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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UTAH GOSPEL MISSION, FIRST UNITARIAN CHURCH OF SALT LAKE CITY, SHUNDAHAI NETWORK, UTAH NATIONAL ORGANIZATION FOR WOMEN, and LEE J. SIEGEL, Plaintiffs, vs. SALT LAKE CITY CORPORATION, a Municipal Corporation; ROSS C. "ROCKY" ANDERSON, Mayor of Salt Lake City, in his official capacity; and THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, Defendants.	:	PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO THE MOTIONS TO DISMISS OF SALT LAKE CITY CORP. ROSS C. "ROCKY" ANDERSON, AND THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS Civil No. 2:03cv00688 DAK District Judge Kimball Magistrate Judge Alba

INTRODUCTION

This 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 defendants are Salt Lake City Corporation ("City"), Mayor Ross "Rocky" Anderson ("Mayor"), and the Church of Jesus Christ of Latter-Day Saints ("Church" or "LDS Church"). Plaintiffs have alleged that the defendants' actions violate both the Free Speech and the Establishment Clause of the First Amendment. The defendants have moved to dismiss the case under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons advanced below, the defendants' motion should be denied.

STATEMENT OF FACTS

The relevant facts that give rise to this litigation are reported in the Court of Appeals' decision in *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 114 (10th Cir. 2002) (*Main Street I)*. In that case, the Tenth Circuit held that the Main Street Plaza ("Plaza") retained its status as a public forum, notwithstanding its sale to the LDS Church by the City. The case arose from the sale of a portion of Main Street that passed through the LDS campus in downtown Salt Lake City. Under the terms of the original transaction conveying the property, the street was closed to vehicle traffic and converted into a pedestrian plaza. To preserve the public's right of way through the property, the City retained an easement over the Plaza. The easement was written in a way to permit the Church to control behavior and limit First Amendment activity on the Plaza. A coalition of plaintiffs brought suit against the City under 42 U.S.C. § 1983, alleging both free speech and Establishment Clause claims. The LDS Church intervened and vigorously defended its interests. Discovery was extensive and thousands of pages of documents

and testimony were introduced into the record. That record provides the foundation for the claims raised in this case. The facts describing the Plaza's objective attributes and the terms of the original transaction are re-alleged in the complaint. *See* Amended Complaint ¶¶ 15-27 ("Am. Compl.") (filed Dec. 2, 2003) (Rec. Doc. 36).

The following additional findings made by the Court of Appeals 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 of Appeals 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*.

Following the Tenth Circuit decision, Judge Stewart issued an order declaring that the Plaza is a public forum and entered an injunction enjoining the City from further interference with plaintiffs' First Amendment rights – subject to reasonable time, place and manner regulations. The entry of this order, however, did not end the controversy over control over the Main Street Plaza. The parties to the *Main Street I* litigation charted very different courses over how to preserve their rights under the terms of the original transaction. The LDS Church filed a petition for rehearing with the Tenth Circuit and a petition for *certiorari* to the United States Supreme Court. Both petitions were eventually denied. While these petitions were pending, the LDS Church initiated a widely publicized campaign to protect its interests in the Plaza and to reassert control over First Amendment activity. It hoped either to reinstitute the First Amendment restrictions on the Plaza or to take complete title to the property untethered from the

easement reserved by the City. The City Council sided with the Church and added its considerable influence to the debate over how to resolve the conflict about control over Main Street Plaza.

Mayor Anderson initiated his own widely publicized campaign to protect the public's interest in the Plaza and to deflect criticism from the LDS Church (and the City Council) regarding the Court of Appeals' decision. The day of the decision, the Mayor held a news conference on the Plaza announcing that the City would not seek further review of the decision and that his office would formulate reasonable time, place, and manner restrictions. Time after time Mayor Anderson promised to protect the public's interest in the property, vis-à-vis the easement and to issue regulations governing First Amendment activity on the Plaza. In a widely reported dispute, the Mayor repeatedly rejected proposals by the City Council and the LDS Church that the City relinquish the easement. 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." Am. Compl. ¶ 31. 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 given control over the Plaza. The allegations are based on media accounts and from the Mayor's own press releases, materials posted on the City's Web site, City publications and official transcripts of City proceedings. Plaintiffs' allegations are based on the Mayor's own acts, admissions, and omissions, and not on rumors, hearsay, or supposition as the defendants claim. The LDS

Church responded in kind with its own public relations campaign and the actions attributed to it in the complaint are based on the same type of sources and materials. *See id.* ¶¶ 28-48.

Anyone who resides in Salt Lake City cannot be unfamiliar with the controversy involving control over Main Street Plaza. Following the Court of Appeals' decision, the charges and counter charges leveled by the key players in the dispute were widely reported and dominated the local media for many months. Not a day went by that did not involve some development in the Plaza controversy. All of this is a matter of public record and is described in the Complaint as background for the Mayor's eleventh hour decision to change horses and relinquish the easement. *See id.* ¶¶ 28-57.

The original plaintiffs, and other members of the community accustomed to seeing the LDS Church dominate the governmental process, were powerless to stop the City from giving away the hard fought victory in *Main Street I*. They were also powerless to stop the LDS Church from consecrating the Plaza as sacred ground and reconstituting it as an ecclesiastical park rather than a downtown plaza. These allegations lie at the heart of plaintiffs' claim that the Mayor's actions crossed the line from neutral government policymaking to an impermissible endorsement of religion. The decision to relinquish the easement occurred under the most unusual circumstances. The Mayor's office, the City Council, and the LDS Church worked hand in hand to deflect criticism of their decision and to create the appearance that the public interest was being served. The remaining allegations in the Complaint describe the circumstances under which the conveyance occurred and the efforts that were taken by the different parties to ensure that the Plaza continued to function as before. These actions were also widely reported and

are a matter of public record of the kind described above. These allegations are also based on defendants' own acts, admissions, and omissions. They are described in a level of detail that accurately reports the events as they developed on the ground. *See* Am. Compl. ¶¶ 49-57.

Plaintiffs simply ask this Court to draw reasonable inferences from this sequence of events about the motives and purposes behind the City's decision not to enforce the terms of the original warranty deed, and then to relinquish the easement. Plaintiffs also ask the Court to assess the restrictions on First Amendment activity that flow from the City's actions. Plaintiffs have alleged that the decision to relinquish the easement was done to give effect to the terms of the original transaction, and to give preferred access to an exclusive governmental platform to the LDS Church, while creating the false appearance that the public's interest was being furthered and preserved. Moreover, by returning control over the Plaza to the LDS Church, the City has once again brought into focus the First Amendment and Establishment Clause claims that were the foundation for the *Main Street I* litigation, and likewise serve as the basis for this case. The allegations contained in the Complaint provide background, context, and substance to those claims.

Salt Lake City has tried once again to do exactly what the Court of Appeals did not permit in Main Street I – 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 City's motives for relinquishing the easement are a façade for its improper purpose of granting the LDS Church an exclusive license to control speech on Main Street and to stifle dissent. This type of viewpoint discrimination is improper and amounts to an end run around the Court of Appeals' decision. City officials have worked in concert with Church officials to preserve the essential attributes of a public forum without the attendant responsibility of managing it in a viewpoint neutral fashion. In effect, the City wants to have its cake and eat it too.

Plaintiffs allege that these actions violate the First Amendment because they reinstitute the very same restrictions on speech that were declared unconstitutional by the Court of Appeals – regardless of the formalities of title to the property. The Plaza remains the quintessential public forum, and the City and/or the LDS Church are constrained by the First Amendment from unreasonably interfering with First Amendment rights on Salt Lake City's Main Street. To the extent the police power over Main Street has been delegated to the LDS Church, the Church has assumed the mantle of government and is subject to First Amendment limitations. Plaintiffs further allege that the City's actions violate the Establishment Clause because those actions (a) have the purpose and effect of promoting religion, and, in this case, a particular religion; (b) impermissibly entangle church and state by giving the Church authority over an open-space pedestrian plaza in the heart of downtown Salt Lake City; and (c) impermissibly endorse religion by conveying a message to non-Mormons that they are outsiders who are not full members of their political community. The secular interests purportedly

advanced by the transaction are a sham designed to deflect attention from the City's improper sectarian motives for entering into this agreement.

STANDARD OF REVIEW

On a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, 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'." *Summum v. Callaghan*, 130 F.3d 906, 913 (10th Cir. 1997) (quoting *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 543 (10th Cir. 1995)). Dismissal pursuant to Rule 12(b)(6) is appropriate "'only when it appears that the plaintiff[s] can prove no set of facts in support of the claims that would entitle [them] to relief.'" *Id.* (quoting *Yoder v. Honeywell Inc.,* 104 F.3d 1215, 1224 (10th Cir. 1997)). At this stage, the "complaint must be construed liberally, giving the plaintiff the benefit of the doubt." *Johnson v. Chilcott*, 599 F. Supp. 224, 226 (D. Colo. 1984) (citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 n.22 (1979) and *Warth v. Seldin*, 422 U.S. 490 (1975)). Finally, when presented with a motion to dismiss, the Court must keep in mind that dismissal "is a 'harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.'" *Id.* (quoting *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 586-87 (10th Cir. 1994)).

ARGUMENT

I. Plaintiffs' Complaint States a Viable First Amendment Claim

A. Regardless of the Plaza's Status as a Public Forum or Private Property, the City's Decision Not to Enforce the Terms of the Original Warranty Deed, and Subsequently to Amend that Deed, Constitute Impermissible Viewpoint Discrimination

Plaintiffs have alleged that 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 for the primary, if not necessarily exclusive, purpose of allowing the LDS Church to stifle dissent—while at the same time giving the Church an exclusive platform to distribute its own message. If plaintiffs are correct, the City's actions constitute improper viewpoint discrimination. In *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), the Court commented 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. This uniquely factual determination requires that the court "carefully scrutinize the validity of the [City's] reasons" for its actions in order to ensure that they are not simply "a pretext for viewpoint discrimination." *Summum v. Callaghan*, 130 F.3d at 919-20. For purposes of Rule 12(b)(6), it is the plaintiffs, rather than the defendants, who are entitled to the benefit of the doubt.

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 clear. 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; *Summum v. City of Ogden*, 297 F.3d 995, 1005 (10th Cir. 2002).[1]

Thus, regardless of the characterization of the governmental action under consideration, the case law is clear that inquiry into governmental interest and motive *is* relevant, indeed essential, in making out claims of the type plaintiffs assert in this case under the federal Constitution. *See Cornelius*, 473 U.S. at 811-13. In that case, the Supreme Court held that, even in a nonpublic forum, a regulation that excludes some groups from the forum and that is "in fact based on a desire to suppress a particular point of view" violates the First Amendment, notwithstanding the fact that there might be valid and reasonable justifications for the regulation. *Id*. at 812. The Supreme Court remanded that case to the district court "to decide in the first instance whether the exclusion of respondents was impermissibly motivated by a desire to

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[1] For purposes of the Establishment Clause terms, the existence of other valid reasons for government actions cannot rehabilitate a decision that was reached for an exclusive or predominant religious purpose. *Sante Fe, Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (discussing "sham" reasons offered by the government). *See* Section III, *infra.* Whatever differences exist between the First Amendment and the Establishment Clause standard, in this case the difference is not important because plaintiffs have alleged that the City's *post hoc* reasons for failing to enforce the terms of the original warranty deed are, in fact, an attempt to conceal a religious purpose. Nevertheless, it is important to draw the distinction between a religious neutral policy which aids religion, *see Mueller v. Allen*, 463 U.S. 338 (1983), and a policy which gives preferential treatment to religion or the speech of religious groups. Both the First Amendment and the Establishment Clause require government neutrality. *See Capitol Square and Review Advisory Bd. v. Pinette,* 515 U.S. 753, 766 (1995) ("[O]f course giving sectarian religious speech preferential access to a forum so close to the seat of government (or anywhere for that matter) would violate the Establishment Clause (as well as the Free Speech Clause) since it would involve content discrimination.").

suppress a particular point of view." *Id.* at 812-13.[2] 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*, 297 F.3d at 1005. 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 at 919-920 (remanding First Amendment case to district court with orders 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"). *Accord East High School Prism Club,* 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. 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 as part of a campaign to influence public opinion. In fact, a number of City Council members freely admitted that from the outset that they were willing to relinquish the pedestrian

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[2] On remand, the district court allowed discovery regarding defendants' underlying motive and granted a preliminary injunction requiring access to the forum pending trial based in part on evidence that the government's decision to adopt the challenged regulations "was discriminatory and designed to punish advocates" of certain positions. That evidence included the writings of a government official involved in adoption of the regulations that identified the excluded groups by name, as well as his oral statements expressing "distaste" for those groups. *NAACP Legal Defense & Educ. Fund v. Horner*, 636 F.2d 762, 764, 769-70 (D.D.C.), *vacated and remanded based on intervening mootness*, 795 F.2d 215 (D.C. Cir. 1986).

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. *See* Am. Compl. ¶ 57. 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. 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." *Joseph Burstyn, Inc.*, 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.").[3]

The Supreme Court has cautioned against the manipulation of public fora to elevate the speech of one group over another. In *Capitol Square Review and Advisory Board v. Pinette* 515 U.S. 753 (1995), Justice Scalia condemned such a practice:

> Of course, 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.) And one can conceive of a case in which a governmental entity manipulates its administration of a public forum close to the seat of government (or within a government building) in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement that is in fact accurate.

Id. at 766. *See also Freedom from Religion Found. v. City of Marshfield* 203 F.3d 487, 491 (7th Cir. 2000) (cautioning against the sale of a section of city park to avoid the appearance of endorsing a particular religion.).

The courts have taken a dim view of post-litigation government attempts to perpetuate discrimination in the context of race. *See Evans v. Newton*, 382 U.S. (1966) (sale of park to avoid desegregation); *Griffin v. Sch. Bd. of Prince Edward County,* 377 U.S. 218 (1964) (closure of public schools and simultaneous issuance or vouchers to be used for private schools.). The same principle is at work in this case, although the asserted claim involves religious based viewpoint discrimination rather than racial discrimination.

[3] Although the City claims that relinquishing the easement was the only way to cure the First Amendment infirmities of the original transaction, their actions have not only perpetuated the impermissible viewpoint discrimination created by the prior transaction, but have also created an independent Establishment Clause problem by abandoning even the pretense of government neutrality toward religion.

B. The Public Forum Status of the Main Street Plaza Was Not Changed by the Amendments to the Original Warranty Deed

Plaintiffs have alleged that the Main Street Plaza is a public forum despite the City's decision to redefine its interest in the property. Nothing in the Court of Appeals decision holds or suggests that the City can change the public forum status of the property through the formalistic expedient of amending the original warranty deed in a manner that preserves the forum's essential attributes and principle use. This is especially true where it is apparent to everyone that the forum would continue to function just as before. The Plaza's objective attributes as a public forum are what matter, rather than the defendants' attempt to elevate form over substance by their reliance on property and contract law principles.[4] The decision in *Main Street I* flatly rejects this sophistry. 308 F.3d at 1131.

The defendant's formalistic view is that the government always retains authority to close a public forum by, among other things, selling the property. *See Int'l Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 699-700 (1992) (Kennedy, J., concurring). We have no quarrel with this general observation, but clearly it must be understood in the context of the overriding principle that "wherever 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 the purpose of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring). Streets and sidewalks are "those areas of public

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[4] For purposes of Rule 12(b)(6), it is important to emphasize that the public forum inquiry is a uniquely factual determination. It must be evaluated in the context of the Tenth Circuit's discussion of the Plaza's objective attributes in Main Street I, 308 F.3d at 1124-25, and any additional allegations describing the Plaza's primary function and use. *See* Am. Compl. ¶¶15-27. The determination must also be made with due regard to plaintiffs' allegation that the City has manipulated the Plaza's status as a public forum in order to avoid the Tenth Circuit's holding that the Plaza be administered in an even-handed way.

property that may be considered, generally without further inquiry, to be public forum property." *United States v. Grace,* 461 U.S. 173, 179 (1983). The government cannot overcome that presumption by mere fiat; "it must alter the objective physical character or physical uses of the property, and bear the attendant costs." *Lee,* 505 U.S. at 700. Neither the fact that legal title to the streets has passed from the City to the Church nor the fact that the sidewalks no longer look like traditional curb and gutter sidewalks negates the public forum status of municipal sidewalks under circumstances where, as here, they continue to have the essential form and function of municipal sidewalks by design and by deed. The government "may not by its own *ipse dixit* destroy the public forum status of streets and parks which have historically been public forums." *See Grace,* 461 U.S. at 180. The easement may have been extinguished, but the parties' intent to destroy the public forum status of the property cannot obscure the fact that the new agreement preserves the plaza's "objective attributes" as a public forum. *See Arkansas Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 678 (1998). Clearly, the Court of Appeals' focus on the easement in *Main Street I* must be understood in this context. Just as in the first litigation, the City has attempted to change the forum's status without "bearing the attendant costs," by rewriting the original warranty deed to preserve the forum's essential attributes but reinstituting the speech restrictions that were previously invalidated. In effect, "the City continues to want to have its cake and eat it too, but it cannot do so under the First Amendment."[5] 308 F.3d at 1131.

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[5] The defendants argue that, in *Main Street I*, the Tenth Circuit found that the pedestrian easement, rather than Main Street Plaza as a whole, was a public forum. Although Plaintiffs recognize that the Tenth Circuit rested its decision in that case on the existence of the easement, that fact is not dispositive of the case *presently* before this Court. Under the terms of the original warranty deed, the parties specifically provided for a pedestrian easement. As a result, rather than delving into broader and more complicated constitutional questions about the status of Main Street Plaza as a whole, the parties and the Court focused their attention on the easement for purposes of their First Amendment claim. Indeed, even though the

To be sure, the easement has been replaced with a different property interest, which the defendants describe as a future interest rather than a possessory interest. The amended warrant deed, however, also encumbers the property with covenants and servitudes requiring the LDS Church to maintain the Plaza as a landscaped area, and prohibiting the placement of any structures or fences on the property. Moreover, just as with the original Warranty Deed, the City reserved utility easements, access for emergency and police vehicles, and a view corridor provision that restricted the erection of buildings on the Plaza. Finally, the Right of Reverter contained in the original deed was replaced with a Right of Re-Entry as the mechanism for enforcing the use restrictions on the property.

These restrictions, when viewed in combination, belie the City's claim that it has completely abandoned its interest in the property. They are also inconsistent with full private ownership of property typically held in fee simple absolute. Furthermore, as part of the deal announced by the Mayor, the LDS Church gave repeated assurances that public access would not be restricted —subject only to the Church's resurrected right to exclude protestors, which the Church had been granted under the terms of the original sale. The right of access promised by the LDS Church was a key consideration for the Mayor. The assurances given by the Church that the public would continue to have access were repeated many times throughout of these negotiations, until and including the date on which the final transaction closed. It is clear from *Main Street I* that the defendants' characterization of the property as private is not dispositive. 308 F.3d at

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easement itself was undefined in the original agreement, the plaintiffs focused on the walkway space that replaced the old curb and gutter sidewalks. Because the City has relinquished the easement, the case now properly focuses on the Plaza's objective attributes as a whole rather than the more straightforward emphasis on the easement. The easement may have been extinguished but that does not mean that the property no longer has the objective attributes of a public forum.

1131. It is equally clear that, in cases involving street sidewalks and parks, "ownership does not mean absolute dominion." *See Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

Other courts have recognized that private ownership of property does not necessarily nullify citizens' First Amendment rights of free speech and expression. The Ninth Circuit recently grappled with the question of whether 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 943 n.6. When examined through this lens, the court observed that the walkway in front of Venetian Casino connected seamlessly with other public sidewalks and allowed unobstructed pedestrian passage, which is a "normal attribute of a public sidewalk." *Id.* at 943. Based on this determination, the court ruled that First Amendment public forum principles applied. Similarly, in *Main Street I*, the Tenth Circuit 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 pedestrian easement was properly classified as a public forum. 308 F.3d at 1122.

The Ninth Circuit's decision in *Venetian* and the Tenth Circuit's 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 (1946). In *Marsh*, the Court rejected the argument that private ownership of a company town nullified First Amendment protections. *Id.* at 505 ("We do not agree that the corporation's property interests settle the [First Amendment] question."). As Justice

Frankfurter noted,

> [t]itle to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations. And similarly, the technical distinctions on which a finding of "trespass" so often depends are too tenuous to control decision[s] regarding the scope of the vital liberties guaranteed by the Constitution.

Id. at 511 (Frankfurter, J., concurring). *See also Evans v. Newton*, 382 U.S. 296, 302 (1966) ("Like the streets in *Marsh v. Alabama*, the predominant character and purpose of this park are municipal.").[6]

The Plaza's objective attributes and primary function have not changed as a result of the City's decision to relinquish the easement. 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. 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. Under these circumstances, the Plaza remains the quintessential public forum. The City cannot abdicate its responsibility to regulate

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[6] Using this analysis, numerous other courts have found that the First Amendment remains relevant even where the property at issue is ostensibly private. For example, in *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000) (en banc), 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. *See also Thomason v. Jernigan*, 770 F. Supp. 1195, 1201 (E.D. Mich. 1991) (holding that city council's relinquishment of public's right of access on a cul-de-sac leading up to abortion clinic did not change public forum status); *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 marketplace were public fora despite being subject to control of a private development corporation under the terms of a ninety-nine year lease).

speech on the Plaza in a content-neutral way by transferring title to the LDS Church any more than it could do so by delegating responsibility to the LDS Church under the terms of the original transaction.

C. The LDS Church Is a State Actor for Purposes of the First Amendment

As a result of the City's decision to relinquish the easement, the LDS Church has assumed important governmental functions. The Church, on the other hand, counters that they are only exercising the rights of all private property owners. But, as plaintiffs have established above, "ownership" over street sidewalks and parks "does not always mean absolute dominion." *Marsh*, 326 U.S. at 506. Accordingly, the Church has assumed the mantel of government in discharging what is uniquely a governmental function.[7] Under any conception of the Supreme Court's state action jurisprudence, by taking control over Main Street, the Church has become the quintessential state actor. *See Evans*, 382 U.S. at 299 (holding that mere fact of private ownership was not enough to divest the park of its "public character;" and that the Fourteenth Amendment applied "regardless of who now has title under state law."); *Marsh*, 326 U.S. at 505-07; *Venetian*, 257 F.3d at 945 n.6; *Lee v. Katz*, 276 F.3d 550, 554-55 (9th Cir. 2002); *Faneuil Hall*, 745 F. Supp. at 69-70. Therefore, the Church's suppression of speech on Main Street Plaza on the basis of viewpoint constitutes impermissible state action in violation of the First Amendment.

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

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const. amend. I. The Supreme Court generally applies the three-part test developed in *Lemon v.*

[7] Plaintiffs also assert that this arrangement is prohibited by the Establishment Clause. *See infra* Section III.

Kurtzman, 403 U.S. 602, 612-613 (1971) when evaluating claimed violations of the Establishment Clause. Despite criticism of that standard, the Tenth Circuit continues to apply it to such cases, albeit recognizing that "[a]lthough the Supreme Court has been unwilling to endorse *Lemon* as the 'be-all' and 'end-all' in Establishment Clause cases, it has continued to apply it almost exclusively." *Friedman v. Board of County Comm'rs,* 781 F.2d 777, 780 (10th Cir.1985) (en banc) (1985). *See also Summum*, 297 F.3d 995, 1009-10 (10th Cir. 2002). Government action violates the Establishment Clause under *Lemon* if it fails to meet any of the following conditions: (1) it must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster excessive government entanglement with religion. *Lemon,* 403 U.S. at 612-13.

The first and second parts of the test have been modified, or at least recast, to ask whether the challenged government action was intended to endorse or has the effect of endorsing religion, or whether it conveys or attempts to convey the message "that religion or a particular religious belief is favored or preferred." *County of Allegheny v. ACLU,* 492 U.S. 573, 592-93 (1989); *Lynch v. Donnelly,* 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring); *Foremaster v. City of St. George,* 882 F.2d 1485, 1491 (10th Cir. 1989). In applying the effects tests the court "inquire[s] what an average person perceives when viewing the action of the City." *Id.*; *see also Robinson v. Edmond*, 68 F.3d 1226, 1229-30 (10th Cir. 1995). This inquiry has been further refined 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." *Summum*, 297 F.3d at 1010

(citing *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308, 317 (2000)) (considering a challenged policy from the vantage point of "an objective observer" and in light of "the history and context of the community and forum.").

The City's decision not to enforce the terms of the original warranty deed and to relinquish the easement violates all three prongs of the *Lemon* test.

A. "Purpose" Prong of the *Lemon* Test

Plaintiffs disagree with the defendants' cramped formulation of the purpose prong, as the Supreme Court's jurisprudence in this area demonstrates that Establishment Clause cases alleging improper religious purpose demand a fact-intensive inquiry. *See Santa Fe,* 530 U.S. at 290. In a now familiar refrain, defendants maintain that the court is inalterably bound by the secular purposes that are identified in the enabling legislation authorizing the City to relinquish the easement. That view is erroneous as a matter of law and is not supported by the cases cited by the defendants. Although a government's stated purposes for a challenge action are to be given "some deference," it remains the task of the court to "distinguis[h] a sham secular purpose from a sincere one." *Id*. at 308. In this respect, although a totally secular purpose is not required, it is clear that the secular purpose requirement is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring). Furthermore, contrary to the objections raised by the defendants, the events leading up to the City's decision to relinquish the easement, including Mayor Anderson's decision not to enforce the terms of the original warranty deed, are relevant to determining primary purpose. The Supreme Court made this principle abundantly clear in *Santa Fe.* 530 U.S. at 315.

For purposes of overcoming a motion to dismiss, this Court's analysis could begin and end with *Santa Fe* because of the uniquely factual determination that the court is duty bound to undertake. Accepting the pleadings as true, the plaintiffs have alleged that the City's decision not to enforce the terms of the original warranty deed and subsequently to relinquish the easement was made for religious purposes and to benefit the predominant religion. Plaintiffs have further alleged that the City's avowed secular purposes are (1) patently disingenuous and (2) were manufactured to conceal and provide cover for the actual religious basis for that decision. If plaintiffs' allegations are accurate, they are entitled to relief under any conception of the Establishment Clause. *See Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687, 714-15 (1994) (O'Connor, J., concurring) ("The establishment clause prohibits the government from abandoning secular purposes . . . to favor the adherents of any sect or religious organization."). There are numerous ways to distinguish or limit the cases cited by the defendants, but it is sufficient to observe that none of those cases purport to cabin the duty of lower courts to review the government's proffered secular purposes to ensure that its actions were not taken for a predominantly religious purpose or to conceal a religious purpose.

Moreover, none of those cases suggest, let alone hold, that the city's actions are to be judged on the face of the ordinance, without any regard to the circumstances that led to its actions. The Supreme Court's analysis in *Santa Fe*, 530 U.S. at 290, clearly repudiates the defendants' more restricted view of the scope of the inquiry required under the purpose prong. *Santa Fe* involved a challenge to a policy of student-led prayer at high school football games. The policy was defended on the grounds that it was adopted to "foster free expression of private persons… as well as solemnize sporting events,

promote good sportsmanship and student safety, and establish an appropriate environment for competition." *Id.* at 309. In that case, as here, plaintiffs challenged the sincerity of those purposes and alleged that they were adopted to conceal a primary religious purpose. Observing that courts are fully capable of "distinguishing a sham secular purpose from a sincere one," *id*. at 308, the Court repudiated the school district's attempt to recharacterize as secular what was, in actuality, a religious policy. *Id*. at 315.

Of critical importance here, the Court flatly rejected the notion that the circumstances and events leading up to the challenged policy or decision are not relevant to the constitutional inquiry. *Id*. The school district policy under consideration in *Sante Fe* was modified several times. Prior to 1995, the school district's policy authorized a student elected as "Student Chaplain" to deliver a prayer over the public address system before each game. After several students and their parents filed suit challenging the policy under the Establishment Clause, the school district adopted a different policy in August 1995. The policy, entitled "Prayer at Football Games," authorized two student elections, the first to determine whether "invocations" and "benedictions" should be delivered at games, and the second to select the spokesperson to deliver them. *Id.* at 297. The policy omitted any requirement that invocations and benedictions be nonsectarian and nonproselytizing, but contained a fallback provision that automatically added the provision if the preferred policy should be enjoined. *Id.* The policy was then changed again to omit the word "prayers" from the title, and to refer to "messages" and "statements" as well as "invocations." *Id.* at 298.

In holding that the school district had run afoul of the Establishment Clause by sponsoring a religious message, the Court looked, among other things, to "the evolution

of the current policy from the long-sanctioned office of 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation." *Id.* at 309. The Court held that "[t]his history indicates that the District intended to preserve the practice of prayer before football games." *Id.* Later in its decision, the Court held that the school district's history of noncompliance with the Establishment Clause not only could be considered, but in fact had to be considered when determining whether the school district's latest iteration of the challenged policy was constitutional. As the Court stated:

> This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District's long-established tradition of sanctioning student-led prayer at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. . . . Our discussion in the previous sections . . . demonstrates that in this case the District's direct involvement with school prayer exceeds constitutional limits. The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

Id. at 315.

Santa Fe did not break any new ground. Numerous earlier Supreme Court cases and Tenth Circuit cases have held that (1) it is the duty of courts to distinguish a sham secular purpose from a sincere one and (2) that the circumstances and events leading up to the adoption of a religious policy of practice are relevant when determining primary purpose. *See Wallace v. Jaffree,* 472 U.S. 38, 75-76 (1985) (O'Connor J., concurring)

("[c]ourts are capable of distinguishing a sham secular purpose from a sincere one"); *Edwards v. Aguillard*, 482 U.S. 578, 592, 594-595 (1987) (after reviewing the historical context of the statute and the specific events leading to the passage of the statute, stating that "[the court] need not be blind to the legislator's preeminent religious purpose for enacting the statute"); *Stone v. Graham*, 449 U.S. 39, 41 (1981) ("No legislative recitation of a supposed secular purpose can bind us to that fact").[8]

In *Bell v. Little Axe Independent School District* 766 F.2d 1391 (10th Cir. 1985), the Court of Appeals affirmed a lower court's finding that an Oklahoma school district's modified post-litigation equal access policy allowing religious speakers to address the student body was adopted to perpetuate the religious practice that was originally enjoined by the lower court. *Id.* at 1402-04 ("The district's behavior belies its avowed secular purpose and indicates that the policy was actually adopted to conceal a pre-eminent religious purpose."). In *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985) (en banc), the court reiterated this concern. Although that case was decided under the effects prong of the *Lemon* test, the court acknowledged that it could have been decided on the purpose prong just as well. *Id.* at 781 n.3 ("[W]e 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 as least possible that the seal had a secular purpose but that the specific elements of it did not."). *See also Summum v. City of*

[8] *See also Grumet,* 512 U.S. at 707 (invalidating a targeted legislative attempt to create a school district for the benefit of a religious community, rather than through a generally applicable law); *Epperson v. Arkansas*, 393 U.S. 97,107-109 (1968) (concluding, after reviewing history of anti-evolution statutes, that law was product of a upsurge of fundamentalist religious fervor); *Sch. Dist. of Abington Township v. Schempp*, 364 U.S. 203 (1963) (rejecting avowed secular purposes offered in support of school policy of starting each day with Bible readings).

Ogden, 297 F.3d at 1005-09 (rejecting city's *post hoc* justification for excluding rival religious monument from city property containing Ten Commandments display as merely a "façade" for viewpoint discrimination.).[9]

In this case, the City's reasons for not enforcing the terms of the original warranty deed and subsequently relinquishing the easement are extremely transparent, especially when viewed in light of the decision in *Main Street I* and the events following that decision. As observed in the previous section on viewpoint discrimination, the City's actions were taken for the predominantly religious purpose of protecting the LDS Church from unwanted religious speech. That discussion is fully applicable here. 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 this 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. *See* Am. Compl. ¶¶ 60 – 65. 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. The facts set

[9] Cases from other Courts of Appeals are in accord. *See Glassroth v. Moore,* 335 F.3d 1282 (11th Cir. 2003) (courthouse display of Ten Commandments); *ACLU v. McCreary County,* – F.3d – (6th Cir. 2003), available at 2003 WL 23014362 (Dec. 18, 2003) (school and courthouse Ten Commandments display); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (courthouse display of Ten Commandments); *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (Latin Cross); *ACLU v. Rabun,* 698 F.2d 1098 (11th Cir. 1983) (same). All these cases and many more recognize what we urge here that "[b]eyond the assessing the purposes articulated by the state, [courts must] ensure that the stated secular purpose is legitimate by examining the context and content of the government action." *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001).

Glassroth is particularly instructive because Judge Moore argued that the District Court erred by psychoanalyzing him and, as he put it, "dissecting [his] heart and mind" for evidence of improper religious motive. *See Glassroth*, 335 F.3d at 1296 (citing *Wallace v. Jaffree* 472 U.S. 38, 40 (1985)). The court rejected this argument with the observation that *Wallace* involved legislative purpose, not that of an individual government actor. *Id.* The court further observed that no psychoanalysis or dissection is required because of Judge Moore's overt statements and actions. *Id*. This analysis should put to rest any suggestion that Mayor Anderson's words and deeds are somehow not relevant.

forth in the complaint, moreover, support these allegations—especially for purposes of minimal pleading requirements of Fed. R. Civ. P. 12(b)(6).

The circumstances under which the agreement was reached are yet to be fully disclosed, but the transaction did not result from an arm's length negotiation. It resulted from undue influence exerted by the LDS Church and was made in the context of claims of bias, betrayal, and conduct by the Church, which the Mayor himself alleged was unethical, unprincipled, divisive and unconstitutional. The Mayor also understood that his decision would be perceived by the public as pandering to the LDS Church and would reinforce the non-LDS community's distrust of and cynicism about the influence of the LDS Church on the affairs of government. 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. Neither the harm to the public attributable to the release of the easement nor the value of the City's property interest were fairly stated. Plaintiffs have alleged that both the value of the easement and the harm to the public were intentionally understated. *See* Am. Compl. ¶¶ 60 – 65. The agreement negotiated by the Mayor was presented to the public without any attempt to balance the competing public interests at stake.[10]

The so-called benefits to the City from this deal come down to the property and money that was put up by the LDS Church and by wealthy and influential members of the Church. *Id.* The Mayor had already rejected earlier attempts to purchase the easement because of the overriding public interests at stake. All of the other purported benefits

[10] Even the terms of the transaction were drafted with the Church's interests (not the public's) in mind in the event of future litigation. *See* Am. Compl. ¶¶ 49-57. The agreement contains various "poison pill" provisions that run exclusively to the benefit of the LDS Church and to the detriment of the City. There was no reason to include these provisions. Similarly, there was no reason the parties could not have sought a declaration in state court concerning the enforceability of the severability clause contained in the original Warranty Deed. The Mayor could have pursued a number of options to resolve the Plaza controversy, but chose the one most beneficial to the LDS Church. The agreement was reached even before the Supreme Court had ruled on the LDS Church's petition for *certiorari*.

were initially rejected by the Mayor because of the importance of the public interest. The justifications now being advanced by the City are a façade for viewpoint discrimination and improper religious purpose. They are merely window dressing, subterfuge, and a sham for the real and improper reasons that motivated the Mayor's decision in this case.

B. "Effects" Prong of the *Lemon* Test

The effects prong asks "whether, irrespective of the actual government's purpose, the practice . . . conveys a message of endorsement or approval." *Foremaster*, 882 F.2d 1485, 1491 (10th Cir. 1989) (quoting *Lynch*, 465 U.S. at 687). "Implicit symbolic benefit is enough, it need not be material and tangible advancement." *Id*. The court must inquire "what an average observer would see when viewing the action of the city." *Id*. Like the purpose prong, this inquiry is extremely fact-intensive. *See County of Allegheny,* 492 U.S. at 592-600 (ordering removal of courthouse crèche display because content and location of display sends a message of government endorsement); *Santa Fe*, 530 U.S. at 317 ("The actual or perceived endorsement of the [religious] is established by factors beyond just the texts of the policy…including the history and context of the policy in the community and forum."). *See also Foremaster*, 882 F.2d at 1491-92 (remanding case for determination whether an average observer would perceive a message of endorsement when viewing the City logo containing a depiction of the Mormon Temple). Indeed, municipal logos depicting the Latin cross have twice been struck down in this Circuit for violating the effects prong. *See Friedman*, 781 F.2d at 777; *Robinson*, 68 F.3d at 1226. In this case, plaintiffs have alleged sufficient facts showing that 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.

After *Main Street I* was decided, the City and the Church charted very different courses over how to preserve their rights under the terms of the original transaction. The LDS Church pursued every possible avenue for appeal and rehearing. *See* Statement of Facts, *supra*. Salt Lake City, on the other hand, did not pursue any further legal action. While its petitions for further review were pending, the LDS Church initiated a widely publicized campaign to protect its interests in the Plaza and to reassert control over First Amendment activity. It hoped either to reinstitute the First Amendment restrictions on the Plaza or to take complete title to the property untethered from the easement reserved by the City. By contrast, Mayor Anderson -- the person responsible for implementing the decision in *Main Street I* and for enforcing the terms of the original warranty deed – rejected calls for the City to relinquish the easement on legal, ethical, and public policy grounds. *See* Am. Compl. ¶¶ 28-48. In the ensuing months, Mayor Anderson and the LDS Church engaged in a vitriolic and widely reported dispute that (according to the Mayor) threatened to tear the City apart along religious lines.

Ultimately, the Church would prevail and the Mayor would be forced to abandon his decision to follow what he described as the "right" and constitutional course. Time and time again, the Mayor attributed his decision to capitulate to the undue influence of the LDS Church over the affairs of government and to the bias of the all-LDS City Council. He also criticized the tactics of the LDS Church for turning their cause into a religious crusade and using its leverage to put the Church's interests ahead of the interests of the public. In a city with a long history of religious divisiveness, it was plain to the Mayor and the public that the dispute threatened to re-open old wounds. Mayor Anderson was acutely aware of this danger and yielded to the Church's demands, even

though he fully understood that the City's interests in the Plaza were being unfairly subordinated. The Mayor's decision was widely perceived as resulting from the Church's undue influence.[11]

The Mayor's decision to relinquish the easement, in order to be truly understood, must be viewed in the context of the heated public dispute between the LDS Church and the City, vis-a-vis the Mayor. On October 10, 2002, the day following the Court of Appeals' decision, Mayor Anderson held a news conference on the Plaza announcing that the City would not seek further review of the decision and that the City had no plans to relinquish the easement. He also announced that his office would formulate reasonable time, place, and manner restrictions. Articles in the *Salt Lake Tribune* and the *Deseret News* both quote the Mayor as saying that "*it would be a betrayal*" [of the public's interest] to relinquish the easement. 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. *See id.* ¶¶ 28-48.[12]

Thus, even if this Court is able to discern some plausible secular purpose for the City's actions, the fact remains that the decision was made in the context of a widely reported and divisive dispute that reinforces the views of non-Mormons that the City did

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[11] A poll taken after the completion of the transaction showed that 39% of Salt Lake City residents, and 68% of non-Mormons, agreed that the deal resulted from undue influence of the LDS Church and violated the Establishment Clause. The polls were conducted by the LDS Church media, the *Deseret News*, and the local broadcast media station, KSL-TV (NBC). *See id.* ¶ 29.

[12] In a carefully planned media campaign complete with press releases, interviews with reporters, and television and radio appearances, the Mayor repeatedly rejected demands from his critics to relinquish the easement. In a statement typical of dozens that are attributed to him following the Court of Appeals' decision, Mayor Anderson was 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." 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. *Id.* ¶ 31.

not act in a neutral manner and that the City unfailingly acquiesces to the demands of the predominant LDS Church community. This conveys a message that the government both protects/ approves the dominant religion and minimizes the interests of non-adherents. Moreover, it is clear to the reasonable observer that 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.

The City's actions send a distinct 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.[13] The creation of what the LDS Church now openly describes as an "ecclesiastical park" in the heart of downtown Salt Lake City 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 controversy.

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[13] 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. *See, e.g.,* Am. Compl ¶¶ 28-48. The vast majority 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. *See id.* ¶ 53.

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, however, 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. 308 F.3d at Main Street is symbolically identified with the center of municipal life and the marketplace of ideas. It is where democracy lives and prospers. 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. The Establishment Clause does not countenance the kind of merger between church and state that has occurred in this case.

This Court is not the first to have dealt with these issues, and is not writing on a clean slate. In other cases where the state has attempted to "comply" with its constitutional obligations of neutrality by transferring property to a private party, courts have refused to rubber stamp these transactions. Rather, they look to all of the circumstances surrounding a deal to ensure that constitutional requirements have been met. In *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc), the city attempted to sell a small plot of land on Mount Soledad that contained a veterans memorial primarily adorned with a large cross. In its solicitation for bids, the city specified that the purchaser would need to maintain the land as a veterans memorial. Furthermore, the city stated that the cross currently standing on the plot would be included in the transaction and that the continued presence of the cross on the land would presumptively satisfy the requirement that the land be used for a veterans memorial. *Id.* at 1132. Any purchaser who wished to remove the cross would need to do so at its own expense, and the city gave no guidance as to how the purchaser could satisfy its obligation to maintain the plot as a war memorial in the absence of the cross. Under these conditions, even though the bidding process had ostensibly been open to all purchasers, the Ninth Circuit found that the sale had been "structured to provide a valuable financial benefit to those supporting the preservation of the cross." *Id.* at 1133. Accordingly, the court ruled that the sale violated the Establishment Clause.

Similarly, in *Freedom from Religion Foundation v. City of Marshfield*, the Seventh Circuit ruled that even though a city had ended its direct government endorsement of religion when it sold a small portion of a city park containing a statute of Jesus to a private party, the sale had the effect of giving the sectarian message conveyed

by the statute "preferential access" to a public forum, which independently violated the Establishment Clause. 203 F.3d at 496. Finally, a Wisconsin federal district court ruled that a city's sale of a "miniscule portion" of a public park to a private party in order to preserve the presence of a religious monument that had been displayed in the park for decades "prove[d] rather than extinguish[ed]" the city's endorsement of the monument's religious message. *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961, 963 (D. Wisc. 2003).

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 v. West High Sch.,*132 F.3d 542, 545 (10th Cir. 1997), 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.[14] The message sent by this government policy is loud and clear, and constitutionally forbidden.

C. "Entanglement" Prong of the *Lemon* Test

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, Inc.*, 459 U.S. 116 (1982); *Grumet*, 512 U.S. at 687 (plurality opinion); *Joseph Burnstyn, Inc.,* 343 U.S. at 495. The Court of Appeals 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's decision to relinquish the easement excessively entangles church and state and impermissibly delegates governmental authority to a religious entity.

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 Faneuil*

[14] In fact, plaintiffs have alleged that there is a widespread belief among non-Mormons that, while much public policy is made with the approval or acquiescence of the Church, virtually no public policy is made in the face of opposition by the Church, unless so ordered by the courts. Am. Compl. ¶ 62-64. The Plaza controversy has merely reconfirmed the fears of the non-Mormon residents of Salt Lake City and has contributed to their sense of alienation and outsider status in their political community.

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,* 492 U.S. at 590-91. 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)).[15]

III. Plaintiffs Have Stated Valid Legal Claims Against Mayor Anderson

The cardinal rule of pleading is that the person or entity that is responsible for causing the injury alleged and who has the ability to redress the injury should be named in the complaint. There is no rule preventing the naming of multiple parties simply because plaintiffs' claims can be redressed by one of the parties. Mayor Anderson has been sued in his official capacity as the Mayor of Salt Lake City. In that capacity, he is

[15] Plaintiffs do not agree that the defendants' assertion that the Utah Constitution offers no greater protection than the federal Constitution. Nevertheless to the extent that the analysis under the Utah constitution mirrors the analysis of the federal constitutional claims, plaintiffs rest on these arguments in defense of the viability of their state constitutional claims.

accountable for the decisions of the City and has the power to redress plaintiffs' constitutional claims. The Mayor has neither denied the allegations nor asserted that responsibility for the actions described therein rests elsewhere. Nor could he, as he is directly responsible for the violations alleged in plaintiffs' Complaint. Despite the long list of cases cited by the City, there is nothing unusual or prejudicial about official capacity suits seeking to hold public officials accountable for the actions of their governments. These are the officials that are charged with the implementation and enforcement of statutes that are being challenged on constitutional grounds. In fact, particularly in cases involving constitutional claims (such as those alleged by the Plaintiffs), it is common practice to name both the municipality and municipal officials.[16]

The cases cited by the defendants stand for the unremarkable proposition that an official capacity suit is a suit against the entity itself. *See Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985). No legal authority compels the Court to dismiss Mayor Anderson at this stage of the litigation. As the court emphasized in *Crighton v. Schuylkill County*, 882 F. Supp. 411, 415 (E.D. Pa. 1995), "[m]otions to dismiss pursuant to Rule 12(b)(6) test the validity of the complaint. A claim that is redundant is not necessarily invalid." There is no definitive Tenth Circuit rule or precedent mandating dismissal, *Doe v. Douglas County Sch. Dist., RE-1*, 775 F. Supp. 1414, 1416 (D. Colo. 1991), and certainly no Supreme Court precedent requiring such action: "While *Brandon v. Holt* held that judgments against defendants sued in their official capacities imposes liability on the entities they represent, *Brandon* does not direct a district court to dismiss claims against

[16] *See, e.g., Summum v. City of Ogden*, 297 F.3d at 995 (mayor and members of city council sued in their official capacity, along with the city); *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001) (same); *Doe v. Village of Crestwood*, 917 F.2d 1476 (7th Cir. 1991) (same); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (same).

defendants sued in their official capacity when a government entity is also named." *Id.* at 415. *See also Capresecco v. Jenkintown Borough*, 261 F. Supp. 2d 319, 322 (E.D. Pa. 2003) ("Defendants do not claim that the allegations against [the officials] fail to state a claim under § 1983; rather, they merely contend that such claims are redundant. This is not a persuasive basis for dismissal under Rule 12(b)(6)."); *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 261-62 (E.D. Pa. 1990) ("A Rule 12(b)(6) motion does not address the redundancy of claims; it questions only their validity. Redundant claims may all be valid.").[17]

Plaintiffs are the masters of their own complaint and can name as a defendant whomever they want, provided that there is a proper legal basis for the claim. That standard is easily met in this case.

CONCLUSION

For all of the reasons advanced above, the defendants' motions to dismiss should be denied.

[17] To the extent that courts dismiss claims or defendants that may, in fact, be redundant in order to promote judicial economy, they generally do so at the summary judgment phase, and not on a motion to dismiss. *See, e.g., Panaderia La Diana, Inc. v. Salt Lake City Corp.*, Civ. No. 2-99-CV-00147 (C.D. Utah) (relied upon by defendants). Furthermore, in most cases, the court dismisses individual defendants sued in their official capacity so as to prevent any confusion by the jury. *See, e.g., Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991) ("To keep both the City and the officers sued in their official capacity as defendants in this case would have been redundant and possibly confusing to the jury."); *Gallardo v. Bd. of County Comm'rs*, 1995 U.S. Dist. LEXIS 3129 (D. Kan. 1995) (cited in defendants' brief). Such concerns are not present in a case like this, however, where the plaintiffs seek only equitable relief, meaning that a judge, rather than a jury, will be adjudicating plaintiffs' claims.

Respectfully submitted this 5th day of January, 2004.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Plaintiffs' Consolidated Memorandum in Opposition to Motions to Dismiss Filed by Salt Lake City Corp., Ross C. "Rocky" Anderson and the Church of Jesus Christ of Latter-Day Saints was sent to:

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