

No. 11-1612

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JOHN SATAWA,
Plaintiff-Appellant,

v.

**BOARD OF COUNTY ROAD COMMISSIONERS OF MACOMB
COUNTY; FRAN GILLETT, in her individual and official capacity as
Chairperson, Macomb County Road Commission; ROBERT HEOPFNER, in
his individual and official capacity as Chairperson, Macomb County Road
Commission,**
Defendants-Appellees.

On Appeal from the United States District Court
For the Eastern District of Michigan

**BRIEF AMICUS CURIAE OF
THE NATIONAL LEGAL FOUNDATION,**
in support of Plaintiff-Appellant Satawa,
Supporting Reversal

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FRAP RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae The National Legal Foundation has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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INTEREST OF THE AMICUS CURIAE

The National Legal Foundation (NLF) is a 501(c) (3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. The NLF and its constituents, especially those in Michigan, believe that the First Amendment protects individuals who wish to display religious symbols in the public square from being censored. Since its founding in 1985, the NLF has litigated important constitutional cases in both the federal and state courts. Thus, the NLF is well equipped to bring to the Court's attention legal arguments pertinent to the issues before this Court.

This Brief is filed pursuant to consent from the Plaintiff-Appellant Satawa ("Mr. Satawa"), and pursuant to Motion because Defendants-Appellees Macomb County Road Commission, *et al.* (the "Board") did not consent.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amicus Curiae*, The National Legal Foundation, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF THE ARGUMENT

This Brief expands upon two arguments made by Mr. Satawa in his Opening Brief. First, the Board’s denial of Mr. Satawa’s request to place a crèche where he had placed one each year for more than sixty years was based upon impermissible pretexts.

Second, should this Court disagree that the permit denial was pretextual, the court below still erred because the Board’s concern for traffic safety is not a compelling interest for the purposes of Free Speech analysis, and the Board’s restriction was not narrowly tailored to achieve its purported interest.

ARGUMENT

I. IN DECIDING WHETHER THE BOARD’S PROFFERED REASON WAS A PRETEXT, THIS COURT SHOULD BE GUIDED BY ITS EMPLOYMENT LAW PARADIGM FOR EVALUATING PRETEXT.

As Mr. Satawa argues, this case largely turns on “Defendants’ *post facto* litigation strategy of alleging a “safety concern” for prohibiting Plaintiff’s nativity display” (Opening Br. at 13-18.). In a word, this case turns on whether this safety concern is a pretext. As far as your *Amicus* can determine, the question of whether the enforcement of a putatively content-neutral reason for denying speech in a traditional or designated public forum is actually a pretext for content-based discrimination is a case of first impression for this Court.

Although there are a few cases from other jurisdictions that evaluate pretext in a public forum context, they are not particularly helpful in that they do not layout an evaluative rubric for their fact-intensive analyses. *See, e.g., Rock for Life-UMBC v. Hrabowski*, 411 Fed. App'x 541, 551-52 (4th Cir. 2010) (evaluating pretext *vel non* for subject matter discrimination); *Boardley v. United States DOI*, 615 F.3d 508, 517 (D.C. Cir. 2010) (same); *Cullen v. Coakley*, 571 F.3d 167, 176-77 (1st Cir. 2009) (evaluating pretext *vel non* for viewpoint discrimination); *McGuire v. Reilly*, 260 F.3d 36, 45 (1st Cir. 2001) (same); *Olivieri v. Ward*, 801 F.2d 602, 606-08 (2d Cir. 1986) (evaluating pretext *vel non* for speaker identity/subject matter); *Lederman v. N.Y. City Dep't of Parks & Rec.*, Nos. 10-Civ.-4800 & 10-Civ.-5185, 2010 U.S. Dist. LEXIS 71425, *15-*16, *24-*29, *34 (S.D. N.Y. Jul. 16, 2010) (evaluating pretext *vel non* for speaker identity); *Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182, 191 (D. Mass. 1998) (evaluating pretext *vel non* for subject matter discrimination).

While this Court's evaluation of the claim of pretext in the instant case must also be fact specific, your *Amicus* suggests that that analysis will be aided by adapting this Court's pretext framework from another context: the three-part test used for employment discrimination cases described in *Manzer v. Diamond Shamrock Chemicals Corporation*, 29 F.3d 1078, 1084 (6th Cir. 1994), *overruled on other grounds by Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009),

as recognized in *Geiger v. Tower Auto.*, 579 F.3d 614 (6th Cir. 2009). Under the *Manzer* test, the plaintiff can demonstrate pretext by making any one of these three showings: “(1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.” *Id.* (emphasis original) (internal quotation marks and citation omitted).

The *Manzer* test was developed in the context of the burden shifting analysis used in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Although burden shifting is not involved in evaluating pretext in the Free Speech context, the *Manzer* test can nonetheless be helpful to this Court by focusing its attention on the ways in which Mr. Satawa can demonstrate pretext.

Here, the first of the three disjunctive elements is not in play. Mr. Satawa does not claim that the Board never raised safety concerns.

The third element might or might not be relevant in this case. In the employment context, that element largely examines whether “other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff.” *Manzer*, 29 F.3d at 1080. This analysis requires the employees to be employees are “similar in all of the *relevant* aspects.” *Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357, 369 (6th Cir. 2007)

(internal quotation marks and citations omitted). In adapting this element to the Free Speech context, this Court would need to determine which speakers to consider (whether it be those with displays in the median involved, all those who have applied for permits for that median, all those who have applied for permits for any location, or some other pool of candidates) and, what “aspects” are relevant in deciding whether Mr. Satawa and these other speakers are “similar.” There might or might not be other similar speakers and they might or might not have been treated similarly.

However, this Court need not wrestle with all these matters since the second element is relevant and easily employed. Under this element, Mr. Satawa need only show by “circumstantial evidence [that it is] more likely than not” that the Board’s reason is a pretext. *Macy*, 484 F.3d at 368. Focusing on this standard from *Manzer’s* second element will help this Court recognize that traffic safety was not the “actual reason” for the Board’s denial of Mr. Satawa’s permit.

On the one side, the Board asserts that it denied Mr. Satawa’s permit due to safety concerns. On the other side, the evidence in this case shows all the following:

- Mr. Satawa’s crèche had been erected at the same location since 1945. (Opening Br. at 6.)¹
- Mr. Satawa was never informed of any safety concerns prior to the Freedom From Religion Foundation’s complaint about the crèche. *Id.*, n.6.
- The Freedom From Religion Foundation objected to the religious content of Mr. Satawa’s crèche. *Id.* at 6.
- *The next day*, the Board ordered Mr. Satawa to remove the crèche. *Satawa v. Bd. of County Rd. Comm’rs*, 09-CV-14190, 2011 U.S. Dist. LEXIS 42196 at *8, *16 (E.D. Mich. Apr. 19, 2011).
- When Mr. Satawa’s permit denial was discussed at the Board meeting, Mr. Hoepfner stated the following to the Board:

“I received a letter from some anti-nativity scene law firm asking me to get rid of [the crèche]. . . . So I wrote the man a letter and ordered him to remove the nativity scene from the right-of-way. I’ve contacted [Attorney] Ben Aloia and asked him to research it. Ben has informed me that we should not allow this nativity scene to be installed, and he has given me some language that I should respond to the permit. I intend to do that.”

Satawa, 2011 U.S. Dist. LEXIS 42196 at *22.

¹ Here and throughout this list, where your *Amicus* cites Mr. Satawa’s Brief, the Brief contains appropriate citations to the Record.

- When Mr. Satawa’s permit was denied via Mr. Hoepfner’s attorney-advised letter, the *only* reason given was the crèche’s religious content. (Opening Br. at 10.)
- Prior to the denial, no safety evaluation was done. (Opening Br. at 15.)
- The Board’s traffic safety concern has changed over the course of the instant litigation and now consists of a “limited,” “potential” hazard. *Satawa*, 2011 U.S. Dist. LEXIS 42196 at *66; Opening Br. at 15-18.

Thus, when evaluated under the “more likely than not” standard of *Manzer*’s second element, the Board’s traffic safety rationale is revealed to be a pretext.

II. THE BOARD’S INTEREST IN ITS CONTENT-BASED RESTRICTION OF MR. SATAWA’S SPEECH IS NOT COMPELLING NOR NARROWLY TAILORED.

For the State to enforce a content-based restriction on speech, it must show that the restriction serves a compelling state interest and that it is narrowly drawn to achieve that end. *Ashcroft v. ACLU*, 542 U.S. 656, 660-61 (1997).

Furthermore, in order to narrowly tailor the restriction, the government must employ the least restrictive means to further the articulated interest. *Id.* at 663.

A. Traffic safety is not a compelling state interest to justify a content-based restriction on the crèche.

Although traffic safety was a pretext, it is the only interest the Board has proffered, and it is the interest this Court must evaluate. Your *Amicus* agrees with Mr. Satawa’s argument that traffic safety is not a *compelling* interest under First

Amendment free speech analysis. (Opening Br. at 26-27.) Your *Amicus* will offer additional reasons why this is so and why the court below was incorrect when it asserted that traffic safety was a compelling interest, *Satawa v. Bd. of County Rd. Comm'rs*, 09-CV-14190, 2011 U.S. Dist. LEXIS 42196 at *66 (E.D. Mich. Apr. 19, 2011).

This Court has followed the logic of the Supreme Court in *City of Ladue v. Gilleo*, 512 U.S. 43, 48-49 (1994), that the government's interest in regulating signs pursuant to traffic safety concerns was "substantial . . . but not sufficiently compelling to support a content-based restriction," holding that a government's interest in traffic safety is "substantial" and "important" but not compelling. *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 819 (6th Cir. 2005). This view is consistent with the overwhelming majority (if not every) court to have considered the question. *See e.g., Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) ("a municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling"); *Clear Channel Outdoor, Inc. v. Town Bd.*, 352 F. Supp. 2d 297, 304 (N.D.N.Y. 2005) ("traffic safety [is] regularly found to be substantial enough government interests to support a content-neutral regulation, those interests are rarely compelling enough to support a content-based regulation"); and *McCormack v. Township of Clinton*, 872 F. Supp. 1320, 1325 n.2 (D.N.J. 1994) ("while courts certainly have recognized states' and

municipalities' interests in aesthetics and safety, *no court has ever held* that these interests form a compelling justification for a content-based restriction of political speech” (emphasis added)).

Such a state of the cases is unsurprising. As this Court noted addressing a slightly different context, the “‘mere speculation about danger’ is not an adequate basis on which to justify a restriction of speech,” *Saieg v. City of Dearborn*, 641 F.3d 727, 739 (6th Cir. 2011) (quoting *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990)), and traffic safety as a general proposition deals in this type of speculation about possible dangers. In defending a regulation of speech, a government must do more than “‘posit the existence of the disease sought to be cured.’” *Saieg*, 641 F.3d at 339, (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994)).

Pertinent to the instant case, the Board *at most* possessed nothing more than a generalized concern about traffic safety for a display that had been put in the same location of 63 years *without any traffic problems resulting from it*. Thus, whatever the Board’s traffic safety concerns may have been, they were far from compelling the complete restriction on Mr. Satawa’s speech at the median.

B. The Board’s policy is not narrowly tailored.

As noted above, any content-based restriction on speech must be narrowly tailored to meet the government’s stated interests. *Ashcroft*, 542 U.S. at 663.

Assuming *arguendo* that traffic safety is a compelling interest (a proposition with which Mr. Satawa and your *Amicus* disagree), it is beyond dispute that the Board never attempted any narrow tailoring in its content-based denial of Mr. Satawa's permit.

A government's attempt to tailor a content-based restriction on speech is "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Id.* at 874.

Here, the Board used the proverbial butcher knife to do the job of a surgeon's scalpel. In other words, because the Board has at least a putative concern for traffic safety implicated by the displays, it has "generally prohibit[ed]" private median displays, no matter their location. (R-13, Exh. B, Decl. Hoepfner, at §8.) Yet, in point of fact, one can conceive of medians filled with displays, like those on Mound Road that would not affect traffic safety at all. Further, other than speculation, nothing suggests Mr. Satawa's crèche has ever interfered with traffic safety during its sixty-three years of history.

Instead, the Board did not suggest reducing the crèche's size or modifying its placement on the median. Such a lack of attempt to narrowly-tailor the restriction *coupled with* the Board's suggestion that Mr. Satawa place the crèche on *private property* only highlight all the points made in the Brief above—the Board's actions were based on the religious content of the crèche, and it developed a

pretextual rationalization that it was concerned with traffic safety. Yet none of the Board's varying traffic safety concerns justify its restriction of Mr. Satawa's constitutionally protected speech. Instead, the Board kowtowed to the demands of the Freedom From Religion Foundation that it engage in content-based discrimination of the 63-year-old crèche.

CONCLUSION

For the foregoing reasons and those set forth in Mr. Satawa's Brief, your *Amicus* requests that this Court reverse the granting of summary judgment in favor of the Board and enter judgment in favor of Mr. Satawa.

Respectfully submitted
this 9th day of August, 2011

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CERTIFICATE OF COMPLIANCE

Counsel for *Amicus Curiae* The National Legal Foundation certifies in accordance with F.R.A.P. 32(a)(7)(B) that this brief contains 2,441 words of Times New Roman (14 point font) proportional type as calculated on the word count function of Microsoft Office Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2011, I electronically filed the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Satawa v. Bd. of County Road Commissioners of Macomb County, et al.*, No. 11-1612, with the clerk of the court by using the CM/ECF system. I further certify that all counsel of record are registered CM/ECF users.

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**ADDENDUM: DESIGNATION OF RELEVANT
DISTRICT COURT DOCUMENTS**

<u>Record No.</u>	<u>Description</u>
R-13	Defendants' Response to Motion for Temporary Restraining Order/Preliminary Injunction
	Exhibit B Declaration of Defendant Robert Hoepfner