterizes the record in its statement of the case when it implies TST collected $182,000 in admission fees for the Gallery *because of the Display*. Response at 14. That estimate assumes every penny of revenue from admission fees is attributable to the Display. That estimate discounts costs of running the Gallery, it ignores that there are hundreds of other works in the Gallery, and it disregards that nobody was drawn to the Gallery because of the Display. (**App. 234-36; 0:19-cv-1122, R. Doc. 94-2, at 58-60**).

Flatly zero evidence supports the suggestion that TST earned $182,000 in admission fees *because the Display was there*, so the City's point defies the legal standard. Viewing the record in the light most favorable to TST (as is required), TST would have earned at least the same amount of admission fees if the City fulfilled its promise.

3.4: TST was entitled to further discovery.

The opening brief assigns error to the District Court refusing TST discovery on the issue of why the City broke its promise. The City

offers no rebuttal.

4: Upon remand, the Court should order reassignment.

Assuming the Court agrees with any of the above points, that will result in a remand. Upon remand, the Court should order reassignment. 28 USC § 2106.

In response, the City defends the District Court's discretion to award sanctions. Response at 61-62. But sanctions is not at bar. The amount of fees owed was not set and the District Court's sanctions order was immaterial to the merits, so the "bright-line" rule required an immediate appeal from the judgments of dismissal, and another appeal from final sanctions order. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202–03 (1988); *see also Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 717 (8th Cir. 1999).

The response does not respond to the opening brief's points that the Court should order reassignment upon remand. There being no objection, the Court should order reassignment upon remand.

CONCLUSION / PRAYER FOR RELIEF

WHEREFORE the Court should reverse the District Court's judgments of dismissal, should remand for trial proceedings on all counts asserted below, and should order reassignment.

Respectfully submitted
on May 25, 2022,
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CERTIFICATE OF COMPLIANCE

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