Case No. 04-4113

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTAH GOSPEL MISSION, FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAH NATIONAL ORGANIZATION FOR WOMEN, and LEE J. SEIGEL,

Plaintiffs,

BRIEF OF APPELLANTS

vs.

SALT LAKE CITY CORPORATION, ROSS C. "ROCKY" ANDERSON, Mayor of Salt Lake City, in his official capacity; and CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISON
The Honorable Dale A. Kimball, District Judge
District Court No. 2:03CV00688

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO F.R.C.P. 26.1

None of the Plaintiffs-appellants are a corporation that has issued shares to the public, nor are any a parent corporation, subsidiary or affiliate of corporations that have done so.

JURISDICTION

This is a civil rights case for injunctive and declaratory relief pursuant to 28 U.S.C. Sections 1331, 1343, and 2201-2202, and 42 U.S.C Section 1983. This Court's jurisdiction is pursuant to 28 U.S.C. Section 1291 and Rules 3 and 4 of the Federal Rules of Appellate Procedure. The notice of appeal was filed on May 21, 2004 from an Order of the district court entered in this action on May 3, 2004, granting the defendants' and intervenor's motion to dismiss all claims and denying plaintiffs motion for a preliminary injunction.

STATEMENT OF ISSUES

1. Did the trial court abuse its discretion in denying plaintiffs' motion for a preliminary injunction on their free speech and Establishment Clause claims challenging the First Amendment restrictions that flowed from Salt Lake City's decision to vacate and sell a downtown sidewalk and plaza easement to the predominant religious organization in the city under circumstances that allow the Church of Jesus Christ of Latter-Day Saints to control all behavior and activity on those sidewalks and through the plaza?

2. Did the trial court err in dismissing the plaintiffs' free speech and Establishment Clause claims under Federal Rule of Civil Procedure 12(b)(6)?

STANDARD OF REVIEW

Denial of a Preliminary Injunction

A district court's denial of a preliminary injunction is reviewed for an abuse of discretion. *ACLU v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999). An abuse of discretion occurs "only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1292 (10th Cir. 1999).

To obtain a preliminary injunction, the movant must establish a substantial likelihood that the movant will eventually succeed on the merits; that the movant will suffer irreparable injury unless the injunction issues; that the threatened injury to the movant outweighs the potential damage to the opposing party; and that the injunction will not be adverse to the public interest. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1291 (D. Utah 1999).

Grant of a Motion to Dismiss

The standard of review governing an order of dismissal under F.R.Civ.P. 12(b)(6) is much more liberal. This Court reviews *de novo* a district court's dismissal of a complaint. *Summum v. Callaghan*, 130 F.3d 906, 913 (10th Cir. 1997). The Court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Id*. The Court will uphold a Rule 12(b)(6) dismissal "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief."

Id. The Court has emphasized that "granting such a motion to dismiss is a harsh remedy that must be cautiously studied, not only to affectuate the spirit of the liberal rules of pleading, but also to protect the interests of justice." *Id*.

STATEMENT OF CASE

This case arises out of the Salt Lake City Corporation's ("City") decision to sell and vacate a vital pedestrian easement that runs through a centrally located downtown plaza that anchors the north end of Main Street. The plaza is owned by the Church of Jesus Christ of Latter-Day Saints ("LDS Church" or "Church"). The plaza itself is located on a one-block length of Main Street that was closed to vehicle traffic and sold to the Church in 1999 as part of an urban renewal plan designed to stimulate downtown Salt Lake City by increasing public space and encouraging pedestrian traffic. As part of that agreement, the Church agreed to construct and maintain the plaza. The City reserved an easement providing for public access to and passage across the plaza twenty-four hours a day, seven days a week. The easement was written in a way that allowed the Church to limit all First Amendment activity. In *First Unitarian Church of Salt Lake City v. Salt Lake City Corp*., 308 F.3d 1114 (10th Cir. 2002) ("*Main Street I*"), the court held that the sidewalks passing through the plaza were a public forum and invalidated the restrictions on First Amendment activity.

Rather than adopt reasonable time, place, and manner regulations, the City chose to vacate the easement and sell it to the LDS Church. The Church immediately reinstituted restrictions on all First Amendment activity. On August 7, 2003, immediately following the conveyance of the property, plaintiffs filed this lawsuit alleging that the City's actions violate the Free Speech Clause and the Establishment Clause of the First Amendment. Three months later, the City filed a motion to dismiss under F.R.Civ.P. 12(b)(6). On that date, the LDS Church intervened and simultaneously moved to dismiss. Plaintiffs subsequently amended their complaint to add the Church as a defendant and state actor. On November 7, 2003, plaintiffs filed a motion for preliminary injunction. The case challenges the circumstances under which a municipality can close a vital downtown street and vest control over it in the predominant religious organization in the city. The motion was supported by an extensive record that the plaintiffs had assembled in the three months following the filing of the complaint. After an expedited discovery and briefing schedule, on January 26, 2004 the district court heard argument on both motions. On May 3, 2004, the district court issued an eighty-two page *Memorandum* and *Order* denying the motion for preliminary injunction and granting the City and Church's motion to dismiss all claims. App. 21.

The district court held that the City's decision to vacate the easement rendered the property completely private and extinguished its public forum status.

The Court also held that the City's decision to sell and vacate the easement was made for legitimate secular purposes (payment), and did not have the effect of advancing or endorsing religion. Plaintiffs appeal from both the *Order* of dismissal and the denial of preliminary injunctive relief.

STATEMENT OF FACTS

Virtually all the facts described below are set forth in plaintiffs' amended complaint. Many are uncontested and are adopted in the district court *Memorandum Opinion*.

The Plaza's Objective Attributes

The plaza's objective attributes and the other relevant facts that give rise to this litigation are reported in the Court of Appeals' decision in *Main Street I*. The following findings of the Court are set out here because they provide the factual underpinnings for the court's conclusion that the "new" sidewalks that now pass over LDS property are by design and deed legally indistinguishable from the old sidewalks for purposes of public forum analysis and the First Amendment:

- The City previously permitted public expression in this area when it was a public sidewalk abutting Main Street. *Main Street I*, 308 F.3d at 1129-30;
- The actual purpose and use of the easement is a pedestrian throughway for the general public. It provides pedestrian passage and forms part of the downtown pedestrian transportation grid. In this respect, it is identical to the sidewalks along that portion of Main Street previously served. *Id.* at 1026, 1030;
- The City's stated purposes for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage

pedestrian traffic generally, stimulate business activity, and provide a buffer closed to automobile traffic to the residential area to the north of the plaza and the business areas to the south. *Id.* at 1026;

- The easement was particularly important to the City as a means of preserving and encouraging pedestrian traffic. It was specifically retained in order to preserve and enhance the pedestrian traffic grid in downtown. *Id.*;
- The easement was central to the role the City envisioned it playing in the character and development of Salt Lake City. *Id;*
- The City's actions approving the sale and resulting property ownership structure were specifically designed to ensure these aims were accomplished, and the pedestrian easement was central to these goals. The sale was expressly contingent on the retention of a perpetual easement requiring that the property be "planned and improved" so as to "maintain, encourage, and invite public use." In addition, the reservation contains a right of reverter in favor of the City enforceable if the property is not used for the purposes set forth in the Deed and easement. Finally, the City would not have agreed to the sale but for the easement. *Id.;*
- To the extent individuals with Church business enter onto the Plaza, this is not the only use or function of the property, or the purposes for which it was designed and intended to function. It is intended, rather, for pedestrian passage and is distinguishable from the types of walkways that merely provide ingress and egress to government facilities. *Id.* at 1127;
- To the extent the walkways provide access to Church facilities as an end destination for tourists, the former sidewalks along Main Street similarly provided tourists with the means of assessing portions of Church facilities. *Id.* at 1030.

Based on these findings the Court held that the public's right of way over the sidewalks, secured by the easement, has all the objective attributes of a traditional public forum. 308 F.3d at 1131. The Court concluded that the sidewalks had not been stripped of that status, notwithstanding the changes in legal title or

appearance, and irrespective of limiting language in the easement that purports to make those sidewalks something other than what they actually are. *Id*.

The plaza's objective attributes and primary function have not changed as a result of the City's decision to vacate the easement. App. 751, 764. The plaza continues to look and operate as a public plaza and thoroughfare, just as it did before, and both the Church and the City have confirmed that this will remain the case. The Mayor acted with full knowledge that the plaza would continue to function as before. App. 484, 488. The City has worked in concert with Church officials to preserve the essential attributes of a public forum without the attendant responsibility of implementing viewpoint neutral regulations. The plaza continues to function as a main downtown traffic artery seamlessly incorporated into the City's transportation grid.

Although the plaza's objective characteristics and primary use have not changed since the decision in *Main Street I*, there have been other developments affecting the plaza that reinforce the Court's decision. First, the plaza as a whole does more than merely provide a corridor between the residential neighborhood to the North and the commercial district to the South. It serves as a park where the public is invited to gather, relax, and enjoy the open space. Appendix ("App.") 776. There are flowerbeds, a reflecting pool and fountain, and even a place where tables and chairs are set out for lunch and leisure. There is also a giant statute of

Brigham Young, an important historical figure and first governor of Utah, which anchors the plaza on the South end. This monument formerly sat on an island in the middle of Main Street. The plaza has the appearance and character of a centrally located downtown park that is landscaped and designed for public use. App. 737, 776. The plaza provides a unique forum for the distribution of literature and social intercourse because people are more likely to gather and are more approachable than they might be when they pass by on the street. App. 737. The plaza is a unique site because it anchors the world headquarters of the Mormon Church, which is a major political force in Utah. App. 430-431, 436-437, 737-738.

The second major development that reinforces the finding of the Court of Appeals is the dominance of the LDS Church in the operation of commercial and residential life in downtown Salt Lake City. The actual Church campus ("campus"), which Main Street Plaza now anchors, is bounded by North Temple on the north, South Temple on the south, West Temple on the west and State Street on the east. App. 855. The LDS Church owns the property across the street on North Temple and on West Temple. On State Street, directly east of the Campus, the Church owns a church park and a number of apartment buildings. Directly south of the Campus, the Church owns all of the commercial property on South Temple, all of the commercial property on the east side of Main Street, and almost all of the property on the west side of Main Street. App. 755-758, 779-781. This

property constitutes the heart of Salt Lake City's downtown commercial district, including two major shopping malls, and multiple high-rise office towers. App. 755-758. Due to the concentration of businesses in this three square block area, Main Street Plaza functions both as an important "green space" or park for this area, and as a funnel to the Crossroads and ZCMI Center shopping malls and to the downtown business district generally for the historic residential neighborhoods directly north of Main Street Plaza. Furthermore, the state capitol and related government building lie only a few blocks to the north of the Plaza. Far from being a dead-end terminus, Main Street Plaza in fact anchors downtown.

The importance of Main Street Plaza will increase due to the extensive plans for the area directly south and west of the plaza. Specifically, the LDS Church plans to develop this area for mixed residential/commercial use with the goal of bringing more people and businesses back downtown. App. 544-546. These plans are currently moving forward. Additionally, at the time of the first litigation, a light rail system was either under construction or about to be completed. It has now been completed and runs the length of Main Street, where it turns west at the Main Street Plaza. When the Church first proposed the initial purchase, it issued a press release stating that the plaza would "increase the safety and convenience of visitors and those who work in the area by providing easier pedestrian access to downtown merchants and the light-rail system." App. 1006. In view of these

developments, both Main Street and the plaza are even more vital to the transportation grid of the City. App. 755-758, 738, 544-550.

The Controversy Over How to Resolve the Impasse Between the City and the LDS Church Over the Enforcement of the Court of Appeals' Decision in Main Street I.

Following the decision in *Main Street I*, the City and the LDS Church chartered sharply divergent courses over how to resolve the issue of ownership and control of the plaza. The Church immediately called on the City to vacate the easement. In response, Salt Lake City Mayor, Rocky Anderson, called a press conference and announced that the City would not seek further review of the decision and that the City had no plans to relinquish the easement. The Mayor also announced that his office would formulate reasonable time, place, and manner restrictions. App. 786-787, 558-562. Articles in the *Salt Lake Tribune* and the *Deseret News* (the city's two major daily newspapers) both quote the Mayor as saying that "*it would be a betrayal*" [of the public's interest] to relinquish the easement. App. 796, 558-562, 563-576. In the ensuing months, the Mayor was to repeat this candid admission many times in what was to become a widely reported dispute with the LDS Church and several outspoken members of the City Council who were critical of his decision. In press releases, interviews, and in television and radio appearances, the Mayor repeatedly rejected demands from his critics to relinquish the easement. App. 735-736, 738-739, 802. In a statement typical of

dozens that are attributed to him following the Court of Appeals' decision, Mayor Anderson is quoted as saying, "If [a candidate for mayor] promised to return [the easement to the Church] they would get 5% of the vote. Even LDS Church members would see through that – No. 1 as pandering, and No. 2 as being completely unethical." App. 739, 568-570. This particular statement is representative of the Mayor's many other statements and acts that place his later actions into context and raise serious questions about how and why the Church was eventually given control over the Plaza. App. 739-740, 445, 742-743, 788, 868-869. This statement, along with other similar ones, had a profound effect on the public debate on this issue, especially among those in the community who were concerned that the solution preferred by the LDS Church (i.e., relinquishment of the easement) would automatically be chosen by the City. App. 738-740, 790, 997-1005.

On October 22, 2002, Mayor Anderson released an eight-page statement outlining the City's reasons for enforcing the terms of the original Warranty Deed, including the terms of the easement. In an announcement accompanying the release of the statement, the Mayor stated that the City instead would draft restrictions on conduct and speech for the easement, "but ones that do not protect the Church from competition or expression it finds offensive." App. 440-447, 787. In his eight-page written statement, the Mayor explained that he was "faced with

the decision as to whether 1) Salt Lake City should simply transfer the easement to the [LDS Church] so the contemplated restrictions can be given effect, 2) Salt Lake City and the [LDS Church] should attempt to restructure the transaction in a manner that would give effect to the essential elements of the agreement reached between them, including assured public access and the restrictions on expressive activities, or 3) Salt Lake City should simply act according to the terms of the Special Warranty Deed, and according to the opinion of the Court of Appeals, and formulate reasonable, content-neutral restrictions as to time, place, and manner that will conform to the requirements of the Constitution." App. 441. The Mayor rejected the first two alternatives, stating, "[b]ased on the fundamental ethical principle that parties to an agreement should, to the extent possible, give effect to the promises each party made to the other, and based on the commitments of the City Council and the [former Mayor's Administration] to the community as a whole, I am compelled to retain the easement on behalf of Salt Lake City, and proceed according to the terms of the Special Warranty Deed (except those that have been held by the Court of Appeals to be unconstitutional), and work with the Salt Lake City Council to formulate constitutionally permissible time, place, and manner restrictions regarding conduct and other expressive activities on the Main Street Plaza." The Mayor concluded that he was "persuaded that such a restructuring would not only be constitutionally suspect but that it would not

comport with the principle that the parties should live up to their agreement." App. 444. To do otherwise, he emphasized, "would be a betrayal of Salt Lake City and of the public." App. 445. The Mayor also explained that "to simply convey the easement to the [LDS Church] would also violate that principle." *Id.* In addition, the Mayor paid special attention to the import of the severability clause of the Special Warranty Deed, stating that "the parties agreed not only to (1) the purchase and sale, (2) the restrictions on conduct and other expressive activities, and (3) the reservation to Salt Lake City of the easement; they also expressly agreed that if any term or restriction set forth in the Special Warranty Deed is held by a court to be unconstitutional, the other terms are to be binding." App. 444. The Mayor never retreated from this view of the binding effect of the Severability Clause. App. 792, 870-871.

Rather than ending the debate, the Mayor's announcement on October 22, 2002 that he would not relinquish the easement only marked the beginning of months of heated public debate, which resulted in tremendous divisiveness in the community along religious lines, and a contentious dispute between the mayor and the LDS Church, and the mayor and some members of the LDS-dominated City Council. During this period, Mayor Anderson appeared on radio talk shows and was widely quoted in television broadcasts and the print media defending his position. App. 739-740, 814-817, 938-959. At this time, a poll conducted by the

Deseret News showed that 62% of Salt Lake City residents wanted the City to keep the easement. Views on this issue, however, were deeply divided along religious lines. Sixty-four percent of LDS Utahans were in favor of giving up the easement to the Church, while 73% of those belonging to another or no religion said that the City should keep the easement. The results of this poll were widely publicized and were an important part of the debate. App. 685-687, 595-598, 740-741, 797-799, 803.

At this juncture, the LDS Church embarked on a sophisticated public relations campaign that turned a contractual dispute into a religious dispute that threatened to tear the City apart along religious lines. LDS Church officials widely distributed at least 20,000 corporate portfolio report-quality information packets to leaders of other faiths, business leaders, community council members, and many others in Salt Lake and Davis Counties. One of the brochures is titled *Realizing a Vision – the New Church Plaza*. App. 448-463. In the brochure, the Church maintains that the easement should not be considered important as a practical matter to the people of Salt Lake City because the Church always intended to allow twenty-four hour access. App. 454. The materials distributed by the Church included a letter from LDS Church President Hinckley describing how the LDS Church had dedicated the Plaza after it first opened as a place to contemplate God and not as a place for "confrontational and noisy demonstrations." App. 468. In

this letter, President Hinckley explained that "the Prayer of Dedication included a plea that the Plaza be seen as a place of peace – an oasis in the midst of this bustling city – an island of quiet beauty where the weary may sit and contemplate the things of God and the beauties of nature," and insisted that "I am convinced that this is what God expects of us, despite differences of opinion on some matters." App. 468. The President's letter to the public was subsequently printed in Salt Lake City's two major daily newspapers. App. 571-572.

Mayor Anderson responded by criticizing the LDS Church public relations campaign, which he described as bringing unfair "pressure to bear" on the City. App. 800, 582-584, 469-474. The Mayor was especially critical of the Church referring to the Main Street Plaza as the "Church Plaza" and as an "ecclesiastical park" because there would have been a public uproar if the original sale were based on the Church turning the plaza into a religious enclave. The Mayor also maintained that the Church's actions were alienating non-Mormons. App. 559-560, 803-804. The Mayor's gravest concern was that the LDS campaign was "ratcheting up" a debate that was already dividing the community along religious lines and wrote letters to Presiding Bishop Burton pleading with him not to fuel the flames of divisiveness in the community. App. 800-801, 852-854, 872. In an interview given to the New York Times, Mayor Anderson described the rancor and mistrust the Plaza controversy was creating along religious lines, stating that "[t]he

impact on the City has been horrendous," and was critical of the Church's tactics, stating: "My job is to do the right thing. To ask me to convey that easement from the City to the LDS Church would be a huge betrayal to the people in this community." App. 595-598, 797. This statement is representative of many others the Mayor made during this period. ("[F]or the City to walk away so casually from promises made. . . just for expediency's sake, not only violates the law but is unethical. . . and [ ] creates a kind of cynicism [among the public]"). App. 801-802, 606-609.

Simultaneously, the City Council initiated its own campaign to thwart the Mayor's decision to adopt reasonable time, place, and manner regulations. App. 573-581, 792, 797-800. Their actions sparked a widely publicized dispute between the Mayor and individual council members, including charges of religious discrimination targeting the Mayor and claims of religious bias and conflicts of interest directed at the all-LDS City Council. App. 796-800, 619-622, 680-684, 922-923. The dispute focused on whether the City Council possessed the authority to resolve the plaza controversy by relinquishing the easement. The City Attorney attempted to resolve this dispute by issuing an advisory opinion indicating that the authority rested with the Mayor alone. App. 900-909.

On November 24, 2002, the Church published an open letter in the *Salt Lake City Tribune* calling on the City to relinquish the easement because the Church

could not allow public protests and demonstrations on the plaza. App. 866-867. At about the same time, the Church offered to purchase the easement. The Mayor rejected this offer and stated that the easement was not for sale. App. 610-613, 806-808, 688-691. ("[T[his used to be a block of our Main Street and the people of the city were promised that there would be a perpetual right of access"). App. 610-613. On November 26, 2002, the Mayor released an open letter addressing the Main Street controversy that was published by the *Deseret News.* App. 475-478, 677-679. In his own words, Mayor Anderson makes the clearest moral, ethical, and legal case for not surrendering the easement. The contents of the letter are reproduced in the district court's *Memorandum Opinion*, pg. 16. App. 36. The Mayor's later actions must be understood in the context of this letter and the impact it had on the Salt Lake City community.

On December 6, 2002, the Mayor released his proposal for regulating speech on the Plaza. The plan adopted by the Mayor narrowly defined the easement and contained detailed regulations more extensive than those governing other public streets and sidewalks. The proposal gave the Church almost all of what it sought by abandoning the City's existing legal claim to guaranteed public access to and across the entire Plaza, by limiting that claim to a narrow strip on the East side of the Plaza (farthest from the LDS Church's temple) and by confining demonstrations to two designated areas at the North and South ends of that narrow

strip. Leafleting would be permitted along the narrow strip under the Mayor's proposal. App. 479-480.

That very same day, attorneys for the Church delivered a letter to the Mayor and members of the City Council rejecting the Mayor's plan and reiterating the Church's demand that the City surrender the easement. "This community needs your help," Bishop H. David Burton wrote. "We respectfully submit that there is a way to resolve this perplexing problem: the easement must be extinguished." App. 883-884.[1] The Mayor wrote back, rejecting the arguments made by the Church and reiterating that the easement had been "a crucial part of the [original] transaction." He also emphasized his willingness to consider "any proposal that guarantees access while addressing the concerns of the Church." App. 887-890.

The City's Decision to Relinquish the Easement

On December 13, 2002, the Mayor either met or spoke with one or more wealthy and influential members of the LDS Church and reached a tentative agreement to vacate the easement in exchange for money pledged (or promised to be raised) by the very same individuals. One of these individuals was Jon Huntsman, a powerful industrialist with direct family ties and access to the LDS

[1] At the same time, however, the Church insisted that it "intended that there be open public access to the plaza – with or without an easement." App. 883-884. Likewise, the LDS Church placed on its website audio clips from its attorney, Alan Sullivan, who said, "The Church has committed to the city and to the community from the very beginning of this dispute that it will permit continuous access for the public on the property and that the property would be managed in exactly the same way as the Church administration block has been operated for a number of decades." App. 885-886.

leadership. Huntsman is also a very senior member of the Church's lay priesthood and hierarchy. App. 1012-1013. This conversation occurred late in the evening on a Friday night and the agreement was worked out with Church leaders over the weekend. App. 811-813, 768-769. On the following Monday morning, the Mayor and Church leaders held a joint press conference and announced a plan that would vacate the easement in exchange for 2.17 acres of vacant LDS Church-owned land in one of the City's industrial/low income residential neighborhoods. App. 1023-1026. The Alliance for Unity, an independent group officially unaffiliated with the Church, simultaneously agreed to help raise $5 million from private sources to help construct a community center in an underserved section of the City. Jon Huntsman, the co-chair of the Alliance for Unity, agreed to spearhead this effort and contributed at least $250,000. App. 1034. A second donor with close ties to the Church, James Sorenson, pledged $500,000 and 2.5 acres of land valued at the same amount. App. 695-696. The Church also agreed to contribute an unspecified amount to the $5 million goal and to pay half of any attorneys' fees sought by plaintiffs in *Main Street I*. The proposal, which would require City Council approval, gave the Church the absolute right to reinstate speech and behavior restrictions on the Plaza. App. 481-490.

On January 8, 2003, the Mayor wrote a letter to the Acting Planning Director Brent Wilde to initiate a petition to close, vacate and abandon the easement. App.

910-913. Working collaboratively with LDS Church officials, the Mayor's office amended the original Warranty Deed. App. 411-415. The Amended Deed conveyed the pedestrian easement to the Church, App. 394-399, thus giving it "complete and absolute control over all activities and uses of the [Plaza]." App. 397. Although eliminating any language regarding a public easement, the document included a requirement that the LDS Church use and maintain the Plaza as a "landscaped space," and prohibited the Church from erecting any fences or obstructing the view corridor. These conditions were secured by a "right of reentry," which runs in favor of the City. App. 396. Although there is no explicit reference to a right of access by the public in the amended Special Warranty Deed, both the City and the LDS Church reiterated in numerous public statements that the public would, *as before*, have unrestricted access to the Plaza – except that the Church would prohibit First Amendment activity on the Plaza with which it disagreed. App. 764, 772, 659-663, 695-696, 640-643, 644-646, 673-674. The right of access promised by the LDS Church was a key consideration for the Mayor in materials the City distributed in support of the proposed agreement and in the press release accompanying that proposal. App. 484, 488.

The Amended Warranty Deed drafted by the City and LDS Church also attempted to thwart litigation regarding the transaction by incorporating poison pill language, which provided that, in the event a court were to determine that the

City's right of reentry created or otherwise established a basis for recognizing a First Amendment public forum, the right of reentry would be extinguished. App. 396. Remarkably, should the right of reentry be terminated, this new provision also asserts that if the LDS Church fails to use and maintain the Plaza as a landscaped space or violates the view corridor and fencing restrictions, the City will also lose its right to obtain equitable or other relief if the City's right to such relief is interpreted to create or establish the basis for a First Amendment forum. These highly unusual provisions in the new Deed, each of which is exceptionally beneficial to the LDS Church, attempted to ensure that the Church could maintain its ability to police First Amendment activity on the Plaza and to shield the Church from any possible threat of litigation.

The Mayor then began a widely publicized media campaign, including press conferences, color brochures, and numerous presentations to neighborhood community councils, the Chamber of Commerce, the Downtown Alliance, and various other groups, to create wide-scale public support for the deal. Officials from the LDS Church actively participated in and assisted with this campaign. App. 749. The City Council also held hearings and commissioned studies designed to buttress the Mayor's proposal. App. 41 (Mem. Op. at 21). One of these studies, however, critically backfired. After reviewing the proposal, the City Planning Commission voted 4-3 to reject the proposal because it did not guarantee

public access. App. 540-543. Significantly, the planning commission vote did not derail the proposal.

On June 10, 2003, the all-LDS City Council voted 6 to 0 with one abstention to vacate the easement and convey it to the LDS Church. App. 664-672, 750. Some Council members cited keeping the Plaza "sacred" as part of their motivation in voting for the Mayor's plan. Council member Jergensen stated that "[t]he sacred nature of this space, once it was developed, will never be consistent with time, place, and manner restrictions." App. 494-97, 670-672, 750. Council member Lambert agreed that the plaza is "sacred" and that "we need to respect that." App. 498-502, 670-672, 750. Under the terms of the Settlement Agreement that the Council approved, the closing could take place no earlier than thirty-five days and no later than sixty days from the signing of the Agreement. On Monday, July 28, 2003, the parties closed on the property. App. 644-646.

Based on these essentially undisputed facts, plaintiffs filed this lawsuit shortly after the parties closed on the property. Plaintiffs alleged that the decision to vacate the easement was made to give effect to the terms of the original transaction and to give preferential access to an exclusive municipal platform to the LDS Church, while creating the false appearance that non-discriminatory, secular interests were being advanced. App. 135-137. Plaintiffs further alleged that the City's *post hoc* reasons for its actions are a pretext for improper religious

and viewpoint discrimination, and that the benefits it received in exchange for vacating the easement were obtained only after the City gave up the fight and acceded to the Church's demands. City officials have worked hand in hand with Church officials to preserve the essential attributes of a public forum without the attendant responsibility of managing it in a content and viewpoint-neutral fashion.

SUMMARY OF ARGUMENT

This action arises from the extraordinary efforts undertaken by the City to avoid the holding in *Main Street I*, and to protect and advance the interests of the LDS Church that are affected by that decision. In *Main Street I*, this Court held that the Plaza was unquestionably a public forum notwithstanding the City's characterization of the property as private, and struck down the restrictions on speech as unconstitutional, noting that "the City may not exchange the public's constitutional rights even for other public benefits such as the revenue from the sale." 308 F.3d at 1132. Notwithstanding the holding of that case, Salt Lake City has tried once again to do just that: to "privatize" a central block of historic Main Street and thereby extinguish the public's constitutional rights. Rather than assume its constitutional obligation to regulate this quintessential public space pursuant to reasonable content-neutral time, place, and manner regulations, the City acquiesced to the LDS Church's demands that the City abandon the easement and thus created an exclusive and uniquely powerful platform for the Church to

promulgate its message on a range of social, political and religious issues, while prohibiting plaintiffs and others from sharing their own messages on the same issues in the same place and in the same manner. The sale of the property not only fails to cure the First Amendment violation present in *Main Street I*, it raises separate free speech and Establishment Clause violations that focus on the City's willingness to carve up Main Street in order to ensure that the Church does not have to share its space with individuals expressing other viewpoints.

Plaintiffs allege that these actions violate the First Amendment because they reinstitute the very same restrictions on speech in a public forum that were declared unconstitutional by the Court of Appeals. The amendments to the Warranty Deed have not changed the public forum status of the property or discharged the City's obligation to adopt reasonable time, place, and manner regulations. If anything, the sale of the property *itself* exacerbates the constitutional violation because it shows how far the City is willing to go to protect the interests of the LDS Church. The City's actions cross the boundary between viewpoint neutral policymaking and impermissible endorsement of religion. Measured by this standard, the City's actions are not viewpoint neutral and (a) have the purpose and effect of promoting religion, and, in this case, a particular religion; (b) impermissibly endorses religion by conveying a message to non-Mormons that they are outsiders who are not full members of their political

community; and (c) impermissibly entangles church and state by giving the Church authority over an open-space pedestrian plaza in the heart of downtown Salt Lake City.

Drawing reasonable inferences from the facts as they exist, plaintiffs submit that they are entitled to a preliminary injunction. The district court's conclusions of law are clearly erroneous about the purposes, motives, and effect of the City's actions in this case. The plaza's objective attributes and use as a downtown thoroughfare have not changed. The plaza remains the quintessential public forum. The City has an obligation to adopt viewpoint neutral time, place, and manner regulations. It cannot discharge that obligation by entering into an ownership agreement with the Church that elevates form over substance. The district court's analysis focused only on the formalities of ownership and the benefits the City received in exchange for the easement. The case is not so straightforward. It raises serious questions about the City's motives and the influence of the LDS Church on the City's decision. Nowhere else in the United States could a municipality sell off a vital downtown street—much less Main Street and much less to a church whose goal is to constrict First Amendment activity on the sidewalk surrounding its property. At the very least, plaintiffs submit that the district court failed to give plaintiffs' allegations the weight they are entitled to under Rule 12(b)(6). Accepting those allegations are true, plaintiffs have made out

a credible claim that the City's actions in this case were unduly influenced by the LDS Church and were taken to protect the Church from dissenting points of view.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims. Alternatively, the Allegations Set Forth in the Complaint State a Claim for Relief.

A. Main Street Plaza Remains a Public Forum Regardless of the Formalities of Legal Title.

In *Main Street I*, the Court held that the pedestrian easement across Main Street Plaza constituted a public forum, notwithstanding the intent of the parties to transfer plenary authority to the LDS Church to regulate speech on the easement. Because the easement was for pedestrian passage, formed part of the downtown pedestrian transportation grid and was open to the public, the Court ruled that "[t]he easement . . . shares many of the most important features of sidewalks that are traditional public fora" and should therefore be classified as a public forum. 308 F.3d at 1128. Although acknowledging that the parties had defined the easement to exclude expressive activities, the Court found that "a deed does not insulate government action from constitutional review." *Id.* at 1122. The Court observed that "the City has attempted to change the forum's status without bearing the attendant costs, by retaining the pedestrian easement but eliminating the speech previously permitted on the same property. In effect the City wants to have its

cake and eat it too, but it cannot do so under the First Amendment." *Id.* at 1131.

The City has amended the original warranty deed in a way that allows it to shirk its constitutional obligation to regulate the Plaza pursuant to content neutral regulations, while at the same time retaining the benefits to the City that Main Street has historically provided. Although the City has relinquished the easement, it has done so under circumstances ensuring that the Plaza will continue to function as an unobstructed pedestrian thoroughfare seamlessly incorporated into the downtown transportation grid and indistinguishable in form and function from its character as a public forum. The easement has been replaced with a different property interest, which the defendants describe as an inferior to the easement. This is a distinction grounded in the technicalities of property law that does not make a constitutional difference. The critical fact here is that the amended warranty deed contains enforceable restrictions on the property that ensure that it will continue to function just as before. The property cannot be developed for commercial, residential, or institutional use. In effect, it must remain as it exists.

Although plaintiffs acknowledge that the Amended Warranty Deed no longer includes any formal right of way or public easement, this factor is no more determinative of the public forum question than the party's suggested labels in *Main Street I*. "[A] deed does not insulate government action from constitutional review," *id.* at 1122, particularly when the City has gone to great lengths to ensure

that, in practice, Main Street Plaza will continue to operate as an unobstructed pedestrian thoroughfare. *See also Evans v. Newton*, 382 U.S. 296, 301 (1966) (rejecting argument that "mere substitution of trustees instantly transferred [property] from the public to the private sector").[2]

The Court in *Main Street I* did not constrain its analysis to the four corners of the deed, but rather analyzed the history, function and purpose of Main Street Plaza to reach its conclusion that the sidewalks through the plaza were properly classified as a public forum. 308 F.3d at 1122. Courts uniformly look to the objective attributes of the property and, measured by this standard, Main Street has not changed and continues to function as before. The proper analysis, therefore, must focus on the historical use and objective attributes of a parcel of land when determining whether a public forum exists because "for property that is or has traditionally been open to the public, objective characteristics are more important

[2] The right of reentry is the enforcement mechanism for ensuring that the property continues to function as a public space and as a pedestrian thoroughfare. The Fifth Circuit has held that the existence of a similar reverter clause in a deed conveying a city-owned golf course to private individuals was itself sufficient to constitute state action, where courses were operated on a segregated basis. *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962); *United States v. Mississippi*, 499 F.2d 425, 430-432 (5th Cir. 1974) (state action in operation of segregated private school established by State's reversionary interest in leased property and knowledge of segregated use to which the property would be put); *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964) (*en banc*) (state action in operation of segregated private hospital where the property was encumbered by a reverter clause requiring that the property be used exclusively as a hospital). Moreover, for purposes of plaintiffs' viewpoint discrimination and establishment clause claims discussed in the ensuing sections, it is the City's decision to vacate the easement itself that constitutes state action. *See Wright v. City of Brighton*, 441 F.2d 447, 450 (5th Cir. 1971) (Fourteenth Amendment was violated by the City's sale of abandoned school building to a private academy which the City knew had a policy of racial discrimination. "…Thus, it is the sale alone, not the City's involvement in the operation of the academy which is in question here, and it is clear beyond peradventure that the sale itself was state action…"); *McNeil v. Tate County School District*, 460 F.2d 568, 571 (5th Cir. 1972) (same—"The effect of the City's actions here was to create another place where these feelings of inferiority could be generated, and it was all the more a humiliating indignity because this building had for years been a public school building which did not lose its identity as a public facility just because legal title changed hands").

and can override express government intentions to limit speech." 308 F.3d at 1125 (citing *United States v. Kokinda*, 497 U.S. 720, 738 (1990) (Kennedy, J., concurring)). In other words, objective characteristics, rather than the intent of the parties to a particular transaction, will determine whether a public forum continues to exist. *See id.* (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998)).

This case involves the quintessential public forum – a city's Main Street.[3] It is the benchmark against which all other public fora are measured. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (observing that public streets are "the archetype of a traditional public forum"); *United States v. Grace*, 461 U.S. 171, 177 (1983) ("[P]ublic places historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks, are considered, without more, to be public forums.") (internal quotations omitted). Even when the deed to the land at issue technically rests in the hands of a private party, the Supreme Court has made clear that

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

[3] See declaration of Benjamin Barber, Ph.D. App. 702-703. Dr. Barber explains how Main Street is imbued with a municipal character, and the difficulty of disengaging its public character from any other use. Dr. Barber also describes the historical and symbolic importance of Main Street as the cradle of democracy and the threat to our democratic ideals of closing it down.

Hague v. CIO, 307 U.S. 496, 515-16 (1939) (emphasis added); *see also Denver Area Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 791-92 (1996) (Kennedy, J., concurring in part and concurring in judgment) (noting that public fora are not "limited to property owned by the government. Indeed, in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remain in private hands.") (internal citations omitted). *See also Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892) (holding that submerged land held in fee by railroad company is held in trust for the public's use and the railroad's piers and wharfs cannot extend beyond the navigable point).

Other courts have recognized that private ownership of property does not necessarily nullify citizens' First Amendment rights of free speech and expression. "Adherence to a formalistic standards invites manipulation." *See Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000) (en banc). "To avoid such manipulation, [a court must] look to the substance of the transaction as well as its form…" *Id.* at 491. In that case, the Seventh Circuit determined that private property remained a public forum based on (a) the historical association of the private property with the public forum; (b) the dedication of the property to public use; and (c) the physical location of the property in relation to the public forum. *Id.* at 494-95. The Ninth Circuit has also held that a sidewalk owned by a private party – in that case, the Venetian Casino –

qualified as a public forum. *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd.*, 257 F.3d 937 (9th Cir. 2001). Rather than focusing exclusively on the technicalities of title and ownership, the court instead examined whether, as a functional matter, the "private" sidewalk operated as if it were a traditional public forum. *Id.* at 942-943. Using the same analysis, the Sixth Circuit reached the same result in a case involving the private sidewalks around a private sports complex. *United Church of Christ v. Gateway Economic Dev. Corp*, **---** F.3d ---, 2004 WL 1936001 (6th Cir.)(Sept. 1, 2004).

These decisions, including the decision in *Main Street I*, represent modern-day applications of the well-established principles that were first announced by the Supreme Court in *Marsh v. Alabama*, 326 U.S. 501, 505 (1946). In *Marsh*, the Court rejected the argument that private ownership of a company town nullified First Amendment protections. *Id.* at 506. ("Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it"). *See also Evans v. Newton*, 382 U.S. at 299 ("Conduct that is formally 'private' may become…so impregnated with a governmental character as to become subject to constitutional limitation."); *Id.* at 302 ("Like the streets in *Marsh v. Alabama*, the predominant character and purpose of this park are municipal.").

While *Marsh* and *Evans* are state action cases, they are relevant here because regardless of the City's decision to vacate the easement, state action exists in the form of the Church.[4] Few functions could be more public than the exercise of police power over streets and sidewalks that are used by the public as if they were city streets and sidewalks. *Venetian*, 257 F.3d at 945-946; *United Church of Christ, supra at *4*. *See also Lee v. Katz*, 756 F.3d 550, 554-555 (9th Cir. 2002) (classifying city commons out on long term lease to a private party as a public forum); *Jackson v. City of Markham*, 773 F. Supp. 105 (N.D. Ill. 1991) (holding that full spectrum of First Amendment rights applied to a private sidewalk despite the adjacent property owner's claim that the sidewalk was privately owned); *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace*, 745 F. Supp. 65 (D. Mass. 1990) (finding that sidewalks of Faneuil Hall Marketplace were public fora despite being subject to control of a private development corporation under the terms of a ninety-nine year lease); *Thomason v. Jernigan*, 770 F. Supp. 1195 (E.D. Mich. 1991) (sidewalks remain public forum despite City Council's decision to relinquish the public's right of access on a cul-de-sac that led to the entrance of a Planned Parenthood facility so that the clinic could exclude antiabortion protestors by utilizing trespass laws).

Regardless of whether the plaza technically qualifies as a "company town"

[4] State action also exists in the city. *See n. 2*, *supra*.

or even a park, as was present in *Marsh* and *Evans*, the Church has voluntarily undertaken a public function historically reserved in the government. Moreover, for purposes of Rule 12(b)(6), the commercial, residential, institutional and green space property owned by the Church in the downtown area is extensive enough to warrant closer consideration of the state action claim asserted against the Church. App. 135.

B. The City's Reasons for Vacating the Easement Are a Pretext for Viewpoint Discrimination that Gives the Church a Powerful Platform in the Heart of Downtown to Distribute Its Message and Suppress Others.

Regardless of the Plaza's status as a public forum, the City does not discharge its constitutional duty to promulgate content-neutral reasonable time, place, and manner restrictions by simply transferring title to the property when the transfer occurred for the primary purpose of allowing the LDS Church to reinstitute the very same content based restrictions on speech that were struck down in *Main Street I***.** The City's decision not to enforce the terms of the original warranty deed, and subsequently to amend the deed so as to relinquish the easement, was made to satisfy the demands of the LDS Church. The City's actions allow the LDS Church to stifle dissent—while at the same time giving the Church an exclusive platform to distribute its own message. While the benefits that flowed to the City in exchange for the easement may be tangible, they were secondary

considerations that only came into play after the City gave up the fight and gave in to the Church's demands. The Church, however, was demanding something that it was not entitled to—an exclusive platform to distribute its message on the sidewalks in front of its property. If plaintiffs' allegations are correct that the City was motivated in whole or part by a desire to protect the Church's interests in controlling this property, the City's actions constitute improper viewpoint discrimination. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). In that case the Court held that the existence of other valid considerations leading to the government's decision is irrelevant if the allegations of viewpoint discrimination are true. *Id*. at 812. The district court did not even consider this argument. Its analysis ended with the benefits received by the City in exchange for vacating the easement.

In *Main Street I*, the City was taken to task for entering into a deal with the LDS Church that is strikingly similar to the transaction that plaintiffs are currently challenging. Under the terms of the amended warranty deed, this new arrangement is admittedly more nuanced, but the City's intent to "protect the Church's expression from competition" is equally improper. 308 F.3d at 1129. Even more so than in the first litigation, the issue of the City's motive (and complicity) has been brought into sharper focus by its extraordinary actions following the Court of Appeals decision. Although plaintiffs acknowledge that the City ultimately

acquiesced to the demands of the LDS Church for reasons that might have been valid in other circumstances, the First Amendment does not permit those considerations to justify or conceal the kind of viewpoint discrimination at work in this case. *Cornelius,* 473 U.S. at 811-813.

The Tenth Circuit has made this observation as well and has in fact rejected a municipality's *post hoc* rationalization for suppressing a particular viewpoint. *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002). Quoting from *Cornelius*, the court in *Summum* began its analysis by noting that "[t]he existence of reasonable grounds for limiting access to a non-public forum… will not save a regulation that is in reality a façade for viewpoint discrimination." *Id*. (quoting *Cornelius*, 473 U.S. at 811-813). *See also Summum v. Callaghan,* 130 F.3d 906, 919-920 (10th Cir. 1997) (remanding First Amendment case to district court to "carefully scrutinize the validity of the County's reasons" for refusing the plaintiff access to what was either a nonpublic or limited public forum, in order to ensure that these were not simply "a pretext for viewpoint discrimination"). *See also Axson-Flynn v. Johnson*, 351 F.3d 1277 (10th Cir. 2004) (Remanded for determination whether school's pedagogical reasons for removing student from acting program was pretext for viewpoint or religious discrimination); *Accord East High School Prism Club v. Seidel,* 95 F. Supp. 2d 1239 (D. Utah. 2000)

(finding high school policy for student clubs to be a façade for viewpoint discrimination.).

In this case, the motives of both the City and the LDS Church are totally transparent. At the very least, plaintiffs are entitled to the benefit of their allegations that the reasons advanced by the City for vacating the easement are a pretext for content and viewpoint discrimination. This is a uniquely factual determination that is inappropriate for disposition under F.R.Civ.P. 12(b)(6). *Summum*, 130 F.3d at 906. Once the Plaza was consecrated as sacred by the Church, it was imperative that the space be protected from speech considered critical or sacrilegious. Incidents involving shouting street preachers were widely reported and greatly exaggerated (for example, by their inclusion in both the Church's and the City's brochures) as part of a campaign to influence public opinion. In fact, a number of City Council members freely admitted from the outset that they were willing to relinquish the pedestrian easement on the Plaza so that the Church could take whatever steps it deemed necessary to preserve the peace and tranquility of the Plaza. Some City Council members actually stated that they thought these actions were necessary to preserve the "sacredness" of the space. Shielding the LDS Church from the disruption that is caused by dissenting voices, however, is not a valid (and certainly not a secular) purpose. First, as the Supreme Court has already explained, government has no business legislating for

the purpose of preserving what some view to be "sacred":

> In the case of most countries and times where the concept of sacrilege has been of importance there has existed an established church or a state religion. That which was "sacred," and so was protected against "profaning," was designated in each case by ecclesiastical authority. . . . But in America the multiplicity of the ideas of "sacredness" held with equal but conflicting fervor by the great number of religious groups makes the term "sacrilegious" too indefinite to satisfy constitutional demands based on reason and fairness.

Joseph Burnstyn, Inc. v. Wilson, 343 U.S. 495, 528 (1952).

Furthermore, by enacting policies that suppress the rights of all others to express their contrary views on the Plaza, the City has both not only elevated the Church above all other parties, but also created the impression that the views of the LDS Church are uncontested. Both the Free Speech Clause and the Establishment Clause prohibit giving sectarian religious speech preferential access to a public forum. *Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 753, 766 (1995). It can also send an improper "impression of endorsement that is in fact accurate." *Id*. *See also Freedom from Religion Found.,* 203 F.3d at 491 (cautioning against the sale of a section of city park to avoid the appearance of endorsing a particular religion). In this sense, the City has actively facilitated the Church's promotion of its orthodoxy and squelching of dissent. Regardless of how many people would like to preserve the sacred tranquility of the Plaza, the Constitution prohibits the use of governmental power to shield a religion from opposing views: "[T]he state has no legitimate interest in protecting religions from

views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or perceived attacks upon a particular religious doctrine." *Burnstyn*, 343 U.S. at 505. For this reason, the Tenth Circuit wholly refused to consider this justification when adjudicating the constitutionality of the original transaction. *Main Street I*, 308 F.3d at 1129 ("Protecting the Church's expression from competition is not a legitimate purpose of the easement or its restrictions, so we do not consider its compatibility with speech.").

C. The City's Decision to Relinquish the Easement Violates the Establishment Clause.

While not a model of clarity, the Supreme Court's Establishment Clause jurisprudence definitely does not allow the City to do what it did here. Under the original three-prong *Lemon* test, the First Amendment requires that a government's action (1) have a secular purpose; (2) not advance or inhibit religion in its principal or primary effect; and (3) not foster an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Bauchman v. West High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) (describing proper method for testing Establishment Clause claims). Even under more modern articulations of the Establishment Clause test, the primary question is whether the government is endorsing or disapproving of religion. *Lynch v. Donnelly*, 465 U.S. 668, 687

(1984) (O'Connor, J., concurring); *Bauchman*, 132 F.3d at 552 ("Justice O'Connor's endorsement test is now widely accepted as the controlling analytical framework for evaluating Establishment Clause claims"). If *either* the government's actual purpose is to endorse or approve of religion *or* the practice conveys a message of endorsement or disapproval, the challenged government action violates the Establishment Clause. *Lynch,* 465 U.S. at 690 (O'Connor, J., concurring). Just as the City's decision to elevate the voice of the Church violates its obligation to regulate speech in a viewpoint neutral manner, it violates the three prongs of the Establishment Clause because of the preferential access the Church has been given to (and control over) this historical downtown public forum. The opposite result reached by the district court was clearly erroneous. The public benefits that the city received in exchange for the easement cannot provide the justification for perpetuating a constitutional violation. That issue was settled in *Main Street I*. 308 F.3d at 1132. At the very least, plaintiffs' allegations state a claim that the secular reasons advanced by the City for amending the Warranty Deed are a pretext for an improper religious purpose.

(1) The City's Decision to Relinquish the Easement Was Motivated by Sectarian Rather Than Secular Purposes

Mayor Anderson fully understood the implications if the City yielded to the

Church's demands and vacated the easement. Time and again he rejected those demands on ethical and legal grounds and as a guardian of the public trust. Mayor Anderson also understood that if he acceded the Church's demands it would be seen as pandering to the Mormon community and raise serious questions in the non-Mormon community about the influence of the LDS Church over the affairs of government. The Mayor knew that if the City gave in to the LDS Church it would open old wounds between Mormons and non-Mormons in a City with a long history of religious divisiveness. A plaza completely controlled by the LDS Church would convey a message of exclusion, not inclusion, to the City's non-Mormons. For these reasons, the Mayor refused to consider relinquishing the easement (and, effectively, the Plaza as a whole) to the Church's unconstrained authority.

The City's later decision to relinquish the easement must be understood in the context of these candid admissions by Mayor Anderson. His decision was ostensibly motivated by several considerations. At base, however, it was done to satisfy the Church's demand that it retain complete control over the plaza under the terms of the original warranty deed – even if it meant that the City's interests under those terms and in the property was extinguished. The City had several options before it over how to resolve the impasse between the Church and the City following the decision in *Main Street I,* but ultimately chose total relinquishment

of the easement because the Church would not accept any compromise that allowed any dissent or other First Amendment activity on the plaza. The City was fully within its rights to retain the easement and enforce its local laws including reasonable time, place, and manner regulations.[5] Although the Church may have bargained for complete First Amendment control when it entered into the original transaction, that agreement was improper then and it is improper now.[6] The City cannot enter into a revised agreement to give effect to the unconstitutional terms (and objectives) of the original agreement. This case is not about the government's plenary authority to dispose of property for a valid secular interest; rather it is about protecting the Church from offensive speech and preserving the Church's interests in the property as a space that it has usurped and consecrated as sacred. These are sectarian reasons – not valid secular governmental reasons.

As we have said previously, the motives of both the City and the LDS Church are extremely transparent. Just as the City's decision to elevate the Church's voice violated the principle of viewpoint neutrality under the Free Speech Clause, it violates the principle that the government act with a secular purpose. Once the plaza was dedicated as sacred by the Church, it was imperative that the space be protected from speech considered critical or sacrilegious. Public space,

[5] This impasse was created by the Church alone since the City's rights were clearly established under the terms of the original transaction. Under those terms, the restrictions on speech struck down by the Court of Appeals did not affect the enforceability of the easement. App. 444-445, 792, 870-871.

[6] In *Main Street I*, the court ruled that such an agreement was improper under the First Amendment. It did not reach plaintiffs' Establishment Clause claim.

however, cannot be manipulated to achieve this goal. Here, both the means and the end violate the Establishment Clause. *Pinette*, 515 U.S. at 766 ("giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)"); *Joseph Burstyn Inc.*, 343 U.S. at 505 ("[T]he state has no legitimate interest in protecting religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or perceived attacks upon a particular religious doctrine."); *accord Main Street I,* 308 F.3d at 1129. Even when the government advances legitimate secular purposes, it cannot act for the specific benefit of the LDS Church. *Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687, 692 (1994) (invalidating New York's creation of a public school district exclusively for adherents of a reclusive religious sect in order to shield their children from the "panic, fear and trauma" that might result from their exposure to the outside world).

From the moment Mayor Anderson decided to set aside the terms of the original warranty deed, everything that occurred thereafter was done either to conceal an improper purpose or to deflect scrutiny of that decision. Even the benefits that purportedly flowed to the City following its decision are presented

disingenuously and are less than they appear. Distilled of its rhetoric, the Church swapped an abandoned parcel of land in one of the City's poorest neighborhoods for the easement rights over a marquee parcel of land in the heart of downtown. The Church also agreed to pay half of the attorney fees owed to the plaintiffs resulting from the first litigation. The money raised by the Alliance for Unity, and the Church's modest contribution to that organization, is not money that was directly paid to the City. Whether the Church or a third party paid money to a fourth party is irrelevant. At the very most, the benefits that were obtained by the City were payment for allowing the LDS Church to continue to suppress speech on the plaza.[7]

At the very least, plaintiffs have alleged that those benefits and the City's other reasons for vacating the easement are a sham or façade adopted to conceal an improper religious motive. Thus, even when the state claims that there is a legitimate secular purpose behind its actions, the Supreme Court has reiterated on numerous occasions that a court's inquiry "not only can, but must, include an examination of the circumstances surrounding [a policy's] enactment" to determine whether secular purpose prong of the *Lemon* test has been satisfied. *See Santa Fe Independent School District v. Doe*, 530 U.S. 290, 315 (2000). In *Sante Fe*, the Supreme Court invalidated a school district's policy allowing for a student-led "invocation" at football games after finding that the policy served no secular

[7] Due to the unique status of the LDS Church in Utah, the agreement cannot be considered the product an arm's length negotiation. The agreement was reached in secret and involved the exchange of money brought to the table by wealthy and prominent members of the LDS Church.

purpose. In reaching this conclusion, the Court looked beyond the mere text of the school district's policy, and "refused to turn a blind eye to the context in which [that] policy arose," which clearly demonstrated that the "policy was implemented with the purpose of endorsing school prayer." *Id.* *See Bell v. Little Axe Ind. Sch. Dist.*, 766 F.2d 1391, 1402-1404 (10th Cir. 1985) ("The district court's [modified post-litigation policy] behavior belies its avowed secular purpose and indicates that the policy was actually adopted to conceal a preeminent religious purpose"). *Friedman v. Board of County Commissioners*, 781 F.2d 777, 781, n.3 (10th Cir. 1985) (*en banc*) ("We note that all courts must be wary of accepting after the fact justifications by government officials in lieu of genuinely considered and recorded reasons for actions challenged on Establishment Clause grounds… It is at least possible that the seal had a secular purpose but that the specific elements of it did not").

In this case, the circumstances surrounding the City's decision to vacate the easement showed that the City's purpose was to protect a religious message. *See Mercier v. City of La Crosse*, 305 F.Supp.2d 999, 1008-1009 (W.D. Wis. 2004) (Post litigation sale of Ten Commandments Monument and parcel of land in city park to private party was made for sectarian purposes). Although government officials are sometimes required to change positions, they cannot change their position because the dominant religion in the city wants its way in a dispute where

the government's interests are compelling. The City simply cannot walk away from important governmental interests without raising the reasonable inference that it did so for an improper religious purpose or to achieve an improper religious end. The City's actions are directly attributable to what the Mayor of Salt Lake City himself describes as the tremendous "pressure [brought] to bear" brought by the LDS Church to rewrite the terms of the original warranty deed in order to create a purely religious enclave and to deprive the public of the right of way through the property. App. 800, 582-584, 469-474. As a result, the City has allowed the Church to create an "ecclesiastical" park at the crossroads of downtown under circumstances that were never contemplated by the enabling legislation originally approving the conveyance of the property to the Church.

(2) The City's Decision to Relinquish the Easement Has the Primary Effect of Advancing Religion and Conveys a Message That the Government Endorses the Predominant Religion in Salt Lake City.

Even if this Court is able to discern some secular purpose, the primary and principal effect of City's actions is to advance the interests of the LDS Church by protecting it from dissenting viewpoints, which further entrenches the Church's already considerable power and influence in the community. If anything, the sale of the property exacerbates the violation because it communicates to non-adherents that not only is the City willing to establish an ecclesiastical park in the heart of downtown (on what was formerly known as Main Street), but it is also willing to

carve up Main Street to ensure that the LDS Church does not have to share this space with individuals or groups expressing other viewpoints. *See Mercier*, 305 F.Supp.2d at 1013 (The sale of the property did not cure the Establishment Clause violation but only shifted it. Now, instead of directly endorsing the religious speech on the monument by displaying it on city-owned land, the City has demonstrated its endorsement by giving the Order [Fraternal Order of Eagles] permanent, preferential access to display the religious speech on land that is surrounded by city-owned property. I cannot find any meaningful difference between a city's own display of a religious monument and a city's grant of permission to one [and only one] private group to permanently display the monument in the same location when the monument is still surrounded by city property"). *Id*. at 1003. More importantly, the City's decision was made in the context of a widely reported and divisive dispute that reinforces the views of non-Mormons that the City did not act in a neutral manner and that the City acquiesces to the demands of the predominant LDS Church community. This conveys a message of endorsement that the government both protects and approves of the dominant religion and minimizes the interests of non-adherents. *Pinette*, 515 U.S. at 766. *See also Robinson v. Edmond,* 668 F.3d 1226, 1229-1230 (10th Cir. 1995) (This inquiry has been further defined to "consider not only whether the government is acting neutrally, but also whether a reasonable observer, reasonably

informed as to the relevant circumstances, would perceive the government to be acting neutrally"). *See also Friedman v. Board of County Commissioners*, *supra* (Latin cross on municipal logo violated effects prong because of perceived endorsement).

The City's actions send a clear message that government favors one religion over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Moreover, by its actions, the City clearly communicates to non-Mormons that they are outsiders, and not full members of their political community. *Lynch,* 465 U.S. at 688 (O'Connor, J., concurring). This has contributed to the divisiveness and mistrust between Mormons and non-Mormons that the Establishment Clause was designed to prevent. In Utah, these charges carry special weight because of the widely held perception that the dominant position of the LDS Church allows it to exert undue influence over the process of government.[8] The creation of what the LDS Church now openly describes as an "ecclesiastical park" on Salt Lake City's Main Street would lead a reasonable observer to believe that the City has endorsed not only religion, but a particular religion, especially given the special history and context of this

[8] Mayor Anderson has alleged on repeated occasions that the LDS Church commands undue influence over the City Council when the Church's interests are at stake. App. 797, 799, 588-94, 809-810, 922-923. Moreover, a recent poll revealed that sixty-eight percent of non-Mormons in Salt Lake City believe that the City's actions violate the Establishment Clause, an effect (and not a cause) of the divisiveness triggered by the LDS Church during the Plaza negotiations. App. 675-676. See also App. 997-1005 (consituent e-mails bemoaning control of LDS Church over city politics).

controversy. *See also Foremaster v. City of St. George*, 882 F.2d 1485, 1491-1492 (10th Cir. 1989) (remanding case for determination whether an average observer would perceive a message of endorsement when reviewing the city logo containing a depiction of the Mormon Temple).

Main Street has symbolic and historical significance in American culture as the center of civic participation and government. For residents and visitors to the City alike, who will use the plaza as they would any other sidewalk, Church ownership of these sidewalks sends the message that the Mormon faith is the preferred religion in Salt Lake City. *Pinette*, 515 U.S. at 766 ["giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination")]. The government may not "manipulate… its administration of a public forum close to the seat of government . . . in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate*." *Id.* (emphasis in original).

Yet that is exactly what the City has done here. Local residents and visitors alike will continue to use the plaza like any other major downtown street. The Court of Appeals made extensive findings describing how this particular section of Main Street serves as a "funnel" between the residential and governmental district

north of the plaza and the commercial and shopping district south of it. Main Street is symbolically identified with the center of municipal life and the commerce of ideas. It is where democracy lives and prospers. App. 710-712. The City can no more transform Main Street into a religious enclave than the Church can usurp this function for itself. By transferring control over the plaza to the Church, the City conflates the role of government and Church and sends the message that they are one and the same. Yet this is precisely what the central command of the Establishment Clause prohibits.

As an objective matter, a "reasonable observer," who is aware of the history and context of the community in which this transaction took place, would clearly view the deal between the City and the Church as a message of government endorsement of religion. *Pinette*, 515 U.S. at 778-82 (O'Connor, J., concurring). Particularly in light of the "unique social and political history of Utah[, which] reveals a longstanding tension involving the separation of church and state," *Bauchman,*132 F.3d at 545, a reasonable observer would believe that the Mayor and City Council's acquiescence to the Church's demand that the City relinquish the easement represented yet another example of the "special relationship" between government in Utah and the LDS Church. By ceding all control over the most important street in Salt Lake City to the LDS Church, the City has "sen[t] a message to non-adherents that they are outsiders, not full members of the political

community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Those who wish to comport themselves according to the ideology of the LDS Church are free to pass through Main Street Plaza unobstructed. Those who do not wish to be passive recipients of LDS Church orthodoxy have no opportunity to express their contrary views on the plaza. They must either silently accept the LDS-promulgated messages while walking along the plaza, risk arrest if they attempt to speak back, or avoid using the main downtown thoroughfare of their City altogether. The message sent by this government policy is loud and clear, and constitutionally forbidden.

(3) The City's Decision to Relinquish the Easement Excessively Entangles Church and State and Impermissibly Delegates Governmental Authority to a Religious Entity.

Even if this case did not involve such a prominent downtown street inextricably imbued with historical and symbolic importance, the City decision to delegate authority to the LDS Church to control expression and other First Amendment activities on the Plaza cannot be reconciled with the Constitution. *See Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *Joseph Burnstyn, Inc.,* 343 U.S. at 495. The Court settled this issue in *Main Street I* when it held that it was the

responsibility of *City* officials, not *Church* officials, to promulgate reasonable time, place, and manner regulations on the Plaza. 308 F.3d at 1132.

The City may not discharge this responsibility by delegating it to a private party or by purporting to privatize the street under circumstances where the street continues to function as before. As emphasized in the First Amendment section, the government's transfer of title does not control the public forum question any more than if the City had directly licensed the Church to maintain the Plaza under a 99-year lease. *See, e.g.*, *Faneuil Hall*, 745 F. Supp. at 65. The maintenance of streets, sidewalks, and parks is a governmental function. The "Establishment Clause . . . mean[s] that the government . . . may not delegate a governmental power to a religious institution." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 590-591 (1989). The First Amendment commands neutrality in the enforcement of restrictions on speech. The Establishment Clause bar is even higher. It forbids the City from delegating policy power over Main Street Plaza to the LDS Church. *See Grendel's Den*, 459 U.S. at 123 ("delegating a governmental power to religious institutions . . . inescapably implicates the Establishment Clause."). Moreover, the state may not delegate its authority over a public function "to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally." *Grumet*, 512 U.S. at 696. When governmental power

is delegated to a private party without any requirement that the power be exercised "in a religiously neutral way[, t]he potential for conflict inheres in the situation.'" *Id.* (quoting *Levitt v. Committee for Public Educ.*, 413 U.S. 472, 480 (1973)).

II. Plaintiffs Suffer Irreparable Harm Each Day That the Speech Restrictions on Main Street Plaza Are Allowed to Remain in Place.

As the Supreme Court has noted, "[t]he loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981) (citing *Elrod* with approval); 11 Charles A. Wright, et al., Fed. Prac. & Proc. § 2948 (1973) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Because chilled speech cannot be compensated by monetary damages, an ongoing violation of the First Amendment constitutes irreparable injury.

The district court held that the plaintiffs could not establish irreparable harm because they waited three months after filing the complaint to seek a preliminary injunction. The court's reliance on this fact is misplaced and the conclusion it draws is clearly erroneous. There is no requirement that First Amendment cases be filed as preliminary injunctions, before responsive pleadings have been filed, before all the facts are known, and before all the parties are before the court. Here,

the City never filed an answer and the LDS Church did not even intervene for three months. More critically, the injury to plaintiffs did not diminish during this period. Nor has it diminished since. The public interest was in fact served by filing a preliminary injunction based on a fully developed record that took time to assemble. This allows the court an opportunity to resolve the important constitutional issues in their full context and *not* on the bare motion to dismiss that the defendants sought to use as a basis to resolve this case. If anything, the public interest would be disserved by the defendants' approach.

III. The Balance of Hardships Weighs in Favor of Plaintiffs' Request Free Speech Rights.

Plaintiffs earned a hard-fought victory in the Tenth Circuit Court of Appeals, only to have the Church and the City wrest it away from them by manipulating the terms of the transaction. *See Freedom from Religion Found.,* 203 F.3d at 491 (warning about the possibility of manipulation). They are entitled to the benefit of that decision while this case runs its course. By contrast, there is no injury to the City (or the Church) that exceeds the burden that was imposed by the decision in *Main Street I*. On balance, the harm to the plaintiffs caused by these speech regulations on Main Street Plaza far outweighs any harm to the defendant. "Possible harm to others from the grant of injunctive relief is small when weighed against the possible infringement of First Amendment rights." *See, e.g., Cam I,*

Inc. v. Louisville/Jefferson County Metro Gov't, 252 F. Supp. 2d 406, 411 (W.D. Ky. 2003). "[I]f the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere from its enjoinment." *Déjà Vu of Nashville, Inc. v. Metropolitan Gov't*, 274 F.3d 377, 400 (6th Cir. 2001).

IV. The Public Interest Would Be Served by Granting the Injunction.

As courts have reaffirmed on numerous occasions, "the public's interest . . . is served when constitutional rights, especially the right to free speech, are vindicated." *See, e.g., News Herald v. Ruyle*, 949 F. Supp. 519, 522 (N.D. Ohio 1996) (citing *Christy v. Ann Arbor*, 824 F.2d 489 (6th Cir. 1987)). As the record shows, the City sacrificed the public's interest to those of the Church when it relinquished the public easement on Main Street Plaza. Therefore, the public's compelling interest in the preservation and enforcement of its constitutional rights should be vindicated without further delay.

CONCLUSION

For these reasons, plaintiffs respectfully request that the district court *Order* dismissing the case under Rule 12(b)(6) be reversed. Plaintiffs additionally request that the district court *Order* denying plaintiffs' motion for a preliminary injunction be reversed and remanded with instructions that the injunction be granted. This Court should restore the status quo as it existed after its decision in *Main Street I*,

until the constitutionality of the City's deal with the LDS Church can be adjudicated.

Dated this 13th day of September, 2004.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Plaintiffs-Appellants' Opening Brief complied with Local Rule 32 (a)(7)(c)(i). This document is proportionately spaced, has a Times New Roman typeface of 14 point and contains 13,943 words.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appellant's Opening Brief was sent to:

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