



December 18, 2024

Concord City Council
c/o Janice Bonenfant
City Clerk
City of Concord
41 Green Street
Concord, NH 03301

Sent via U.S. Mail and Electronic Mail (cityclerk@concordnh.gov)

Dear Concord City Council:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit that defends free speech, is concerned by the reactions to the Satanic Temple's Baphomet display on City Plaza. We commend the City Council for adhering to its constitutional obligations by approving the Satanic Temple's permit application. But the opposition from Mayor Champlin, the extent to which Council approval was non-unanimous, and the reports that the city may reevaluate its policies for next year raise concerns that Concord may deny future applications by the Satanic Temple or other groups based on their views or message.¹ We therefore urge the Council to reaffirm and stick to its commitment to its First Amendment obligation to evaluate applications for displays on public property based on viewpoint-neutral criteria.

The Supreme Court has firmly established that the "public retains strong free speech rights when they venture into public streets and parks, which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."² The authority of government actors like the Concord City Council to "limit expressive activity" in traditional public forums like City Plaza is "sharply circumscribed."³ A public plaza, like other traditional

¹ *E.g.*, Tony Schinella, *Satanic Temple Installation Vandalized Twice, Removed From Concord's City Plaza*, PATCH (Dec. 10, 2024), <https://patch.com/new-hampshire/concord-nh/satanic-temple-installation-damaged-removed-concord-s-city-plaza> ("A soon-to-be-formed ad hoc committee will examine the permitting process for unattended displays on the city plaza with new policies to be considered before next December, Champlin said.").

² *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (cleaned up).

³ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see also* *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003) (recognizing pedestrian plaza that operates as a public thoroughfare as a traditional public forum); *Ark. Soc'y of Freethinkers v. Daniels*, 2009 U.S. Dist. LEXIS 116982 at *12

public fora, can be subject to reasonable and content- and viewpoint-neutral time, place, and manner restrictions on expressive activity—like permit requirements for temporary installations—so long the restrictions are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication.⁴ Even if City Plaza were construed as a limited public forum, Concord still “must not discriminate against speech on the basis of viewpoint,”⁵ which occurs when the government regulates speech “based on ‘the specific motivating ideology or the opinion or perspective of the speaker.’”⁶

For this reason, Concord may not restrict displays simply because, in its view, they reflect an antagonistic or divisive ideology or perspective. Even if—in fact, especially if—the Satanic Temple put up the display, as Mayor Champlin believes, “in order to drive an anti-religious agenda” or as a “calculated political effort,” rather than to promote “religious equity,”⁷ the government may not disfavor “anti-religious” speech. The fact that Concord, or some of those through whom it acts, may believe a display is “a deliberately provocative and disturbing effigy”⁸ does not make it any less constitutionally protected, as “[g]iving offense is a viewpoint.”⁹

A recent Texas case illustrates as much. In 2015, the Texas State Preservation Board approved the Freedom From Religion Foundation’s “Bill of Rights nativity scene” for display in the State Capitol.¹⁰ The display featured “four cutout figures—the Statue of Liberty, George Washington, Thomas Jefferson, and Benjamin Franklin—standing over a manger containing the Bill of Rights.”¹¹ It also included a banner stating “Happy Winter Solstice / At this Season of Winter Solstice, we honor reason and the Bill of Rights (adopted December 15, 1791) / Keep State & Church Separate / On Behalf of Texas Members of the Freedom From Religion Foundation.”¹²

(E.D. Ark. Dec. 16, 2009) (policy permitting displays on state capitol grounds created an unlimited public forum, i.e., a designated public forum, because the policy had no content-based requirements).

⁴ See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

⁵ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); see also *Ctr. for Investigative Reporting v. SEPTA*, 975 F.3d 300, 313 (3rd Cir. 2020) (“viewpoint restrictions are impermissible in any forum”).

⁶ *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

⁷ Michaela Towfighi, *The Satanic Temple’s holiday display in Concord removed after further vandalism*, NHPR (Dec. 10, 2024), <https://www.nhpr.org/nh-news/2024-12-10/satanic-temple-concord-holiday-display-state-house-first-amendment>.

⁸ Kevin Landrigan, *The Satanic Temple statue is back in Concord*, YAHOO! NEWS (Dec. 17, 2024), <https://www.yahoo.com/news/satanic-temple-statue-back-concord-235100869.html>.

⁹ *Matal v. Tam*, 582 U.S. 218, 243 (2017).

¹⁰ *Freedom from Religion Found., Inc. v. Abbott*, 58 F.4th 824, 829 (5th Cir. 2023); see also *Freedom from Religion Found., Inc. v. Abbott*, 2016 U.S. Dist. LEXIS 176114 at *5–6 (W.D. Tex. Dec. 20, 2016).

¹¹ *Freedom from Religion Found., Inc. v. Abbott*, 58 F.4th at 829.

¹² *Id.*

Unlike Concord, which has allowed similar displays at City Plaza,¹³ Texas’s Governor decided to violate the Constitution. He directed the Preservation Board’s executive director to remove the display.¹⁴ As justification, he said the display was intended to “belittle,” “offend,” and “mock[] Christians and Christianity,” “did “not educate” the public or promote religious diversity,¹⁵ and did “nothing to promote morals and the general welfare.”¹⁶ Years of litigation ensued, which Texas could easily have avoided.¹⁷

In the end, the U.S. Court of Appeals for the Fifth Circuit declared that it was “not seriously disputed . . . that the Board’s removal of the exhibit violated the First Amendment.”¹⁸ It accordingly left the district court’s declaratory judgment against Texas intact, and remanded for a potential award of attorney fees,¹⁹ which ultimately cost Texas nearly \$360,000.²⁰

FIRE commends Concord for not following in Texas’s footsteps. But given the extant uncertainty, we request that Concord affirm it will continue to uphold the Constitution and refrain from viewpoint discrimination. Should Concord seek to amend its policy, FIRE would be happy to lend our First Amendment expertise—free of charge—to help ensure it protects freedom of speech.

We respectfully request a substantive response to this letter no later than January 6, 2025.

Sincerely,



M. Brennen VanderVeer
Program Officer, Public Advocacy

Cc: Byron O. Champlin, Mayor

¹³ *FFRF debuts Solstice display in N.H. capital*, FREEDOM FROM RELIGION FOUND. (Dec. 14, 2018), <https://ffrf.org/news/releases/ffrf-debuts-solstice-display-in-n-h-capital/>; *FFRF returns to New Hampshire for the holiday season*, FREEDOM FROM RELIGION FOUND. (Nov. 25, 2019), <https://ffrf.org/news/releases/ffrf-returns-to-new-hampshire-for-the-holiday-season/>; Shawne K. Wickham, *Capital city glows with messages of mutual respect*, N.H. UNION LEADER (Dec. 22, 2022), https://www.unionleader.com/news/capital-city-glows-with-messages-of-mutual-respect/article_788d41e1-c22e-5cc5-b77d-5eee81fa96c8.html.

¹⁴ *Freedom from Religion*, 58 F.4th at 829.

¹⁵ *Freedom from Religion*, 2016 U.S. Dist. LEXIS 176114 at *21.

¹⁶ *Freedom from Religion*, 58 F.4th at 829.

¹⁷ *See id.* at 829–31.

¹⁸ *Id.* at 828.

¹⁹ *Id.* at 837–38.

²⁰ *Gov. Abbott and Texas pay \$358,000 in attorney fees in FFRF’s Bill of Rights case*, FREEDOM FROM RELIGION FOUND. (Aug. 6, 2024), <https://ffrf.org/news/releases/gov-abbott-and-texas-pay-358000-in-attorneys-fees-in-ffrfs-bill-of-rights-case/>.