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' RESPONSE TO STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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The United States of America (hereinafter "Government") submitted a Statement of Interest (Doc. No. 20), urging this Court to reject Plaintiffs' challenge to the Consent Judgment. The Government's arguments are not persuasive and should be rejected.

To begin, the Statement of Interest is long on allegations and short on established facts and controlling law. Indeed, the Government's factual "background" is based almost entirely on its allegations set forth in its complaint filed against the City. (Gov't's Statement of Interest at 2-7 [hereinafter "SOI"]) (citing Complaint, *United States v. Sterling Heights*, 2:16-cv-14366 (E.D. Mich. Dec. 15, 2016)).

In the recitation of its allegations, the Government places great weight on its claim that the City Planner had initially recommended approval of the special approval land use (SALU) permit application submitted by the American Islamic Community Center, Inc. ("AICC"). (SOI at 3). But the Government's reliance on this allegation is misleading. First, the City Planner is not the approval authority for a SALU permit application. That authority belongs principally to the Planning Commission. *See* Zoning Ordinance § 25.01(A). Second, the August 13, 2015 Staff Report included *two* recommendations: a motion to approve the application

and a motion to *deny* it.[1] (Norgrove Decl., Ex. B [August 13 Staff Report] [Doc. No. 9-4]). The Planning Commission ultimately voted to postpone the decision in order to gather more information (and because two commissioners were not present—the commission was taking its fact-finding role quite seriously). And third, the September 10, 2015 Staff Report, which was prepared after attempts were made to gather more information from, and to work with, AICC—attempts which were rebuffed by AICC[2]—makes clear that "the Office of Planning has determined that [AICC] has not met [the required zoning] standards."[3] (Norgrove Decl., Ex. C [September 10 Staff Report] [Doc. No. 9-4]). Consequently, the Government's assertion that "the City Planner concluded that the Application met all of the requirements of the Zoning Ordinance" (SOI at 9) is, at the end of the day, *not* true.

Next, the Government's attempt to impute an illicit motive to the City based on comments made by private citizens at a public hearing and during public

[1] The August 13 Staff Report also states that "[t]he Planning Commission must determine after conducting the public hearing whether all of the criteria set forth in the Section 25.02 General Standards have been met." (Norgrove Decl., Ex. B [p. 3] [Doc. No. 9-4]).

[2] (*See* Norgrove Decl. ¶¶ 16-22 [Doc. No. 9-4] [setting forth AICC's lack of cooperation]).

[3] The Planning Commission voted 6 to 1 at the August 13 hearing to postpone the vote on AICC's application (Defs.' Ex. D [Planning Commission August 13 Minutes][Doc. No. 14-5]) and ultimately voted unanimously (9 to 0) to deny the application at the September 10 hearing (Defs.' Ex. F [Planning Commission September 10 Minutes] [Doc. No. 14-7]).

protests (SOI at 4) is improper and repulsive. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 394 (1983) (acknowledging the Court's "reluctance to attribute unconstitutional motives to the States"). It's repulsive because it shows that the Government has little regard for the First Amendment, and it suggests that the Government is ultimately pursuing this case not for justice, but for a political agenda.[4] Indeed, if a private citizen wants to express concern about Islamic terrorism (or express a view that the Government deems critical of Islam) in a public forum, the First Amendment gives him that right. As stated by Magistrate Judge Grand in a similar context (*i.e.,* private citizens publicly opposing the construction of an Islamic school in their residential neighborhood):

> Courts have a long history of vigorously protecting a wide range of First Amendment activities, including anonymous identities, membership rolls, and associational affiliations. *See, e.g., Highfields Capital Mgmt., L.P. v. Doe,* 385 F. Supp. 2d 969 (N.D. Cal. 2005)*; Britt v. Superior Court*, 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766 (1978); *NAACP v. Alabama*, 357 U.S. 449 (1958). And there can be no question that the activity Davis is alleged to have engaged in (which MCA is not claiming was unlawful) is protected by the First Amendment. As the United States Supreme Court explained in

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[4] The Government fails to mention that during the August 13 Planning Commission hearing, "more than 44 residents" spoke about the current "horrendous" traffic problems on 15 Mile Road and that the City Planner acknowledged that the intersection near the proposed Mosque location has "one of the highest rates for accidents." (Norgrove Decl. ¶ 15 [Doc. No. 9-4]). In short, the Government's political agenda should not be permitted to trump the legitimate concerns of private citizens, particularly when the very zoning laws in question are in place to protect the public interest, not to promote the narrow interests of AICC or the Government.

> *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (internal citations omitted):
>
> > This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open."
>
> Under these indelible principles it is clear that permitting third-party discovery into a private citizen's lawful actions on a matter of public debate would clearly cause her and other individuals to be hesitant about becoming involved in the political process. Indeed, protecting against such a chilling effect is one of the First Amendment's very purposes. *See, e.g., Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807, 810 (D.D.C. 1982) ("[T]here is no doubt that the overwhelming weight of authority is to the effect that forced disclosure of first amendment activities creates a chilling effect which must be balanced against the interests in obtaining the information.").

Muslim Cmty. Ass'n v. Pittsfield Twp., No. 12-cv-10803, 2014 U.S. Dist. LEXIS 184684, *14-15 (E.D. Mich. July 2, 2014) (quashing subpoenas directed toward a private citizen who publicly opposed the construction of an Islamic school in her residential neighborhood).

Allowing the Government to rely on such "evidence" does, in fact, have a chilling effect on speech, and that is evident by the *ad hoc* speech restrictions imposed by the Mayor during the February 21, 2017 City Council meeting at issue here—restrictions which Plaintiffs are appropriately challenging as violations of the First Amendment. (Compl. ¶¶ 87-96 [Doc. No. 1]).

And finally, the Government's spurious allegations that one member of the Planning Commission, Plaintiff Norgrove, harbored anti-Muslim sentiments are just that: spurious. (SOI at 5). Even assuming these bogus allegations were true (which they are not),[5] Plaintiff Norgrove is only one of nine commissioners, and even the City Planner that the Government praises after the August 13, 2015 report ultimately recommended, based upon further investigation and a demonstrated unwillingness of AICC to cooperate with the City (*see* Norgrove Decl. ¶ 16 [Doc. No. 9-4]), that AICC had failed to meet the required zoning standards. The Government's desperate search for a closet "Islamophobe" is (and continues to be) a fool's errand.

The Government's legal arguments fare no better. Indeed, the Government begins its argument by creating a straw man, stating that "Plaintiffs further allege that the City lacked authority to approve a settlement overriding the City Planning Commission's previous denial, absent a court finding that the denial violated federal law or the City admitting to such a violation." (SOI at 8). That is inaccurate.

As Plaintiffs acknowledge, the City Council may approve a SALU permit application by way of a consent decree, but in order to do so, the City Council ***must***

[5] Interestingly, the Government conducted a fact-finding investigation into this matter, which included an interview of Plaintiff Norgrove. Yet, we see no evidence provided in support of the Government's claim—just unsubstantiated and impertinent allegations.

comply with the Zoning Ordinance, as the Zoning Ordinance itself requires. Zoning Ordinance § 25.01(A). In other words, the City "may not waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public," *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1056 (9th Cir. 2007), via a consent decree, *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 270 (8th Cir. 2011) (invalidating a consent decree and stating that "[s]tate actors cannot enter into an agreement allowing them to act outside their legal authority, even if that agreement is styled as a 'consent judgment' and approved by a court"). The Consent Judgment does just that.[6] (*See* Norgrove Decl. ¶¶ 10-30 [setting forth facts demonstrating that the Consent Judgment fails to meet the requisite standards under the Zoning Ordinance]).

In order for such a consent decree to be valid, it must be "*necessary* to rectify a *violation of federal law*." *See Perkins v. City of Chi. Heights*, 47 F.3d 212, 216 (7th Cir. 1995). The Consent Judgment fails to meet this requirement.

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[6] As Plaintiffs have demonstrated previously, on its face the Consent Judgment fails to meet the standards set forth in § 25.02 of the Zoning Ordinance. For starters, the proposed Mosque is not in harmony with the surrounding neighborhood; it will make vehicular and pedestrian traffic more hazardous; it will interfere with the use of adjacent land; its construction undermines public health, safety, and welfare; and its construction and operation are detrimental and injurious to the local neighborhood. *See id.* The Consent Judgment doesn't even address the dangerous traffic situation, and the overflow parking provisions are a sham. They are unenforceable and will inevitably fail (as foreseen by the Consent Judgment itself), shifting the burden to local residents by the imposition of a permit-based parking ordinance. (Consent Judgment § 2.2 [Ex. E, Doc. No. 9-2]).

And the Government's Statement of Interest doesn't rectify this fundamental problem. The Government cannot redo the Consent Judgment by arguing here that there was a violation of federal law that *necessitated* its entry. As stated by the D.C. Circuit:

> In this case, then, if the election plan set forth in the consent decree were intended to remedy an admitted or adjudged violation of the Voting Rights Act, the fact that the Board's actions collided with the state statutory scheme just discussed would not stand in the way of the plan's implementation. *Notably, however, the consent decree in this case specifically provides that no violation of the Voting Rights Act is to be inferred, and the Supreme Court has specifically held that consent decrees should be construed simply as contracts, without reference to the legislation that motivated the plaintiffs to bring suit*. *See United States v. ITT Continental Baking Co.,* 420 U.S. 223, 236-37 (1975); *see also Paralyzed Veterans of Am. v. Washington Metro. Area Transit Auth.,* 894 F.2d 458, 461 (D.C. Cir. 1990) (same). Nor is there any other basis for concluding that the consent decree was anything more than a settlement of the NAACP's claims against the county: The fact that the plan received section 5 preclearance from the Attorney General is irrelevant, as is the fact that the district court in *Campbell* might ultimately have concluded that the county's previous election method was in violation of the Voting Rights Act—neither circumstance establishes that a Voting Rights Act violation did indeed exist, and none is to be presumed from the fact of the consent decree's existence.

Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs, 142 F.3d 468, 477 (D.C. Cir. 1998) (emphasis added); *see also id*. at 477-79 (vacating consent decree implementing an election plan and stating that "if a violation of federal law necessitates a remedy barred by state law, the state law

must give way; if no such violation exists, principles of federalism dictate that state law governs").

In this case, the Government cannot dispute that there were no findings that federal law *necessitated* the entry of the Consent Judgment in this case, and its claim that no findings were necessary (SOI at 12) is simply wrong as a matter of law.[7] The Government is no doubt dismissive of this requirement because no such findings could be made in this case: the parties to the Consent Judgment specifically disavowed any liability. (Muise Decl. ¶¶ 5, 7, Ex. C [Consent Judgment ¶ 6, ECF No. 18], Ex. E [disclaiming "any admission of liability"]; [Consent Judgment, ECF No. 20] [finding same]) (Doc. No. 9-2]). As stated by the Ninth Circuit:

> Before approving any settlement agreement that authorizes a state or municipal entity to disregard its own statutes in the name of federal

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[7] The cases relied upon by the Government are not applicable because they do not involve situations where the consent decree itself was contrary to state law. (*See* SOI at 12) (citing cases). The principle case relied upon by the Government, *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 485 (6th Cir. 2010), involved the question of whether the district court abused its discretion by denying a consent decree based on the lower court's conclusion that the civil penalty provision was too high. The case doesn't come close to resolving this matter in the Government's favor. Rather, the relevant case law overwhelmingly supports Plaintiffs' position. *League of Residential Neighborhood Advocates,* 498 F.3d at 1052; *Perkins*, 47 F.3d at 216; *St. Charles Tower, Inc.*, 643 F.3d at 270; *Cleveland Cnty. Ass'n for Gov't by the People*, 142 F.3d at 477-79; *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997); *see also Vestevich v. W. Bloomfield Twp.*, 245 Mich. App. 759, 764-65 (Mich. Ct. App. 2001) (affirming decision to set aside a consent judgment in a zoning dispute).

> law, a district court must find that there has been or will be an *actual* violation of that federal law.
>
> *Such a finding could not have been made in this case*. While a district court would not be bound by the parties' stipulation that a violation of federal law had occurred or would occur, the district court here was *presented with a settlement agreement* that specifically reiterated the *City's denial* of all of the allegations of the complaint, and disclaimed any "admission of liability . . . under any federal, state, or local law, including [RLUIPA]."

League of Residential Neighborhood Advocates, 498 F.3d at 1058. This is the situation presented by this case. The Government doesn't like it, but its *post hoc* arguments set forth in its Statement of Interest cannot change it.[8]

As firmly stated by the Seventh Circuit,

> [U]pon *properly supported findings* that such a remedy is *necessary* to rectify a *violation of federal law*, the district court can approve a consent decree which overrides state law provisions. *Without such*

[8] The Government's half-hearted attempt at arguing a RLUIPA violation is not only too late, *see supra*, it's unconvincing. (*See* SOI at 10-11). Requiring AICC to comply with the Zoning Ordinance does not violate federal law. *See, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 n.11 (11th Cir. 2004) (requiring religious organizations "to apply for [conditional use permits] allows the zoning commission to consider factors such as size, congruity with existing uses, and availability of parking" and finding "that such reasonable 'run of the mill' zoning considerations do not constitute substantial burdens on religious exercise") (quoting *Lady J. Lingerie, Inc. v. Jacksonville*, 176 F.3d 1358, 1362 (11th Cir. 1999)); *see also Livingston Christian Sch. v. Genoa Charter Twp.*, No. 15-12793, 2016 U.S. Dist. LEXIS 85095, *20 (E.D. Mich. June 30, 2016) ("Operating a school on the Church property is not a 'fundamental tenet' of LCS's faith. It is merely a 'desirable accessory,' especially given the alternative locations at LCS's disposal.") (citing *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983) ("[B]uilding and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs")).

> *findings,* however, parties can only agree to that which they have the power to do outside of litigation.

Perkins, 47 F.3d at 216 (emphasis added).

CONCLUSION

While the Government may have an interest in this case, that interest does not override the fact that the Consent Judgment is invalid, and this Court should so hold.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, 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.

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