IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

KAMAL ANWIYA YOUKHANNA, *et al.*,
Plaintiffs,

v.

CITY OF STERLING HEIGHTS, *et al.*,
Defendants.

No. 2:17-cv-10787-GAD-DRG

Hon. Gershwin A. Drain

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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ISSUES PRESENTED

I. Whether the Court should declare the Consent Judgment invalid as a matter of law because it was entered into in violation of state and local zoning laws and there were no findings that it was necessary to rectify a violation of federal law.

II. Whether Plaintiffs are entitled to judgment as a matter of law on their free speech claim because Defendants' prior restraint on their speech at the February 21, 2017 City Council meeting was content- and viewpoint-based in violation of the Free Speech Clause of the First Amendment.

III. Whether Plaintiffs are entitled to judgment as a matter of law on their equal protection claim when Defendants granted the use of a forum (*i.e.*, City Council meeting) to people whose views they found acceptable, but denied use to those, including certain Plaintiffs, wishing to express less favored or more controversial views in violation of the Equal Protection Clause of the Fourteenth Amendment.

IV. Whether Plaintiff Rrasi is entitled to judgment as a matter of law on her unlawful seizure and free speech claims when Defendant Taylor directed her seizure without probable cause and in retaliation for her speech in violation of the First and Fourth Amendments.

V. Whether Plaintiffs are entitled to judgment as a matter of law on their due process claim because Defendants deprived them of proper notice and an opportunity to be heard when the City materially deviated from the decision of the Planning Commission, thus subverting the purpose of the duly conducted notice and comment process and thereby harming the property interests of Plaintiffs in violation of the Due Process Clause of the Fourteenth Amendment.

VI. Whether Plaintiffs are entitled to judgment as a matter of law on their Establishment Clause claim when Defendants' actions had the effect of conveying a message of approval of Islam and its adherents and disapproval of those who are not adherents of Islam, including Plaintiffs, in violation of the Establishment Clause.

VII. Whether Plaintiffs are entitled to judgment as a matter of law on their claim arising under the Michigan Open Meetings Act when Defendant Taylor, the City Council chairman, removed certain Plaintiffs from the City Council meeting on February 21, 2017, and closed the meeting to the general public during the City Council's vote on the Consent Judgment agenda item in violation of the Act.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Am. Atheists, Inc. v. Duncan, 637 F.3d 1095 (10th Cir. 2010)

Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro, 477 F.3d 807 (6th Cir. 2007)

Esperance v. Chesterfield Twp., 89 Mich. App. 456 (Mich. Ct. App. 1979)

Greene v. Barber, 310 F.3d 889 (6th Cir. 2002)

League of Residential Neighborhood Advocates v. City of L.A., 498 F.3d 1052 (9th Cir. 2007)

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)

Lowery v. Jefferson Cty. Bd. of Educ., 586 F.3d 427 (6th Cir. 2009)

Lynch v. Donnelly, 465 U.S. 668 (1984)

Matal v. Tam, 137 S. Ct. 1744 (2017)

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995)

Terry v. Ohio, 392 U.S. 1 (1968)

United States v. Richardson, 949 F.2d 851 (6th Cir. 1991)

Mich. Comp. Laws § 15.263

Mich. Comp. Laws § 125.3502

I. The Consent Judgment Is Invalid.

Because there are *no* findings that the Consent Judgment was *necessary* to rectify an *actual* violation of federal law, it cannot be used as a means to circumvent zoning regulations. *League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d 1052, 1055-56 (9th Cir. 2007); *Perkins v. City of Chi. Heights*, 47 F.3d 212, 216 (7th Cir. 1995); *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 270 (8th Cir. 2011). Defendants are in a legal quandary. They originally told this Court that the Zoning Ordinance standards applied (because they do), but that the City Council only had to "consider" them (*i.e.*, the Council was not required to make any record demonstrating *compliance* with the standards), and thus it was Plaintiffs' burden to prove a negative.[1] Realizing that this position was untenable,[2] Defendants changed course and now claim that there are ***no*** zoning standards (local, state, or otherwise) that apply when the Council approves a special approval land use via a consent judgment, forcing Defendants to concede

[1] The general standards of § 25.01 are *not* "discretionary" (and Defendants should stop saying so)—they are *required*. (Ex. B, McLeod Dep. at 72:17-23). The Planning Commission applied the standards based on the *facts* and properly concluded that the construction did not comply. Defendant Taylor and the City agreed. (Ex. J, Taylor Dep. at 75:25 to 76:1-4; Ex. B, McLeod Dep. at 111:21-25 to 112:1-2). Thus, by Defendants' standards, the Mayor and the City's witness must be closet "Islamophobes." (Defs.' Resp. at 8 [according to Defendants, requiring compliance with § 25.02 equals "personal dislike of Islam"]).

[2] For good reasons, as this litigation demonstrates, both the Zoning Ordinance and the MZEA require "a statement of findings and conclusions . . . which specifies the basis for the decision" when approving a special approval land use. Mich. Comp. Laws § 125.3502(4); (Ex. E, ZO at § 25.03B).

that the Council could approve a nuclear power plant in a residential neighborhood via a consent judgment. (Ex. B, McLeod Dep. at 43:14-25 to 44:1-11). And with a wave of the hand, Defendants dismiss the entire MZEA by claiming that it only ever applies when considering an "application" for special land use.[3] (Defs.' Resp. at 8, n.9). Yet, the Consent Judgment itself proclaims that "AICC is hereby granted special land use approval" (Ex. R, Consent J. ¶ 1.1), thereby reversing the Planning Commission's unanimous decision and effectively approving AICC's application. Defendants have to twist themselves in a pretzel and argue that the standards do not apply because when it comes to consent judgments, the Council is only *ever* an "approving" authority and *never* a "reviewing" authority, and only when it is the latter do they apply. However, § 25.03 specifically refers to the Council as a "reviewing" authority in the context of approving a special approval land use via a consent judgment.[4] (Ex. E, ZO at § 25.03A). Having no legitimate response, Defendants simply state in a footnote that this section (which, by the way, Defendants rely on to argue that no hearing is necessary), somehow doesn't apply. (Defs.' Resp. at 6, n.7). Defendants' parsing of the ordinance and its

[3] Defendants are wrong. The MZEA section they cite only uses the term "application" when addressing notice. Mich. Comp. Laws § 125.3502(2). The section cited by Plaintiffs is not limited to "applications," it applies to all "bodies" with approval authority—which is far more important than "reviewing" authority since the former involves making the *final decision*. *Id*. at § 125.3502(4)

[4] Defendants argue that the Council is *never* a "reviewing" authority, so they can get no traction from the use of the word "if."

dismissing of the MZEA[5] not only requires pretzel twisting, it requires Defendants to disregard the stated intent of the ordinance, which should guide the resolution of any ambiguities (which there are none, but for those Defendants create). Per the ordinance's stated "Intent":

> *The specific intent of these districts is to encourage the construction and continued use of one family dwellings and to prohibit the use of the land which would substantially interfere with the development of one family dwellings.* The city also discourages any land use which, *because of its character and size*, would create requirements and costs for public services substantially in excess of those needed for the one family densities of that zoning district. The city also discourages any land use *which would be incompatible or generate excessive traffic on local streets*.

(Ex. E, ZO at § 3.00 [emphasis added]). The Consent Judgment is invalid.

II. Defendants' Speech Restriction Is Unlawful.

The Council meeting is a public forum. *Lowery v. Jefferson Cty. Bd. of Educ.*, 586 F.3d 427, 432 (6th Cir. 2009). Defendants' prior restraint on Plaintiffs' speech is an impermissible content- and viewpoint-based restriction. *Glendale Assocs., Ltd. v. N.L.R.B.*, 347 F.3d 1145, 1155 (9th Cir. 2003) ("A rule is defined as a content-based restriction on speech when the regulating party must examine the speech to determine if it is acceptable."); *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("Giving offense is a viewpoint."). Contrary to Defendants' argument, the challenged restriction is not a restriction on subject matter. The subject matter was

[5] Where is the MZEA section that authorizes municipalities to completely disregard zoning regulations in order to settle a lawsuit via a consent decree?

the mosque construction. It is a restriction on *viewpoints* espoused on this subject matter, which is unlawful in *any* forum. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) (stating that viewpoint discrimination occurs when the government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). There is no basis to argue otherwise.

III. Plaintiff Rrasi Was Unlawfully Seized in Retaliation for Her Speech.

"[W]hen the officer, by means of physical force *or show of authority*, has in *some way restrained the liberty of a citizen* [we may] conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (emphasis added). "It does not take formal words of arrest or booking [to effect a seizure]. It takes simply the deprivation of liberty under the authority of law." *United States v. Richardson*, 949 F.2d 851, 856-57 (6th Cir. 1991) (internal quotations and citations omitted). Here, there is no factual or legal dispute that Plaintiff Rrasi was seized at the direction of Defendant Taylor in retaliation for Plaintiff Rrasi approaching him *during a recess* (*i.e.*, there was no meeting business that was disrupted) to express her "concerns, why was he [council member Skrzyniarz] allowed to talk about religion when we wasn't." (Ex. N, Rrasi Dep. at 47:16-19). There was no probable cause to justify this seizure, in violation of the First and Fourth

Amendments. *See Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987) (requiring probable cause to seize).

IV. Defendant Taylor Does Not Enjoy Immunity.

"The burden of proof in establishing absolute immunity is on the individual asserting it." *Trevino v. Gates*, 23 F.3d 1480, 1482 (9th Cir. 1994). Defendant Taylor has not met that burden. To begin, legislative immunity only applies to individual (and not official) capacity claims. *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 218 (6th Cir. 2011). And his *ad hoc* decision to seize Plaintiff Rrassi during a recess was not a "legislative" function. "'[S]tripped of all considerations of intent and motive,' the action in substance was not essentially and clearly legislative. . . . [It] did not 'bear all the hallmarks of traditional legislation.'" *Canary v. Osborn*, 211 F.3d 324, 331 (6th Cir. 2000); *Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003) (setting forth factors to "determine whether an action is legislative," including, *inter alia*, "'whether the act involves *ad hoc* decision-making, or the formulation of policy'" and "'whether the act applies to a few individuals, or to the public at large'") (citations omitted).

Defendant Taylor is also not entitled to qualified immunity in that he violated clearly established law. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Nonetheless, he does not enjoy qualified immunity for claims advanced against him in his official capacity. *Hall v. Tollett*, 128 F.3d 418, 430 (6th Cir. 1997).

And his retaliatory intent against Plaintiff Rrasi precludes his qualified immunity claim. *See Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821-25 (6th Cir. 2007) ("Because retaliatory intent proves dispositive of Defendants' claim to qualified immunity, summary judgment was inappropriate."); *see also Greene v. Barber*, 310 F.3d 889, 894 (6th Cir. 2002) (stating that an act taken in retaliation for the exercise of a constitutional right is actionable under § 1983); *Bloch v. Ribar*, 156 F.3d 673, 682 (6th Cir. 1998) ("[G]overnment officials . . . may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. Surely, anyone who takes an oath of office knows—or should know—that much.") (citation omitted).

V. Defendants Violated the Michigan Open Meetings Act ("OMA").[6]

Ordering all private citizens, excluding the media, to leave a public meeting during a vote is contrary to the OMA, which "was enacted to provide openness and accountability in government, and is to be interpreted so as to accomplish this goal." *Esperance v. Chesterfield Twp.*, 89 Mich. App. 456, 463 (Mich. Ct. App. 1979) (stating that the Act "implicitly requires that all parts of the meeting . . . be open to the public"). And an individual Plaintiff can be excluded *only if* he or she

[6] Defendants claim that Plaintiffs were required to name the City Council. (Defs.' Resp. at 10-11). They are mistaken. *See Esperance v. Chesterfield Twp.*, 89 Mich. App. 456, 463 (Mich. Ct. App. 1979) (suing township under OMA for actions taken by the township's board). Also, Defendant Taylor is the chairman of the Council, and he was sued in his official capacity, which is a suit against the entity he represents. *See Ky. v. Graham*, 473 U.S. 159 (1985).

"actually committed" a breach of the peace. Mich. Comp. Laws § 15.263. The City has no authority to remove peaceful citizens based on the actions of others. The Court should declare the City's actions in violation of the OMA, regardless of whether or not it invalidates the Consent Judgment as a result. These types of anti-democratic practices must be stopped.

VI. Defendants Violated the Establishment Clause.

Defendants' actions are not immune from the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) ("Every government practice must be judged . . . to determine whether it constitutes an endorsement or disapproval of religion."). Whether intentionally or unintentionally, Defendants' actions communicated governmental disapproval of the Chaldean Christians and their "good faith concerns" related to the mosque in their neighborhood. Whether "in reality or public perception," Defendants made the Chaldeans feel like second-class citizens,[7] in violation of the Establishment Clause. *See Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1119 (10th Cir. 2010).

CONCLUSION

Plaintiffs request that the Court grant judgment in their favor.

Respectfully submitted,

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[7] (*See* Ex. 3, Youkhanna Decl. ¶¶ 2-8; Ex. 5, Catcho Decl. ¶¶ 4-6).

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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