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

Opening brief for The Satanic Temple, Inc.

Matthew A. Kezhaya # 0402193
KEZHAYA LAW PLC
333 N. Washington Ave., # 300
Minneapolis, MN 55401
(479) 431-6112
matt@kezhaya.law

SUMMARY OF THE CASE

The Satanic Temple, Inc. ("**TST**") sued the City of Belle Plaine on allegations of speech suppression, religious discrimination, and promissory estoppel. The City opened a public forum in its park to accommodate a Christian monument, granted TST a right to participate, but closed the forum to exclude TST's Display.

The District Court dismissed several claims at the pleading stage, ostensibly "without prejudice." But the District Court denied every mechanism to revive the claims. On timeliness grounds, a magistrate denied leave to amend and refused leave to nonsuit the surviving claim. TST refiled the claims as a separate lawsuit, but the District Judge dismissed it because, it found, the Magistrate's order was a *de facto* dismissal with prejudice. The District Judge also announced an intention to sanction TST's attorneys for doing what is necessary to preserve TST's right of review.

The Court should entertain oral argument, at twenty minutes per side. This case asks complex questions about fundamental rights under both the Federal and Minnesota Constitutions.

CORPORATE DISCLOSURE STATEMENT

1. Plaintiff-Appellant The Satanic Temple, Inc. is a nonprofit religious corporation with no parent corporations and no publicly held corporations own 10% or more of Plaintiff-Appellant's stock.

2. As a nonprofit religious corporation, Plaintiff-Appellant has neither stock nor owners.

Respectfully submitted on
January 28, 2022,
on behalf of The Satanic Temple, Inc.

By: Matthew A. Kezhaya, # 0402193
KEZHAYA LAW PLC
333 N. Washington Ave. # 300
Minneapolis, MN 55401
phone: (479) 431-6112
email: matt@kezhaya.law

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the dismissal orders because a timely notice of appeal followed a final judgment on the merits. 28 USC § 1291; FRAP 4.

In *Satanic Temple I*, the District Court dismissed several claims "without prejudice" and retained jurisdiction over a state law claim. (**Ad. 24; 0:19-cv-1122, R. Doc. 79, at 31.**) The District Court did not address the nature of its subject matter jurisdiction after the federal questions were dismissed, but district courts generally retain discretion to exercise supplemental jurisdiction over pendent state-law claims. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); 28 USC § 1367. However, the order of dismissal precluded finality because some claims could be refiled and no Rule 54(b) certificate issued.

Mathers v. Wright, 636 F.3d 396, 398 (8th Cir. 2011). TST moved for leave to amend the complaint, or to nonsuit the remaining claim so all claims could be heard at once. (**App. 135-36; 0:19-cv-1122, R. Doc. 65, at 11.**) That was denied by the Magistrate. (**Ad. 54; 0:19-cv-1122, R. Doc. 79, at 31.**) The Magistrate's order denying leave to amend was not a "final" judgment. *United States v. University of Massachusetts, Worcester*, 812 F.3d 35, 44 n.7 (1st Cir. 2016); 28 USC § 636. The claims were refiled as *Satanic Temple II*. (**App. 357; 0:21-cv-336, R. Doc. 1, at 1.**) Those claims were all dismissed with prejudice. (**Ad. 102; 0:19-cv-01122, R. Doc. 109, at 48.**) Simultaneously, the District Court granted summary judgment on the state law claim. (**Id.**) Thus, and only then, was the "entire controversy" finally resolved. *Morris v. Barkbuster, Inc.*, 923 F.2d 1277, 1280 (8th Cir. 1991).

Timely notices of appeal were filed on the same day as the order. (**App. 353; 0:19-cv-01122, Doc. 110, at 1; App. 630, 0:21-cv-336, R. Doc. 45, at 1.**) But the judgments were issued the next day, on September 16, 2021. (**Id.**) The notices are treated as having been

filed on September 17. FRAP 4(a)(2).

On September 17, the judgment in *Satanic Temple II* was amended to identify the plaintiff as "The Satanic Temple, Inc." (the original judgment left off the "Inc."). (**App. 634, 0:21-cv-336, R. Doc. 43, at 1.**) An amended notice of appeal followed same-day. (**App. 636, 0:21-cv-336, R. Doc. 45, at 1.**)

Thus, the notices of appeal were filed one day after the judgment. This was timely. FRAP 4(a)(1)(A) (30-day deadline). Because the notices of appeal were timely filed after the "entire controversy" concluded, this Court has jurisdiction over the order of dismissal and summary judgment in *Satanic Temple I* and the order of dismissal in *Satanic Temple II*.

STATEMENT OF THE ISSUES

1: The District Court erred by finding that the complaint in *Satanic Temple I* did not adequately plead its claims despite allegations of viewpoint discrimination, religious animus, and a press release that the City closed the forum to end a public debate.

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,
473 U.S. 788 (1985)

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993)

2: The District Court erred by finding that the complaint in *Satanic Temple II* was *res judicata,* where the preceding order of dismissal was "without prejudice;" and erred in holding that the complaint failed to state a claim despite allegations (this time supported by evidence) of viewpoint discrimination, religious animus, and the press release that the City closed the forum to end a public debate.

Kulinski v. Medtronic Bio–Medicus, Inc.,
112 F.3d 368 (8th Cir.1997)

N. Assur. Co. of Am. v. Square D Co.,
201 F.3d 84 (2d Cir. 2000)

3: The District Court erred by granting summary judgment on

promissory estoppel by changing the text of the promise, refusing to consider the evidence of the City's bad faith as an injustice, and refusing to allow discovery on the issue of why the City broke its promise.

Meriwether Minnesota Land & Timber, LLC v. State,
818 N.W.2d 557 (Minn. Ct. App. 2012)

4: Upon remand, the Court should order reassignment because the District Judge conflated the role of the judiciary with that of the defense by demanding the complaint notify the District Judge (not the defense) of the claims and evidence, and announced a forthcoming monetary sanction against TST's attorneys for ensuring there will be "finality," required for appeal.

Sentis Grp., Inc., Coral Grp., Inc. v. Shell Oil Co.,
559 F.3d 888 (8th Cir. 2009)

STATEMENT OF THE CASE

Factual history

The City established its Veterans Park in 2001. (**App. 362; 0:21-cv-336, R. Doc. 1, at 6**). In August 2016, a City resident (without authority) affixed a metal monument to the Park with a concrete base. (**App. 363; 0:21-cv-336, R. Doc. 1, at 7.**) The monument depicted a soldier kneeling to a Cross:

(**Id.**)

In August 2016, a City resident (who is now a TST member) complained about the legality of the Christian monument. (**App.**

364; 0:21-cv-336, R. Doc. 1, at 8.) The monument made this resident feel like a second-class citizen in her own town, and she saw it twice-daily. (**App. 366; 0:21-cv-336, R. Doc. 1, at 10.**) The City Administrator opined that it was constitutionally permissible. (**App. 364; 0:21-cv-336, R. Doc. 1, at 8.**) In response, the resident invoked the Freedom From Religion Foundation ("**FFRF**"), an advocacy group for nonbelievers, who threatened litigation. (**App. 365; 0:21-cv-336, R. Doc. 1, at 9.**)

In January 2017, the City removed the Cross from the monument. (**Id.**) This caused the public to threaten the resident. (**Id.**) The resident filed multiple police reports but, by June 2017, the threats combined with police inaction caused the member to move out of the City. (**App. 365-66; 0:21-cv-336, R. Doc. 1, at 9-10.**)

By February 2017, the Veterans Group (the political proponents of the Christian monument) invoked the Alliance Defending Freedom, an advocacy group for Christians. (**App. 366; 0:21-cv-336, R. Doc. 1, at 10.**) The group devised a strategy that would accommodate the Cross while excluding other displays. (**App. 366-67; 0:21-**

cv-336, R. Doc. 1, at 10-11.) They would convince the City to declare part of the Park a "free speech zone," for the purpose of erecting privately-donated monuments, but only monuments that did not exceed the size of the Christian monument, and only monuments from City residents. (**App. 367; 0:21-cv-336, R. Doc. 1, at 11; App. 418-422, 0:21-cv-336, R. Doc. 1-1, at 1-5.**) Thus, if all of the monuments in the Park "happened" to have only one religious viewpoint, then that was just a reflection of the "qualified" donors' intent and the City had plausible deniability. (**App. 367; 0:21-cv-336, R. Doc. 1, at 11.**)

In February 2017, the City addressed the proposal at a public meeting (the "**Adopting Meeting**.") (**App. 368; 0:21-cv-336, R. Doc. 1, at 12.**) The complaint fully details the meeting (**App. 368-72; 0:21-cv-336, R. Doc. 1, at 12-16**), but there are two critical points: the City resolved, by a 3-2 vote, to adopt the proposal with some to-be-determined modifications (**App. 372; 0:21-cv-336, R. Doc. 1, at 16**); and Councilor Stier, the tie-breaking vote, sought and received assurances that adopting this proposal would not

permit any Satanic monuments in the Park:

> I've seen monuments that are going up in Detroit right now that have [a] Satanic meaning to them. So, how can we up here, be assured that, number one, these monuments won't go into that Park?

(**App. 370; 0:21-cv-336, R. Doc. 1, at 15; App. 565**, **0:21-cv-336, R. Doc. 1-2, at 44, Clip 7**).

After the Adopting Meeting, City personnel modified the proposal to surreptitiously limit the City's exposure to competing monuments from undesirable groups. (**App. 372; 0:21-cv-336, R. Doc. 1, at 16.**) Particularly, they added:

- a kill switch to shut down the Park if and when an undesirable monument is requested (the City was expecting displays from TST and the FFRF) (**Id.**);
- a one-year renewable limit for displays (despite that these displays were to be permanently affixed to the land) (**App. 373; 0:21-cv-336, R. Doc. 1, at 17**); and
- a requirement for a $1,000,000 insurance policy (which the Veterans Group already had) (**Id.**)

They also removed the requirement that the display be proffered by a City resident, (**App. 374; 0:21-cv-336, R. Doc. 1, at 18**), because the residency requirement was a blatant effort "to prevent certain religions from speaking." (**App. 452; 0:21-cv-336, R. Doc. 1-1, at 35.**) On behalf of the Alliance Defending Freedom, the Mayor demanded that the residency requirement be replaced. (**App. 374; 0:21-cv-336, R. Doc. 1, at 18.**) But it never returned. (**App. 376; 0:21-cv-336, R. Doc. 1, at 20.**)

In late-February 2017, the City adopted the proposal as modified. (**App. 436-38; 0:21-cv-336, R. Doc. 1-1, at 19-21**) (the "**Enacting Resolution**.") Prior to the public meeting, the votes were resolved off-the-record. (**App. 375; 0:21-cv-336, R. Doc. 1, at 19.**)

Two days after the Enacting Resolution passed, TST applied to erect its to-be-constructed Display in the Park. (**App. 378; 0:21-cv-336, R. Doc. 1, at 22.**) In addition to honoring Belle Plaine Veterans, TST wanted to emplace its display as an expression of its core religious tenets. (**App. 379; 0:21-cv-336, R. Doc. 1, at 23.**) Particularly, the Display was intended to spread awareness of TST's

religious viewpoint, inform the public that TST is patriotic, and rebut the perception that Christianity and patriotism are equivalent. (**Id.**); (**App. 624-26; 0:19-cv-1122, R. Doc. 119, at 59-62.**) The City recognized the religious nature of TST's Display. (**App. 385; 0:21-cv-336, R. Doc. 1, at 29.**)

On March 29, the City issued only two permits: one to replace the Cross (**App. 457; 0:21-cv-336, R. Doc. 1-1, at 40**) and one to TST. (**App. 455; 0:21-cv-336, R. Doc. 1-1, at 38**) (the "**Permit**.") TST's permit states that TST may emplace the Display in the Park on or after April 3, and that it is "good for one year from the date of this letter." (**App. 455; 0:21-cv-336, R. Doc. 1-1, at 40.**) The Cross returned on April 8. (**App. 385; 0:21-cv-336, R. Doc. 1, at 29.**)

On April 19, TST selected its artist to construct the Display. (**Id.**) The Display was completed on June 23. (**App. 386; 0:21-cv-336, R. Doc. 1, at 30.**) The Display looked like this:

(**App. 378; 0:21-cv-336, R. Doc. 1, at 22**).

While TST's Display was under construction, a mob took a religious objection to TST's equal access to the forum. (**App. 386; 0:21-cv-336, R. Doc. 1, at 30.**) The complaint fully details the controversy, but the following points are critical:

- there were daily protests at the Park (**Id.**);
- the City received a flood of religious objections to TST's Display (**App. 387; 0:21-cv-336, R. Doc. 1, at 31**); and
- the Mayor invited a local Catholic priest to speak at a Council meeting to address his religious objection to TST's

Display (**App. 388; 0:21-cv-336, R. Doc. 1, at 32**).

On June 29, TST notified the City that the Display was ready for installation. (**App. 392; 0:21-cv-336, R. Doc. 1, at 36.**) The City Administrator immediately responded that the installation must wait until after July 6. (**Id.**) The City Administrator also immediately notified the Mayor, who called for an off-the-record meeting between the City Council and the Veterans Group on July 10. (**Id.**) At that meeting, the Council and the Veterans Group resolved to exclude TST's Display. (**Id.**)

On July 12, the City Administrator began coordinating with the City's insurer about the text of the Recission Resolution and the press release. (**Id.**) The next day, the City Administrator informed the City's insurer that the plan was to remove the Christian monument, rescind the Enacting Resolution, and exclude TST's Display. (**App. 540; 0:21-cv-336, R. Doc. 1-2, at 19.**) Simultaneously, the City was deceiving TST into thinking that the installation was proceeding as normal. (**App. 393; 0:21-cv-336, R. Doc. 1, at 37.**)

Per the plan, the Christian monument was quietly removed on

July 14. (**App. 393; 0:21-cv-336, R. Doc. 1, at 37.**) Contemporaneously, the Veterans Group broadcasted that the monument was removed and that it will "support the decision of the city" with respect to whether it would return. (**Id.**)

On July 14 (a Friday), the City Administrator notified the Council that the Christian monument was removed "prior to the protests scheduled this weekend;" and, fifteen minutes later, told TST that the City would be "considering" whether to close the forum on Monday. (**App. 394; 0:21-cv-336, R. Doc. 1, at 38.**)

On July 17, the City held a public meeting to quietly shut down the forum. (**App. 395; 0:21-cv-336, R. Doc. 1, at 39.**) At that meeting, the City resolved to enact the Recission Resolution by a consent agenda. (**App. 397; 0:21-cv-336, R. Doc. 1, at 41; App. 568; 0:21-cv-336, R. Doc. 1-2, at 47, Clip 1**); (**App. 554; 0:21-cv-336, R. Doc. 1-2, at 33.**) (the "**Recission Resolution**.") A "consent agenda" precludes discussion of matters addressed in the agenda. (**App. 395; 0:21-cv-336, R. Doc. 1, at 39.**) On July 18, the City notified TST that the forum had been eliminated and the City would

not allow TST's Display. (**App. 556; 0:21-cv-336, R. Doc. 1-2, at 45.**)

Also on July 18, the City issued a press release which states it closed the forum because of the debate happening in and around the Park which "portrayed our city in a negative light" and which "promoted divisiveness among our own residents." (**App. 562; 0:21-cv-336, R. Doc. 1-2, at 41.**) And the City closed the forum to "bring this divisive matter to closure." (**Id.**)

Procedural history

TST filed suit on April 25, 2019 (*Satanic Temple I*). (**App. 1; 0:19-cv-1122, R. Doc. 1.**) The complaint alleged that: (1) TST is a religion (**App. 5; 0:19-cv-1122, R. Doc. 1, at 5**); (2) TST sought and received an equal right as the Christians to emplace its Display in the forum (**App. 4; 0:19-cv-1122, R. Doc. 4**); (3) but the Recission Resolution uniquely targeted TST's Display for suppression (**App. 7; 0:19-cv-1122, R. Doc. 7, at 7-8**); (4) the City coordinated the removal of the Christian monument to appear evenhanded when

excluding TST's Display (**App. 8; 0:19-cv-1122, R. Doc. 1, at 8**); (5) the purpose of the Recission Resolution was to discriminate against TST, either because of religious animus or in order to yield to a heckler's veto (**App. 8; 0:19-cv-1122, R. Doc. 1, at 8; App. 90; 19-cv-1122 R. Doc. 1, at 9-13**); and (6) the press release publicly declared that the City closed the forum to end the controversy (**App. 10; 0:19-cv-1122, R. Doc. 1, at 10**). TST asserted Minnesota and Federal Constitutional claims, as well as a promissory estoppel claim. (**App. 10-24; 0:19-cv-1122, R. Doc. 1, at 10-24.**)

The City admitted that it issued the press release. (**App. 43; 0:19-cv-1122, R. Doc. 23, at 6.**) It also admitted that, despite the text of the Recission Resolution, no vandalism ever occurred. (**App. 79; 0:19-cv-1122, R. Doc. 43.**)

The parties cross-moved for judgment on the pleadings. The City asserted that TST had not stated any claims and TST asserted that the City's admissions that there was no vandalism and that the City closed the "free speech zone" to silence a debate were admissions to yielding to a heckler's veto. (**Ad. 1; 0:19-cv-1122, R. Doc. 46, at**

1.) TST also pointed out that Councilor Stier stated his bias at the outset by seeking assurances there would be no Satanic monuments in the Park. (**App. 74; 0:19-cv-1122, R. Doc. 43, at 3.**)

In reliance on the bar against discovery during the pendency of a motion to dismiss, TST did not engage in discovery until after the District Court ruled on the motions. (**App. 124; 0:19-cv-1122, R. Doc. 165, at 3.**) About one year after the deadline to amend the pleadings passed, the District Court dismissed all but the promissory estoppel claim for pleading deficiencies, "without prejudice." (**Ad. 1; 0:19-cv-1122, R. Doc. 46, at 23**) (July 31, 2020); compare (**Ad. 27; 0:19-cv-1122, R. Doc. 79, at 4**) (the deadline was on October 15, 2019). The order did not provide a deadline to amend.

After the order, about four months for discovery remained. In those four months, TST responded to the City's discovery requests, issued its own discovery requests, defended two depositions, and attempted to take three depositions of the City's witnesses (the City refused to produce its witnesses for depositions). (**App. 124-27; 0:19-cv-1122, R. Doc. 65, at 3-6.**) All the while, TST overhauled

the complaint to bolster the factual allegations. (**App. 131; 0:19-cv-1122, R. Doc. 65, at 10.**)

At the close of discovery, TST moved for leave to amend the scheduling order to permit amending the complaint; or, failing that, to nonsuit the promissory estoppel claim so that everything could be heard at once. (**App. 135-36; 0:19-cv-1122, R. Doc. 65, at 314-15.**) TST also moved for discovery on why the City broke its promise. (**App. 96; 0:19-cv-1122, R. Doc. 58.**) The District Court assigned both motions to the Magistrate, who denied the motion to amend or nonsuit for untimeliness (**Ad. 48; 0:19-cv-1122, R. Doc. 79, at 25**) and held that why the City broke its promise was irrelevant to "injustice." (**Ad. 46; 0:19-cv-1122, R. Doc. 79, at 23.**)

TST issued objected to the Magistrate's order (**App. 137; 0:19-cv-1122, R. Doc. 91**) and, in reliance on the prior dismissal "without prejudice," filed *Satanic Temple II*. (**App. 357; 0:21-cv-336, R. Doc. 1.**) The City moved to dismiss *Satanic Temple II* as *res judicata*, and for Rule 11 sanctions against TST's counsel for refiling suit.

TST objected. (**App. 571; 0:21-cv-336, R. Doc. 23; App. 615; 0:21-cv-336, R. Doc. 24.**)

After TST filed *Satanic Temple II*, the City moved for summary judgment on promissory estoppel. TST objected that the City was not entitled to judgment; and TST was entitled to discovery on why the City broke its promise. (**App. 150; 0:19-cv-1122, R. Doc. 94.**)

The District Court simultaneously heard the motions for summary judgment, to dismiss, and for sanctions. During the summary judgment portion of the hearing, the District Court took issue with TST asserting reputational harm because the District Judge did not have prior notice of those asserted harms. (**App. 348; 0:19-cv-1122, R. Doc. 119, at 24.**) TST responded that Rule 54(c) permitted the argument. (**App. 348-490; 0:19-cv-1122, R. Doc. 119, at 24-25.**)

During the motion to dismiss portion, the District Judge inquired into why TST's efforts to emplace the Display were "religious," and therefore protected by the Free Exercise Clause. (**App. 624-25; 0:19-cv-1122, R. Doc. 119, at 59-60.**) TST explained that it was "religious" because of the inverted pentagrams, and the doctrinal

matter of presenting TST's viewpoint whenever the government opens the door to religion. (**App. 624-26; 0:19-cv-1122, R. Doc. 119, at 59-61.**) The District Court incredulously responded if TST was religious because it was "anti-religious." (**Id.**) TST explained that there is no concept of "anti-religious," something is either religiously motivated or it is not. (**Id.**) TST is a religion and the abstention doctrine precludes the District Court from second guessing TST's doctrine; and at issue was a motion to dismiss, so it is an expression of TST's doctrine because the complaint says it is. (**Id.**)

Ultimately, the District Court affirmed the Magistrate's order in full, granted the City summary judgment in full, held that the Magistrate's order denying leave to amend was a *de facto* dismissal with prejudice, dismissed *Satanic Temple II* with prejudice, and announced that it intends to issue a monetary sanction against TST's counsel of record for filing *Satanic Temple II*. (**Ad. 102; 0:19-cv-1122, R. Doc. 109.**) No final sanctions order has yet issued.

SUMMARY OF THE ARGUMENT

Satanic Temple I plausibly alleged that the City opened the forum to accommodate a Christian monument and closed it to exclude a competing Satanic monument because of an unlawful desire to suppress TST's viewpoint. The District Court refused to treat the allegations as true and dismissed the claims, "without prejudice."

That was error, but the District Court went further and rejected every mechanism for TST to correct the asserted deficiencies. TST was barred from amending the complaint, barred from nonsuiting the surviving claim, and its refiled complaint was thrown out as *res judicata*. But *Satanic Temple II* was not *res judicata* because the Magistrate's order denying leave to amend lacked finality and lacked the power to provide finality.

Satanic Temple II plausibly alleged the same issues as before, this time in painstaking detail and supported with evidence (even though this is not required). Again, the District Court refused to treat the allegations as true.

The District Court also erred in its treatment of the City's motion

for summary judgment. The District Court changed the text of the City's promise and hypothesized evidence to accuse TST of fraud. The District Court even prohibited TST from discovery on why the City broke its promise, which is part of the "injustice" inquiry, only to issue a summary judgment because TST did not have sufficient evidence of "injustice."

A remand to the same judge would be a plain miscarriage of justice. The District Judge announced bias by donning the role of the defense, manipulating the proceedings in an effort to preclude TST from appellate review, and announcing sanctions against TST's lawyers for ensuring a final judgment on the merits.

ARGUMENT

1: *Satanic Temple I* plausibly alleged its claims.

Satanic Temple I plausibly alleged its claims. The Court should reverse the order of dismissal in *Satanic Temple I* and remand for further proceedings.

Standard of review

This Court reviews a district court's decision to grant a motion to dismiss de novo. *Friends of Lake View School District Incorporation No. 25 of Phillips County v. Beebe*, 578 F.3d 753, 757–58 (8th Cir. 2009). The reviewing court accepts as true all factual allegations set out in the complaint. *Id.* An action may be dismissed under FRCP 12(b)(6) if the complaint fails to state a claim upon which relief can be granted. *Id.* The question is whether there is "sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Warmington v. Bd. of Regents of Univ. of Minnesota*, 998 F.3d 789, 795–96 (8th Cir. 2021). Questions of state

law are reviewed de novo. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991).

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

Satanic Temple I asserted violations of the Free Speech Clause and Minnesota's analog. (**App. 12-14, 23-24; 0:19-cv-1122, R. Doc. 1, at 12-14, 23-24.**) Minnesota and Federal free speech protections are co-extensive, so this section addresses only Federal law to cover both counts. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 516 (Minn. 2012).

The Free Speech Clause enshrines the right of free speech against unreasonable speech restrictions. U.S. Const. amend I. To resolve whether a speech restriction is "unreasonable," the threshold inquiry is whether it is content-based or content-neutral, *i.e.*, resolving the government's purpose behind the restriction. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994). A content-based restriction is presumptively unconstitutional and must survive strict scrutiny. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). But even a

content-neutral policy must be narrowly drawn to a significant governmental interest. *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1221 (8th Cir. 1998).

The City violated TST's free speech rights by closing the forum to suppress TST's expressive conduct, or by restricting TST's speech to deter vandalism. Monuments do not vandalize. The First Amendment solution was to punish the vandals, not silence TST.

1.1.1: The City opened a limited public forum.

A Free Speech analysis starts with a forum analysis. *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006). The "free speech zone" was a limited public forum. (**Ad. 12; 0:19-cv-1122, R. Doc. 46, at 12.**) A "limited public forum" is one where the government has opened its property for speech about a specific topic. *Id.*, 444 F.3d at 976. The City created a limited public forum by opening its Park to an otherwise impermissible form of speech (private structures) for the purpose of engaging in expressive activity about a specific topic. Indisputably, TST's speech was about that topic because TST

received the Permit. (**App. 455; 0:21-cv-336, R. Doc. 1-1, at 38.**) But, upon notice that TST was ready to use the Permit, the City closed the forum. (**App. 7; 0:19-cv-1122, R. Doc. 1, at 7.**) The issue is whether the Recission Resolution was "viewpoint neutral" and "reasonable" *Bowman*, 444 F.3d at 975. It was neither.

1.1.2: Closing it was viewpoint discrimination.

The complaint plausibly alleged that closing the forum was viewpoint discrimination. A speech restriction is content-based if the government's purpose is "concerned with undesirable effects that that arise from the direct impact of speech on its audience or listeners' reactions to speech." *McCullen*, 573 U.S. at 481. The test is whether the government has denied access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). That is a fact question. *Id.* at 812.

The complaint plausibly pleaded viewpoint discrimination. TST's Display was permissible under the policy (**App. 4; 0:19-cv-**

1122, R. Doc. 1, at 4), the closure exclusively suppressed TST's Display (**App. 9; 0:19-cv-1122, R. Doc. 1, at 9**), the City closed the forum because of its aversion to TST's Display (**App. 8-13; 0:19-cv-1122, R. Doc. 1, at 8-13**), and the City closed the forum to end the controversy caused by TST's Display (**App. 10; 0:19-cv-1122, R. Doc. 1, at 10**).

To dismiss the viewpoint discrimination claim, the District Court simply ignored these inconvenient facts. (**Ad. 12-14; 0:19-cv-1122, R. Doc. 46, at 12-14.**) This violated the standard, which requires that *all* facts be deemed true. *Lake View*, 578 F.3d at 757–58.

The District Court pointed out that the City was not required to keep a limited forum open indefinitely. (**Ad. 12; 0:19-cv-1122, R. Doc. 46, at 12.**) (citing *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983)). But the power to close a forum is limited by the prohibition against viewpoint discrimination. *Student Gov't Ass'n v. Bd. of Trustees of Univ. of Massachusetts*, 868 F.2d 473, 480 (1st Cir. 1989); *Missouri Knights of the Ku Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347, 1352 (W.D. Mo. 1989). Just like an at-will

employee can be fired, but not in violation of Title VII; the City could close the forum, but not to suppress TST's viewpoint. Closing the forum to suppress TST's viewpoint impermissibly disfavored "ideas that offend," which violates the First Amendment. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

1.1.3: Closing it was an overbroad speech restriction.

The second prong asks whether closing the forum was "reasonable." *Bowman*, 444 F.3d at 975. The test is whether the regulation is narrowly tailored (*i.e.*, does not burden substantially more speech than necessary) to serve a significant government interest. *Id.* at 980. A complete ban on speech is permissible only if "each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

The defendant bears the burden to justify a "reasonable fit" between the asserted goal and the means selected to accomplish it. *Krantz*, 160 F.3d at 1221. This is a fact question, and it requires proof of a study or reliable evidence regarding the effect of the regulated

activity upon the asserted interest. *Id.*

The District Court erred by ignoring the "unreasonableness" argument and failing to hold the City to its burden of proof. (**Ad. 12-13; 0:19-cv-1122, R. Doc. 46, at 12-13.**) Ostensibly, the City shut down the forum to discourage vandalism. (**App. 37; 0:19-cv-1122, R. Doc. 1-1, at 10.**) But monuments cannot cause these problems, people cause these problems. In *Krantz*, a city unconstitutionally prosecuted people for placing flyers on cars under ordinances designed to prohibit littering. This Court explained that "littering is the fault of the litterbug, not the leafletter." *Krantz*, 160 F.3d at 1219. The First Amendment solution to *potential* vandals (the City admitted there was no vandalism) is to prosecute the vandals, not silence TST. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

The Seventh Circuit has addressed a similar fact pattern. *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992). There, a district court found an Establishment Clause violation where a city displayed only Christian displays. But it was unconstitutionally overbroad to prohibit *all* displays. *Id.*, 964 F.2d at 620-22.

Once the City purposefully opened the Park to these displays and granted TST a right to participate, it was categorically unreasonable to suppress that speech because someone *might* vandalize TST's Display. *Bowman*, 444 F.3d at 981-82 (striking as overbroad a five-day cap on speaking permits because the cap "does not by itself foster more viewpoints; it merely limits Bowman's speech.") When the City did so, it curtailed substantially more speech than necessary to accomplish its purpose. *Krantz*, 160 F.3d at 1222. It was error for the District Court to reject this point, and it was double-error for the District Court to relieve the City of its burden of proof.

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

Satanic Temple I asserted that the City violated TST's free exercise rights, protected by the Free Exercise Clause and Minnesota's analog. (**App. 10-12, 23; 0:19-cv-1122, R. Doc. 1, at 10-12, 23.**)

1.2.1: The City engaged in status-based discrimination.

The Free Exercise Clause prohibits the City from enacting a law which discriminates against TST's religious beliefs. U.S. Const.

amend. I. Free Exercise Clause liability lies if: (1) a religious act was burdened; and (2) the religious act was targeted. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). But when (as here) the Free Exercise claim supports a Free Speech claim, the law which burdens religious expressive conduct must survive strict scrutiny no matter how "neutral" it is. *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 881-82 (1990); *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940).

1.2.1.1: TST's Display was "religious"

The complaint plausibly alleged that a religious act was burdened. It alleged that: (1) TST is a religion (**App. 3; 0:19-cv-1122, R. Doc. 1, at 3.**); (2) TST sought to emplace its Display in the Park (**App. 7; 0:19-cv-1122, R. Doc. 1, at 7.**); (3) the Display was to be emplaced in the same forum as the Christian monument (**App. 6; 0:19-cv-1122, R. Doc. 1, at 6.**); (4) the Display features inverted pentagrams, which are well-known symbols of religious significance to Satanists (**App. 35; 0:19-cv-1122, R. Doc. 1-1, at 8.**); and (5) the

City suppressed the Display because of religious animus (**App. 12; 0:19-cv-1122, R. Doc. 1, at 12**).

The District Court held that the complaint did not plausibly allege that the Display was religious. (**Ad. 9; 0:19-cv-1122, R. Doc. 46, at 9.**) This was playing obtuse. Obviously, a *religious* organization's *religious* display is *religious*. *Lake View*, 578 F.3d at 757–58.

The District Court also held that Free Exercise liability only lies if a government burdens a "central" tenet of the religious belief. (**Ad. 8; 0:19-cv-1122, R. Doc. 46, at 8.**) That was wrong. The inquiry is whether the practice was (1) sincerely held; and (2) religious in the plaintiff's scheme of things. *United States v. Seeger*, 380 U.S. 163, 185 (1965). A nontheistic creed, like TST's, is "religious." *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11 (1961); *Satanic Temple v. City of Scottsdale*, No. CV18-00621-PHX-DGC, 2020 WL 587882, at *7 (D. Ariz. Feb. 6, 2020).

The inquiry is *not* whether the practice is "central" to the religion. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2256 (2020) ("The Free Exercise Clause protects against even 'indirect coercion'

… [such as] status-based discrimination.") A "centrality" requirement wouldn't even make sense. Judges are not theologians; they lack the skillset to dissect belief. This is why 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." *Smith,* 494 U.S. at 887 (collecting cases).

The complaint only needed to allege that a religious entity was denied equal rights because of its religious viewpoint. *Espinoza*, above. The complaint alleged that. (**App. 11-13; 0:19-cv-1122, R. Doc. 1, at 11-13.**) It was error for the District Court to demand that TST further support its claim with a sermon.

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

The second Free Exercise Clause question is whether the City "neutrally" prevented TST's religious act; but, "Facial neutrality is not determinative." *Church of the Lukumi Babalu Aye*, 508 U.S. at 534. A facially neutral law "may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it

unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

It is irrelevant if the City "neutrally" prohibited TST's religious expression because the Free Exercise claim supports a Free Speech claim. *Smith*, 494 U.S. at 881-82. But even if the "neutrality" inquiry applies, it is still a fact question of the City's intent whether the Recission Resolution targeted TST's Display. *Church of the Lukumi Babalu Aye*, 508 U.S. at 546. The complaint answered that fact question with an allegation that the City intentionally designed the Recission Resolution to preclude TST's Display. (**App. 9-13; 0:19-cv-1122, R. Doc. 1, at 9-13.**)

Yet, the District Court held that the closure of the forum was neutral because it applied to all. (**Ad. 83; 0:19-cv-1122, R. Doc. 109, at 29.**) That finding suffers from four reversible errors: (1) it erroneously credited facial neutrality; (2) it disregarded the fact allegation that the Recission Resolution uniquely targeted TST's Display; (3) it ignores that the Christian monument got 10 months of display time, whereas the Satanic monument got none; and (4) it

ignored that neutrality is irrelevant under *Smith*'s hybrid-rights test.

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

The Minnesota constitution removes neutrality as a defense. Minn. Const. art. 1 § 16; *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990). Under Minnesota law, the test is whether: (1) the objector's belief is sincerely held; (2) the state action burdens the exercise of religious beliefs; (3) the state's interest is overriding or compelling; and (4) the state action uses the least restrictive means. *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 442 (Minn. 2002). Just as under Federal law, Minnesota prohibits judicial second-guessing of religiosity. *Id.*; *State v. Pedersen*, 679 N.W.2d 368, 374 (Minn. App. 2004).

The District Court held that TST adequately pleaded sincerity. (**Ad. 10; 0:19-cv-1122, R. Doc. 46, at 10.**) But the District Court erred by failing to draw the connection that TST's Display, which featured symbols of religious significance, was religiously motivated. (**Id.**) Also, as addressed in § 1.2.1.1, the District Court

errantly ignored that the exclusion was status-based discrimination.

The City bore the burden of proving the remaining elements (that its interest is "compelling" and that the restriction uses the least restrictive means possible). *Pedersen*, 679 N.W.2d at 373. But it never proffered an argument that its interest is "compelling" or that closing the forum was the least restrictive means to further that interest. Yet the District Court did not hold the City to its burden. It was reversible error to dismiss this count.

1.3: The City violated the Equal Protection Clause.

Satanic Temple I asserted that the City violated the Equal Protection Clause. (**App. 14-15; 0:19-cv-1122, R. Doc. 1, at 14-15.**) The Equal Protection Clause requires governments to treat similarly situated people alike. U.S. Const. amend. XIV, *Ellebracht v. Police Bd. of Metro. Police Dep't of St. Louis*, 137 F.3d 563, 566 (8th Cir. 1998). Discrimination against a suspect class triggers strict scrutiny and religion is a suspect class. *Plyler v. Doe*, 457 U.S. 202, 218 (1982). TST is a religion. (**Ad. 10; 0:19-cv-1122, R. Doc. 46, at 10.**) Therefore,

TST is a suspect class.

The complaint adequately pleaded that the City opened the forum to accommodate a Christian monument, allowed it exclusive access for a time, and then closed it once TST announced it was ready for equal participation in the "free speech zone." (**App. 6-7; 0:19-cv-1122, R. Doc. 1, at 6-7.**) Only TST's Display was excluded. (**App. 9; 0:19-cv-1122, R. Doc. 1, at 9.**) The purpose behind the closure was to exclude "[TST's] controversial but constitutionally protected religious viewpoints." (**App. 14; 0:19-cv-1122, R. Doc. 1, at 14.**)

The District Court minimized these allegations as "conclusory." (**App. 14-15; 0:19-cv-1122, R. Doc. 46, at 15.**) But nothing more was needed about the City's intent than the allegation than the City allowed the Christian monument to have display time and then intentionally precluded TST's Display. The District Court improperly required that TST plead detailed factual allegations or describe the evidence. *Warmington*, 998 F.3d at 795-96. It was a complaint, not a summary judgment motion.

The District Court also erred by suggesting that TST is not similarly situated as Christianity. (**Ad. 14; 0:19-cv-1122, R. Doc. 46, at 14.**) (blithely disregarding that Christianity was the predicate "similarly situated" party, not the Veterans Club). In the press release, the City overtly states that it contemplated two factions in the debate: "religious" vs. "non-religious." (**App. 71; 0:19-cv-1122, R. Doc. 33, at 17.**) The City accommodated what it considered the "religious" and excluded what it considered the "non-religious."

It was error to dismiss this count. Over time, America's population is increasingly diverse and decreasingly theistic. To allow the City to discriminate against TST is to sew the seeds of discrimination against a more palatable religious minority; one day, that minority could be Christians. *Zorach v. Clauson*, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting) ("The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power.")

1.4: The City violated TST's RLUIPA rights.

Satanic Temple I asserted a violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("**RLUIPA**"). (**App. 16-18; 0:19-cv-1122, R. Doc. 1, at 16-18.**) RLUIPA prohibits a government from imposing a "land use regulation" in a manner that imposes a substantial burden on the exercise of religion. 42 USC § 2000cc(a). This means the City could not restrict TST's use of land if TST has an easement in the regulated land. 42 USC § 2000cc-5(5).

Even the District Court acknowledged that the Permit was an express easement. (**Ad. 18; 0:19-cv-1122, R. Doc. 46, at 18.**) But the District Court held that the Recission Resolution terminated the Permit. (**Id.**) That was error because RLUIPA precludes governments from infringing on a religion's reasonable expectation to use land, *Andon, LLC v. City of Newport News, Va.*, 813 F.3d 510, 515 (4th Cir. 2016), and the Permit provided TST that reasonable expectation. By terminating the Permit, the City violated RLUIPA.

The District Court also errantly held that RLUIPA only protects religious gatherings. (**Ad. 19; 0:19-cv-1122, R. Doc. 46, at 19.**) The

statute explicitly protects against a land use regulation that prevents a religious structure within a jurisdiction. 42 USC § 2000cc(b)(3). The Recission Resolution precluded TST's Display, which is a religious structure, from the City. It was error to dismiss this count.

2: *Satanic Temple II* plausibly alleged its claims.

It was not enough to dismiss the counts from *Satanic Temple I*, the District Court prohibited every mechanism for TST to correct the asserted deficiencies. The Court should reverse the order of dismissal in *Satanic Temple II* and remand for further proceedings.

2.1: Satanic Temple II was not barred by res judicata.

The District Court held that claim preclusion barred *Satanic Temple II* because the Magistrate denied leave to amend. But the Magistrate's order was not preclusive. TST was entitled to file *Satanic Temple II* because the claims in *Satanic Temple I* were dismissed without prejudice.

Standard of review

This Court reviews the application of *res judicata* de novo. *St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.*, 457 F.3d 766, 770 (8th Cir. 2006). The doctrine of *res judicata* governs the binding effect of a former adjudication. *In re Anderberg-Lund Printing Co.*, 109 F.3d 1343, 1346 (8th Cir. 1997). *Res judicata* has two aspects: "claim preclusion," which precludes relitigation of the same claim between parties or their privies where a final judgment has been rendered upon the merits by a court of competent jurisdiction and "issue preclusion," which finalizes factual and legal issues "actually and necessarily determined." *Id.* The party against whom *res judicata* is asserted must have had a full and fair opportunity to litigate the matter in the proceeding that is to be given preclusive effect. *Id.*

2.1.1: The Magistrate did not issue a preclusive order.

At issue is claim preclusion. (**Ad. 92-99; 0:19-cv-1122, R. Doc. 109, at 38-45.**) Under claim preclusion, a claim will be precluded by a prior judgment when: (1) the first suit resulted in a final

judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action. *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8th Cir. 1998).

The Magistrate's order was not a "final judgment on the merits." The requirement of a "final judgment on the merits" is closely tied to the "finality" required for appellate jurisdiction. *AVX Corp. v. Cabot Corp.*, 424 F.3d 28, 32 (1st Cir. 2005) (describing the concepts as "interchangeable"); *Downing v. Riceland Foods, Inc.*, 810 F.3d 580, 586–87 (8th Cir. 2016) (a Rule 54(b) certificate renders a partial judgment "final," both for appeal and *res judicata*). The Magistrate's order did not purport to be "final." (**Ad 54; 0:19-cv-1122, R. Doc. 79, at 31.**) Nor could it; orders denying leave to amend are not a "final judgment on the merits." *Worcester*, 812 F.3d at 44 n.7.

Moreover, magistrates lack the power to "dismiss for failure to state a claim upon which relief can be granted" and "to involuntarily dismiss an action." 28 USC § 636(b)(1)(A). Magistrates lack the

power to effectuate a final judgment because that would usurp the traditional adjudicatory function of an Article III judge. *United States v. Flaherty*, 668 F.2d 566, 585 (1st Cir. 1981); *see also N. Bottling Co. v. Pepsico, Inc.*, 5 F.4th 917, 924 (8th Cir. 2021) ("Without the parties' consent, magistrate judges cannot issue binding decisions on dispositive motions").

In *Satanic Temple I*, there was no consent for a disposition by a magistrate judge. As a result, the Magistrate lacked the power to enter the "final judgment on the merits" required by the first element of *res judicata*. *Costner*, 153 F.3d at 673. Because the Magistrate lacked the power to enter a "final judgment on the merits," the Magistrate's denial of leave to amend cannot, consistent with the statute, be treated as a *de facto* dismissal with prejudice.

Relatedly, the counts in *Satanic Temple I* were previously dismissed "without prejudice." (**Ad. 23; 0:19-cv-1122, R. Doc. 46, at 23.**) Once those claims were dismissed without prejudice, they were to be treated as if they had never been brought at all. *Gerhardson v. Gopher News Co.*, 698 F.3d 1052, 1056 (8th Cir. 2012). Thereafter,

the District Court lacked jurisdiction to take any further action on them, including to dismiss them with prejudice. *Norman v. Arkansas Dep't of Educ.*, 79 F.3d 748, 751 (8th Cir. 1996). The Magistrate could only prohibit amending the complaint in *Satanic Temple I;* the Magistrate lacked the power to preclude *Satanic Temple II*.

2.1.2: TST was entitled to file *Satanic Temple II*.

In support of its decision to treat the Magistrate's order as a "final judgment on the merits," notwithstanding the statute, the District Court relied on an inapposite line of cases which gave preclusive effect to the denial of leave to amend a complaint. *E.g. Poe v. John Deere Co.*, 695 F.2d 1103, 1105 (8th Cir. 1982).

But in each case, a judgment on the merits preceded the denial of leave to amend. *Millennium Lab'ys, Inc. v. Ward*, 289 Neb. 718, 728 (2014) (observing that fact). When the denial of leave to amend is preceded by a dismissal *without* prejudice, the denial of leave to amend cannot be "contorted" into a dismissal *with* prejudice. *Kulinski v. Medtronic Bio–Medicus, Inc.*, 112 F.3d 368, 373 (8th

Cir.1997); Restatement (Second) of Judgments § 20(1)(b) and cmt. f-g (1982), id. § 26, cmt. b-c.

The District Court downplayed *Kulinski* because the preceding dismissal there was for lack of jurisdiction (**Ad. 97; 0:19-cv-1122, R. Doc. 109, at 43**); *Kulinski*, 112 F.3d at 370. But that is a distinction without a difference because this case involved a preceding dismissal "without prejudice" for pleading deficiencies (**Ad. 23; 0:19-cv-1122, R. Doc. 46, at 23**). There are only two kinds of involuntary dismissals: "with" or "without" prejudice. FRCP 41(b). A dismissal for lack of jurisdiction is "without prejudice." *Missouri Soybean Ass'n v. U.S. E.P.A.*, 289 F.3d 509 (8th Cir. 2002). But so is a dismissal for pleading defects. *Knox v. Lichtenstein*, 654 F.2d 19, 22 (8th Cir. 1981). Either way, a dismissal "without prejudice" entitles the plaintiff to refile. *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).

A denial of leave to amend the complaint is irrelevant to the claim preclusion analysis. *N. Assur. Co. of Am. v. Square D Co.*, 201

F.3d 84, 88 (2d Cir. 2000). The bar is instead "based on the requirement that the plaintiff must bring all claims at once against the same defendant relating to the same transaction or event." *Id.* But the requirement that a plaintiff bring all claims at once breaks down when (as here) the plaintiff tries to do so and is rebuffed. Wright & Miller, 18 Fed. Prac. & Proc. Juris. § 4412 (3d ed.) (citing, among others, *Lake View*, 578 F.3d at 760; *Baker Group, L.C. v. Burlington Northern and Santa Fe Ry. Co.*, 451 F.3d 484, 486–488 (8th Cir. 2006)). This dovetails with the point that claim preclusion only applies when the party has had "a full and fair opportunity to litigate the matter in the proceeding that is to be given preclusive effect." *Anderberg-Lund Printing Co.*, 109 F.3d at 1346.

TST never had a fair opportunity to litigate the claims in *Satanic Temple I* because TST was precluded from every mechanism to pursue the claims. TST suffered a dismissal at the pleading stage, was barred from discovery on the City's intent, was prevented from amending the complaint, and was even denied leave to nonsuit so that all claims could be simultaneously addressed. For the District

Court to bar *Satanic Temple II* was judicial sleight of hand which precluded TST from ever being heard on these claims. *Res judicata* is there to preclude *successive* litigation, not serve as a game of keep-away to preclude a plaintiff from being heard in the first place.

It did violence to the basic fairness that underlies the public's confidence in the courts for the District Court to rebuff TST's efforts to present all of the claims in *Satanic Temple I*, only to bar TST from bringing them as *Satanic Temple II*; and it was beyond the pale to announce that it will monetarily sanction TST's attorneys for failing to read invisible ink on the Magistrate's order. (**Ad. 101; 0:19-cv-1122, R. Doc. 109, at 47.**)

The District Court's order does not even make for good policy. What is the learning lesson from this case? Upon a dismissal without prejudice, a plaintiff should always re-raise those claims in a second lawsuit, without first seeking leave to amend, because it is better to ask for forgiveness than permission? *Cf. United States v. Rhynes*, 196 F.3d 207 (4th Cir. 1999) ("In the law, it is not usually true that it is better to ask forgiveness than permission.") The

District Court's ruling posits, "yes." The second complaint was barred *because* TST first sought leave to amend the complaint. (**Ad. 96; 0:19-cv-1122, R. Doc. 109, at 42.**) An affirmance is an announcement that the courts want more cases.

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

To avoid duplicative briefing, the following sections assumes familiarity with the controlling law from § 1.

2.2.1: Viewpoint discrimination motivated the closure.

The District Court dismissed the viewpoint discrimination claim because, ostensibly, Belle Plaine closed the limited public forum in a viewpoint-neutral manner. (**Ad. 82; 0:19-cv-1122, R. Doc. 109, at 28.**) To reach that conclusion, the District Court failed to treat the allegations of the complaint as true.

Particularly, the District Court ignored that, before voting to pursue what would become the Enacting Resolution, Councilor Stier (the tie-breaking vote) sought and received assurances that the adopting the proposal would mean the Park could exclude a

competing monument from a Satanic viewpoint. (**App. 370; 0:21-cv-336, R. Doc. 1, at 14.**); (**App. 570; 0:21-cv-336, R. Doc. 3, at Clip 7.**) ("[H]ow can we up here be assured that, number one, these [Satanic] monuments won't go into that Park?") This plainly establishes a government disapproval of TST's religious viewpoint.

The District Court also disregarded that the Enacting Resolution was crafted, specifically, to reduce the City's exposure to any undesirable monuments by limiting all displays to the dimensions and materials of the Christian monument, requiring a $1,000,000 insurance policy for any display (which the Christian monument's backers already had), and limiting permits for displays to one-year increments. (**App. 377; 0:21-cv-336, R. Doc. 1, at 21.**) These measures were implemented to accommodate the Christian monument while inhibiting the anticipated atheistic monuments from TST and the FFRF. (**Id.**) Again, this establishes that the City did not like TST's viewpoint and took actions to suppress it.

The District Court also ignored the public objection to TST's Display which explicitly took issue with TST's viewpoint. (**App.**

386; 0:21-cv-336, R. Doc. 1, at 30; App. 458-569; 0:21-cv-336, R. Doc. 1-1, at 42-104 and Doc. 1-2, at 1-48.) The public objection is the predicate for the point that the City yielded to a heckler's veto.

The District Court also disregarded that the Mayor invited a Catholic priest to a Council meeting for the purpose of expressing a religious objection to TST having equal access to the "free speech zone." (**App. 171; 0:21-cv-336, R. Doc. 94, at 22; App. 388-390; 0:21-cv-336, R. Doc. 1, at 32-34.**) And, at the conclusion of the meeting, the Mayor advised the priest to coordinate with the Veterans Group, to "help the entire process," which was barely-concealed code for: "convince the Veterans Group to remove the Christian monument so the City can exclude the Satanic monument in a manner that appears facially neutral." (**App. 391; 0:21-cv-336, R. Doc. 1, at 35.**) This establishes the City's hostility to TST's viewpoint, it addresses actions taken by the City for the purpose of suppressing TST's viewpoint, and identifies the beginnings of pretextual efforts to conceal the fact that TST's viewpoint would be suppressed *because of* TST's viewpoint.

The District Court also ignored that, upon learning TST's Display was ready for installation, the Mayor called for a meeting between the Council and the Veterans Group to "discuss the whole public forum issue again" in light of its forthcoming installation. (**App. 392; 0:21-cv-336, R. Doc. 1, at 36**) That meeting was off-the-record (**App. 394; 0:21-cv-336, R. Doc. 1, at 38**) and resulted in a resolution to exclude TST's Display (**App. 392; 0:21-cv-336, R. Doc. 1, at 36**). Specifically, by having the Christian monument quietly removed, and then shutting down the "free speech zone" before TST could install its display. (**App. 391; 0:21-cv-336, R. Doc. 1, at 35.**) All the while, the City Administrator coordinated this plan with the City Attorney and the City's insurer. (**App. 392; 0:21-cv-336, R. Doc. 1, at 36; App. 535; 0:21-cv-336, R. Doc. 1-2, at 14.**) Simultaneously, the City was deceiving TST into thinking that the installation was proceeding as normal. (**App. 393; 0:21-cv-336, R. Doc. 1, at 37.**) All of this betrays a coordinated effort by City officials to suppress TST's viewpoint.

The District Court also disregarded statements in the Recission

Resolution, which evidence that the City excluded the Display because of its expected effects on an angry public. (**App. 554; 0:21-cv-336, R. Doc. 1-2, at 23.**) The Recission Resolution recites that "the City Council has determined that allowing privately-owned memorials … no longer meets the intent or purpose of the Park." (**Id.**) That was a half-truth. The foundational purpose of the forum was to accommodate a Christian monument to the exclusion of a Satanic monument. (**App. 370; 0:21-cv-336, R. Doc. 1, at 14; App. 570; 0:21-cv-336, R. Doc. 3, at Clip 7**) ("[H]ow can we up here, be assured that, number one, these [Satanic] monuments won't go into that Park?"); and (**App. 388; 0:21-cv-336, R. Doc. 1, at 32**) (Mayor Meyer explained that the City opened the forum "basically, so that the Cross could go back in the Park").

The Recission Resolution also proffers that it was passed to deter vandalism. (**App. 554; 0:21-cv-336, R. Doc. 1-2, at 33.**) That was a mischaracterization. The City did not find that allowing the installation of private displays in the Park would cause vandalism; the City found that *protestors* would cause vandalism. By silencing

TST's speech to acquiesce to these protesters, the City was engaging in overt viewpoint discrimination. *Terminiello*, 337 U.S. at 4.

Last, the District Court omitted that the City publicly announced that it closed the forum to silence the debate taking place in and around the Park. (**App. 562; 0:21-cv-336, R. Doc. 1-2, at 41.**) The City did not close the forum while the Christian monument stood alone, despite daily protests. (**App. 386; 0:21-cv-336, R. Doc. 1, at 30**). It wasn't until the Christian monument would have to share the limelight with the Display that, suddenly, things were "too controversial." TST's right of free expression does not begin and end with its political palatability. *Girouard v. United States*, 328 U.S. 61, 68–69 (1946) (the freedom of thought protects not just the thoughts we agree with, but the thoughts we hate).

The District Court could not confront these facts, so it simply ignored them. (**Ad. 81-82; 0:19-cv-1122, R. Doc. 109, at 27-28.**) It was error for the District Court to ignore these facts because they show that closing the forum was "in fact based on the desire to suppress a particular point of view." *Cornelius*, 473 U.S. at 812.

As a fallback, the District Court held that "Belle Plaine had no obligation to keep open indefinitely the limited public forum in Veterans Memorial Park." (**Ad. 82; 0:19-cv-1122, R. Doc. 109, at 27.**) Not in a vacuum, but the City could not close the forum because it did not like the speech it was accommodating. *Student Gov't Ass'n*, 868 F.2d at 480. The City admitted to exactly that. (**App. 43; 0:19-cv-1122, R. Doc. 23, at 5.**)

Additionally, the District Court noted that there is not a "private constitutional right to erect a structure on public property." (**Ad. 81; 0:19-cv-1122, R. Doc. 109, at 33.**) That was wrong. The City vested TST with that right by deeming TST's Display "private speech" (**App. 437; 0:21-cv-336, R. Doc. 1-1, at 20**) and *explicitly* authorizing its erection on public property. (**App. 455; 0:21-cv-336, R. Doc. 1-1, at 38.**)

2.2.2: Closing the forum was an overbroad restriction.

Alternatively, the Recission Resolution is an overbroad speech restriction. The District Court rejected this theory without analysis.

(**Ad. 82; 0:19-cv-1122, R. Doc. 109, at 27**) ("Nor does TST plausibly allege that, *while the limited public forum was open*, Belle Plaine imposed any unreasonable viewpoint-discriminatory restrictions") (emphasis added). That was not the issue. The issue is that closing the forum was overbroad to justify the City's proffered interest of "dissuading vandalism."

The law and the analysis are the same as in § 1.1.3. The City never provided a factual predicate for its claims that *displays*, contributed to vandalism, discouraged serenity in the Park, or consumed law enforcement resources. *Frisby*, 487 U.S. at 485. Nor did the City offer any argument for how closing the forum was narrowly tailored to those purported ends. The First Amendment solution to vandalism is to punish vandals, not silence TST. *Terminiello*, 337 U.S. at 4.

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

2.3.1: The City engaged in status-based discrimination.

The law is the same as in § 1.2.1. Recall, the District Court

dismissed this count in *Satanic Temple I* because the complaint did not adequately plead that TST's Display was an expression of its creed. (**Ad. 9; 0:19-cv-1122, R. Doc. 46, at 9.**) *Satanic Temple II* corrected that by adding detailed factual allegations which explain TST's creed and why TST's Display was an expression of that creed. (**App. 379-385; 0:21-cv-336, R. Doc. 1, at 23-29.**)

Partly, TST's Display is a way for TST to spread awareness about its worldview. (**App. 381; 0:21-cv-336, R. Doc. 1, at 25.**) The inverted pentagrams also make clear that the Display was a religious structure. (**App. 378 and 383; 0:21-cv-336, R. Doc. 1, at 22 and 27.**) Even the shape of the monument was intended to convey human supremacy over the divine (another core tenet of the TST's creed). (**App. 384; 0:21-cv-336, R. Doc. 1, at 28.**)

To support dismissal, the District Court simply ignored the new allegations and parroted the prior finding that the complaint did not show that the Display was "central" to TST. (**Ad 82-84; 0:19-cv-1122, R. Doc. 109, at 28-30.**) This was error because all facts are to be deemed true. *Lake View*, 578 F.3d at 757–58. And because

centrality is not the inquiry. The issue is status-based discrimination, which violates the Free Exercise Clause. *Espinoza,* 140 S. Ct. at 2256.

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

The District Court dismissed the Minnesota constitutional claim without discussion. (**Ad. 82-84; 0:19-cv-1122, R. Doc. 109, at 28-30.**) Presumably, the District Court followed the same analysis as in the Free Exercise Clause count, and rejected the count on the unfounded belief that TST cannot be religious because it rejects the supernatural. (**App. 625; 0:19-cv-1122, R. Doc. 119, at 60**) (incredulously asking if TST is religious because it is "anti-religious").

This misapplied the legal standard by, again, ignoring inconvenient facts. *Lake View*, 578 F.3d at 757–58. It was also erroneous under Minnesota's substantive law, which requires that any doubt be resolved in favor of finding that the conduct was religiously motivated. *Pedersen*, 679 N.W.2d at 374.

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

2.4.1: The City endorsed Christianity.

Satanic Temple II asserted a violation of the Establishment Clause. (**App. 403; 0:21-cv-336, R. Doc. 1, at 47.**) "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another" *Larson v. Valente*, 456 U.S. 228, 244 (1982). The complaint showed that the City officially preferred Christianity over Satanism when Councilor Stier sought assurances that pursuing the proposal would mean that the Christian monument would be allowed in the Park to the exclusion of a Satanic one (**App. 370; 0:21-cv-336, R. Doc. 1, at 14**), the Mayor announced that the City opened the forum to display the Cross on public grounds (**App. 377; 0:21-cv-336, R. Doc. 1, at 21**), and the City closed the forum to exclude TST's Display (**App. 388**; **0:21-cv-336, R. Doc. 1, at 32**).

The District Court erroneously rejected this claim on the unfounded view that an Establishment Clause claim requires coercion.

(**Ad. 85; 0:19-cv-1122, R. Doc. 109, at 31.**) As sole support of its hypothesis, the District Court cited to the plurality opinion from *Van Orden v. Perry*, 545 U.S. 677 (2005). The District Court's sole authority is the precedential equivalent of a dissent. *Marks v. United States*, 430 U.S. 188 (1968). Worse yet, the District Court made no effort to distinguish the majority opinion from *McCreary County v. ACLU*, 545 U.S. 844 (2005), which *is* binding, and which held that endorsement is an Establishment Clause violation; no coercion required. *Id.*, 545 U.S. at 880 (the view that "government should be free to approve the core beliefs of a favored religion over the tenets of others … should trouble anyone who prizes religious liberty.")

Nor did the District Court acknowledge *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019), where the Supreme Court explained that governments only escape the *Lemon* test if the religious monument at issue is *decades old*. *Id.*, 139 S. Ct. at 2084; *see also Lemon v. Kurtzman*, 403 U.S. 602 (1971).

This monument scheme had only existed for about four months at the time the City excluded TST's Display. Because this is a new

monument scheme, the case is controlled by *McCreary County* and *Lemon*; and certainly not the *Van Orden* plurality. As pleaded, the City endorsed Christianity and censored Satanism. That violates the Establishment Clause.

2.4.2: Motive aside, Christianity was treated better.

Minnesota's constitutional analog to the Establishment Clause prohibits a government from giving "*any* preference by law to any religious establishment or mode of worship." Minn. Const. art. 1 § 16 (emphasis added). The difference being that the Minnesota Constitution focuses on the effect, rather than the Federal Constitution's focus on the motive.

Minnesota continues to follow the *Lemon* test. *Edina Community Lutheran Church v. State*, 745 N.W.2d 194, 211 (Minn. App. 2008). Under Minnesota law, it is dispositive that the City granted a Christian monument exclusive access to the public sphere until it became clear that the Christian monument would have to share the attention with TST. At that point, the City shut the forum down to

suppress TST's viewpoint. In effect, Christians got 10 months of display time, yet Satanists got nothing. It was reversible error to dismiss the Minnesota Establishment Clause claim, and it was double-error to dismiss it without an analysis. (**Ad 84-86; 0:19-cv-1122, R. Doc. 109, at 30-32.**)

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

2.5.1: The City intentionally disfavored Satanists.

The law is the same as in § 1.3. The District Court dismissed the Equal Protection claim from *Satanic Temple I* because, supposedly, nothing in the complaint alleged that the Recission Resolution "has both a discriminatory purpose and a discriminatory impact." (**Ad. 15; 0:19-cv-1122, R. Doc. 46, at 15.**)

Satanic Temple II bolstered the factual allegations with specific evidence that would be adduced at trial, even though this is not required. *Warmington*, 998 F.3d at 795-96. A full review was discussed in § 2.2.1. In gist, *Satanic Temple II* painstakingly detailed that the City opened the forum to accommodate the Christian monument

and closed the forum to exclude TST's Display. Because the City intentionally treated Satanists dissimilarly from Christians, it violated TST's equal protection rights. The District Court rejected the claim by again conflating the delineation as between "local" vs. "foreign" (**Ad. 88-90; 0:19-cv-1122, R. Doc. 109, at 34-36**), as opposed to the complaint which posits it was between "Christianity" vs. "Satanism." (**App. 408; 0:21-cv-336, R. Doc. 1, at 52.**) It is the same error as in *Satanic Temple I*.

2.5.2: Motive aside, Christians got better treatment.

Satanic Temple II plausibly alleged that the City violated TST's equal protection rights under the Minnesota Constitution. Minnesota law inquires into the effects rather than the proof of motive. *State v. Russell*, 477 N.W.2d 886 (Minn. 1991); Minn. Const. art. 1 § 2. The District Court rejected the claim without analysis. (**Ad. 86-90; 0:19-cv-1122, R. Doc. 109, at 34-36.**)

The threshold issue in Minnesota's equal protection analysis is whether the "claimant is treated differently from others to whom

the claimant is similarly situated in all relevant respects." *Gustafson v. Commissioner of Human Services*, 884 N.W.2d 674, 682 (Minn. App. 2016). The City allowed the Christian monument to have 10 months of exclusive access to its forum and then closed the forum as soon as TST announced it was ready to install its competing Display. (**App. 409; 0:21-cv-336, R. Doc. 1, at 53.**) That is dissimilar treatment.

The next issue is to determine whether the challenged action involves a suspect class or fundamental right. *Gustafson*, 884 N.W.2d, at 682. Religion is a suspect class. *Plyler*, 457 U.S. at 218, n. 14 . TST is a religion. (**Ad. 10; 0:19-cv-1122, R. Doc. 46, at 10.**) Therefore, TST is a suspect class.

The last question is whether the City can justify whether the Recission Resolution was "narrowly tailored and reasonably necessary to further a compelling governmental interest." *In re Guardianship, Conservatorship of Durand*, 859 N.W.2d 780, 784 (Minn. 2015). The City has never proffered argument along these lines. Thus, *Satanic Temple II* stated a violation of its Minnesota equal protection rights.

It was error for the District Court to reject the claim, particularly without providing an analysis.

2.6: The City withheld a meaningful notice and hearing.

Satanic Temple II plausibly alleged a procedural due process claim. (**App. 409; 0:21-cv-336, R. Doc. 1, at 53.**) Governments must give meaningful notice and a hearing before taking away a property right. U.S. Const. amend. XIV; *Anderson v. Douglas Cty.*, 4 F.3d 574, 578 (8th Cir. 1993)..

The District Court rejected it without defining TST's interest in the right to emplace its Display. Because the Display was to be affixed to land, it was a "real property right" within the meaning of *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 658 (Minn. 2012). More particularly, it was either an express easement or a special-use permit, which is "an authorization to use property in a way that is identified as a special exception in a zoning ordinance." (**Ad. 10; 0:19-cv-1122, R. Doc. 46, at 18**) (finding it was an express easement); Black's Law Dictionary, SPECIAL-USE PERMIT (11th ed.

2019); see also *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712 (Minn. 1978). As the *Barton* Court held, procedural due process rights kick in when a government looks to revoke "the particular interests of the applicant." *Id.*, 268 N.W.2d at 716.

As pleaded, the City secretly resolved to revoke TST's right to emplace the Display. This deprived TST of its rights to a meaningful notice and a meaningful hearing before the City made that determination. It was error to reject the procedural due process claim.

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

The City was not entitled to summary judgment on the promissory estoppel claim. The Court should reverse the summary judgment order and remand with directions to permit discovery on why the City broke its promise, or with directions to enter judgment in TST's favor, or for trial proceedings.

Standard of review

This Court reviews a grant of summary judgment de novo. *Lincoln Ben. Life v. Wilson*, 907 F.3d 1068, 1074 (8th Cir. 2018). The

evidence and the inferences which reasonably may be drawn from the evidence are viewed in the light most favorable to the non-movant. *Id.* Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and is entitled to judgment as a matter of law, *i.e.*, that the record as a whole could not lead a rational trier of fact to find for the nonmoving party. *Id.*

In Minnesota, promissory estoppel has three elements: (1) a clear and definite promise; (2) the promisor intended to induce reliance and such reliance occurred; and (3) the promise must be enforced to prevent an injustice. *Hous. & Redevelopment Auth. of Chisholm v. Norman*, 696 N.W.2d 329, 336 (Minn. 2005); *see also Walser v. Toyota Motor Sales, U.S.A., Inc.*, 43 F.3d 396, 400–01 (8th Cir. 1994) (Minnesota has adopted the Restatement) and Restatement (Second) of Contracts § 90 (1981).

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

The District Court's analysis turned on a finding that the promise was "for at least ten days up to one year." (**Ad. 65; 0:19-cv-1122,**

R. Doc. 109, at 11.) This was error because it took the record in the light *least* favorable to TST and it disregards that the Enacting Resolution is not the promise.

A "promise" occurs when a promisor manifests an intention when he has reason to believe that the promisee will infer that intention from his words or conduct. Restatement (Second) of Contracts § 2, cmt. b (1981). The "manifestation of the City's intent" is the Permit: TST may emplace its Display in the Park and, "This permit is good for one year from the date of this letter." (**App. 455; 0:21-cv-336, R. Doc. 1-1, at 38.**) The Permit does not contemplate closing the forum. (**Id.**)

Despite this plain text, the District Court injected the caveat that the Permit was only good for "up to" one year. This came from the Enacting Resolution, which states that the "City, through its City Administrator, may terminate all permits by giving ten (10) days' written notice of termination to Owner." (**App. 438; 0:21-cv-336, R. Doc. 1-1, at 21.**) But statutes are not "promises." *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 552 (8th Cir.

1997); *Meriwether Minnesota Land & Timber, LLC v. State*, 818 N.W.2d 557, 568 (Minn. Ct. App. 2012). The Permit, alone, was the manifestation of an intent to refrain from acting (removing the Display).

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

The District Court also erred by finding that TST could not prove detrimental reliance. This element asks if the promisor intended to induce reliance and if the promisee in fact relied to its detriment. *Meriwether*, 818 N.W.2d at 567. The District Court correctly found that the City intended for TST to undertake efforts to place the Display in the Park (**Ad. 65; 0:19-cv-1122, R. Doc. 109, at 11**) but erred in finding that TST did not "detrimentally" rely on the Permit. (**Ad. 68-69; 0:19-cv-1122, R. Doc. 109, at 14-15.**)

The District Court faulted TST for engaging the services of a designer to design the monument prior to receiving the Permit. (**Ad. 67; 0:19-cv-1122, R. Doc. 109, at 13.**) That was wrong. The application required a design. (**App. 29-30; 0:19-cv-1122, R. Doc. 1-1,**

at 1-2.) It also conflated detrimental reliance with contract consideration. A party can "reasonably rely" on a promise by continuing conduct they started before the promise. Restatement (Second) of Contracts § 90, Illustration 17 (1981). TST designed the Display before receiving the Permit, but that does not diminish the reasonableness of actually building the Display upon receiving the Permit.

Similarly, the District Court faulted TST for receiving more monetary and in-kind donations than it expended in creating the Display. (**Ad. 68; 0:19-cv-1122, R. Doc. 109, at 14.**) But this again takes the record in the light least favorable to TST. TST's donors funded the Display on the expectation that that it would be displayed in the Park. The donors did not fund the Display so it could sit in the Salem Art Gallery, where it is not fulfilling that purpose. This caused reputational harm to TST, for failing to effectuate the donors' intent. (**App. 226; 0:19-cv-1122, R. Doc. 94-2, at 50.**)

To solve for that, the District Court accused TST of fraud. Under the District Court's construction of the record, TST "misrepresented the scope of its permit" to its donors. (**Ad. 68; 0:19-cv-1122, R.**

Doc. 109, at 14.) Nothing of record addressed any statements that TST made to the public, or even when they were made, only that TST received more donations than its out-of-pocket expenses.

The remainder of the District Court's assessment of reliance is infected by the error in changing the terms of the promise. The District Court found that "TST could not have reasonably relied on an expectation that Belle Plain [sic] would *guarantee* TST the opportunity to display its monument for a full year." (**Id.**) (emphasis in original). But the City did *"guarantee"* TST the opportunity to Display its monument for a full year. (**App. 455; 0:21-cv-336, R. Doc. 1-1, at 38.**) ("This permit is good for one year.")

3.3: The City closed the forum in bad faith.

The District Court erred by holding there was no injustice to avoid by enforcing the promise. "Injustice" is a legal question which entails the weighing of public policies. *Greuling v. Wells Fargo Home Mortgage, Inc.*, 690 N.W.2d 757, 761 (Minn. App., 2005).

TST incurred time, effort, and expense to create a Display that

honors Belle Plaine veterans and demonstrates pluralism and equality. Instead, TST inadvertently expended the public's time and money to memorialize the fact that Satanism is so maligned in Belle Plaine that it cannot even honor those who fought and died for our Constitution.

To support denying that any injustice occurred when the City broke its promise, the District Court returned to the promise–as retroactively modified by the District Court–and held that it was revocable on ten days' notice. (**Ad. 70; 0:19-cv-1122, R. Doc. 109, at 16.**) But, recall, TST only got *up to* three days' notice. TST provided the City's July 13 email which stated the City's intent to close the forum. (**App. 328; 0:19-cv-1122, R. Doc. 94-2, at 152.**) Meanwhile, the City was falsely suggesting to TST that the installation was proceeding as normal. (**App. 334; 0:19-cv-1122, R. Doc. 94-2, at 158.**) TST did not receive notice that the City intended to close the forum until July 14 (**App. 339; 0:19-cv-1122, R. Doc. 94-2, at 163**), about fifteen minutes after the City had surreptitiously arranged for the removal of the Christian monument. (**App. 337;**

0:19-cv-1122, R. Doc. 94-2, at 161). That is *negative* notice; three days at the most. (**App. 37; 0:19-cv-1122, R. Doc. 1-1, at 10**) (the Recission Resolution was passed on July 17). To solve for the insufficient notice issue, the District Court simply ignored it. (**Ad. 69; 0:19-cv-1122, R. Doc. 109, at 15.**)

It was also error for the District Court to hold that it would be unreasonable *not* to think the City could close the forum. (**Ad. 70; 0:19-cv-1122, R. Doc. 109, at 16.**) It is unclear how. The promise doesn't say anything about closing the forum, the bar against viewpoint discrimination would make that illegal, and TST's should be allowed to expect that a City will conform its conduct to the First Amendment.

Moreover, the District Court erred by falsely stating that TST "could have–but did not" place a monument in the Park. (**Ad. 69; 0:19-cv-1122, R. Doc. 109, at 15.**) The evidence shows precisely the opposite. Upon hearing that TST's Display was ready for installation, the City stalled until after the City formed its plan to exclude TST's Display and secured the votes to close the forum. (**App. 320-**

337; 0:19-cv-1122, R. Doc. 94-2, at 144-161.)

3.4: TST was entitled to further discovery.

The District Court also erred by prohibiting discovery on why the City broke its promise. FRCP 56(d); (**App. 238; 0:19-cv-1122, R. Doc. 94-2, at 62.**) It appears to be an issue of first impression under Minnesota law whether promissory estoppel elementally requires proof of bad faith against a government. But it is minimally relevant to the cause of action because, "To estop a government agency, some element of fault or wrongful conduct must be shown." *Brown v. Minnesota Dep't of Pub. Welfare*, 368 N.W.2d 906, 910 (Minn. 1985) (equitable estoppel case).

To support granting summary judgment in favor of the City, while prohibiting discovery on why the City broke its promise, the District Court held that it is "irrelevant" to the injustice prong because why the City broke its promise is not elemental to TST's prima facie case. (**Ad. 74; 0:19-cv-1122, R. Doc. 109, at 20.**) This was error because something can be "relevant" for purposes of

discovery, while not necessarily elemental to the prima facie case, a point the District Court recited below. (**Ad. 72; 0:19-cv-1122, R. Doc. 109, at 18**) (citing FRCP 26(b)(1); *In re Milk Prods. Antitrust Litig.*, 84 F. Supp. 2d 1016, 1027 (D. Minn. 1997)).

To support the finding that why the City broke its promise is irrelevant to whether that caused an injustice, the District Court held that "injustice" is limited to enforcing promises and vindicating the promisee's reliance, "not preventing broader societal injustices." (**Ad. 73-74; 0:19-cv-1122, R. Doc. 109, at 19-20.**) The District Court is wrong. The very definition of Minnesota's injustice element entails weighing of "public policies," *Greuling*, 690 N.W.2d at 761, *i.e.*, the principles "of fundamental concern to the state and the whole of society." Black's Law Dictionary, PUBLIC POLICY (11th ed. 2019). The Minnesota Court of Appeals has also specifically considered, in evaluating "injustice," public policies *other* than enforcing promises and vindicating the promisee's reliance. *Meriwether*, 818 N.W.2d at 568-69.

The sought-after evidence would have foreclosed any dispute

that the City closed the forum out of malice against TST's viewpoint, which would tend to prove the injustice prong because that bears on the public policies against religious viewpoint discrimination enshrined in the First Amendment and Minnesota's analogous constitutional provisions. It was wrong to preclude this discovery, only to grant summary judgment for not having enough evidence.

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.

Standard of review

This Court reviews a request for reassignment for plain error if a timely motion to recuse was not made in the district court. *Burton v. Nilkanth Pizza Inc.*, 20 F.4th 428, 434 (8th Cir. 2021). Reassignment is appropriate when a court's proceedings or rulings "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Sentis Grp., Inc., Coral Grp., Inc. v. Shell Oil Co.*, 559 F.3d

888, 904 (8th Cir. 2009).

4.1: Conflating the roles of the judiciary and the defense.

The District Court demonstrated prejudice by conflating the role of the judiciary with the role of the defense. The District Court took issue with TST's assertion of reputational damages because the complaint did not specifically allege reputational harm. (**App. 352; 0:19-cv-1122, R. Doc. 119, at 28**) (taking issue with TST was "presenting new theories to me that I haven't had notice of"); (**Ad. 68; 0:19-cv-1122, R. Doc. 109, at 14**) (rejecting evidence because it was not pleaded in the complaint). But it is the *defendant* who receives notice of the claims, not the judiciary. *Leatherman v. Tarrant Cty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163 (1993). The judiciary only hears the proof and issues a judgment. Wright & Miller, 10 Fed. Prac. & Proc. Civ. § 2664 (4th ed.) ("The question is not whether plaintiff has asked for the proper remedy but whether plaintiff is entitled to any remedy"); *Fast v. Sch. Dist. of City of Ladue*, 728 F.2d 1030 (8th Cir. 1984). The District Judge donned the role of the

defense by demanding prior notice of all TST's evidence. *Contra.*, *e.g.*, FRCP 26(b)(1) (*parties* obtain discovery, not the District Judge).

4.2: The forthcoming sanctions order.

The District Court also demonstrated prejudice by excluding every available mechanism to re-raise the constitutional claims in a manner that would allow appellate review, only to announce that it will issue a monetary sanction against TST's attorneys for insisting on a final judgment on the merits, *i.e.*, one that would vest this Court with jurisdiction. *City of Council Bluffs, Iowa v. United States Dep't of Interior*, 11 F.4th 852, 856 (8th Cir. 2021).

Because the first order of dismissal was "without prejudice," the outstanding federal questions barred finality. *Mathers*, 636 F.3d at 398. The Magistrate's order denying leave to amend did not (and could not) provide that finality. *Worcester*, 812 F.3d at 44 n.7; 28 USC § 636.

Before an appeal would lie, TST needed an order of dismissal "with prejudice." Hence *Satanic Temple II*. Attorneys should not

have to risk sanctions to ensure appellate jurisdiction, yet that is precisely what happened below.

This is a religious discrimination case where the judge refuses to recognize the plaintiff's religiosity, held the complaints to impossible standards, refused to entertain the evidence or the legal theories, hypothesized evidence to accuse the plaintiff of fraud, donned the role of the defense, and announced that it will issue a monetary sanction against the plaintiff's attorneys for doing what is necessary to preserve the right of review. Plainly, a remand to the same judge would be a miscarriage of justice.

Conclusion

The Court should reverse the judgments of dismissal and the summary judgment and should remand for further proceedings.

Respectfully submitted on
January 28, 2022,
on behalf of The Satanic Temple, Inc.

By: Matthew A. Kezhaya, # 0402193
KEZHAYA LAW PLC
333 N. Washington Ave. # 300
Minneapolis, MN 55401
phone: (479) 431-6112
email: matt@kezhaya.law

CERTIFICATE OF SERVICE

NOTICE IS GIVEN that I, Matthew A. Kezhaya, efiled the foregoing document by uploading it to the Court's CM/ECF system on January 28, 2022 which sends service to registered users, including all other counsel of record in this cause. Paper service to follow upon the Clerk's instruction. s/ Matthew A. Kezhaya

CERTIFICATE OF COMPLIANCE

This document complies with the page limitation of FRAP 32(a)(7)(B) (a principal brief may not exceed 13,000 words) because, excluding the parts of the document exempted by FRAP 32(f), this document contains **12,964** words.

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