

No. 18-1874

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

**KAMAL ANWIYA YOUKHANNA; Wafa Catcho; Mary Jabbo; DEBI
RRASI; JEFFREY NORGROVE; MEGAN MCHUGH,**
Plaintiffs-Appellants,

V.

CITY OF STERLING HEIGHTS; MICHAEL C. TAYLOR, individually and
in his official capacity as Mayor, City of Sterling Heights, Michigan,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE GERSHWIN A. DRAIN
CASE NO. 2:17-cv-10787-GAD-DRG

APPELLANTS' PRINCIPAL BRIEF

ROBERT JOSEPH MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. Box 131098
ANN ARBOR, MICHIGAN 48113
(734) 635-3756

Attorneys for Plaintiffs-Appellants

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
2020 PENNSYLVANIA AVENUE NW
SUITE 189
WASHINGTON, D.C. 20006
(646) 262-0500

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTERESTS**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir.

R.26.1, Plaintiffs-Appellants state the following:

Plaintiffs-Appellants Kamal Anwiya Youkhanna, Wafa Catcho, Marey Jabbo, Debi Rrasi, Jeffrey Norgrove, and Megan McHugh are individual, private parties.

No party is a subsidiary or affiliate of a publicly owned corporation. There are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R.34(a), Plaintiffs respectfully request that this Court hear oral argument. This case presents for review important legal issues regarding the validity of a consent decree entered in a separate federal case that permitted the controversial construction of a large mosque in a residential, Chaldean Christian neighborhood in the City of Sterling Heights, Michigan (“City”). Plaintiffs, who are residents of the City, challenge this consent decree, arguing that it is invalid and unenforceable because it violates state and local zoning regulations, which are enacted for the benefit of the public. The district court judge who approved the consent decree in the prior proceeding and who presided over this case ruled against Plaintiffs and in favor of the City.

Plaintiffs also challenge various acts of Defendants related to the City’s approval of the mosque, alleging that these acts violate Plaintiffs’ rights protected by the First (freedom of speech and Establishment Clause), Fourth (unlawful seizure), and Fourteenth (equal protection and due process) Amendments and the Michigan Open Meetings Act.

Oral argument will assist this Court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

TABLE OF CONTENTS

	Page
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS	i
REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED	ii
TABLE OF AUTHORITIES	vi
PRELIMINARY STATEMENT	1
STATEMENT OF JURISDICTION.....	2
STATEMENT OF THE ISSUES FOR REVIEW	3
STATEMENT OF THE CASE.....	4
A. AICC Permit Application.....	4
B. Local and State Zoning Regulations	6
C. Actions of the Planning Commission.....	9
D. Litigation Against the City	12
E. City Council Meeting of February 21, 2017	12
F. Consent Judgment	16
G. Plaintiffs’ “Good Faith Concerns” about the Mosque	18
H. The District Court’s Opinion and Order	19
1. Consent Judgment Ruling.....	19
2. Michigan Open Meetings Act Ruling	21
3. Due Process Ruling	21

4. First Amendment and Equal Protection Rulings.....	22
5. Fourth Amendment Ruling.....	24
6. Establishment Clause Ruling.....	24
SUMMARY OF THE ARGUMENT	25
STANDARD OF REVIEW	27
ARGUMENT	28
I. THE CONSENT JUDGMENT IS INVALID	28
II. DEFENDANTS’ CONTENT- AND VIEWPOINT-BASED SPEECH RESTRICTION VIOLATES THE FIRST AMENDMENT.....	35
III. DEFENDANTS DEPRIVED PLAINTIFFS OF THE EQUAL PROTECTION OF THE LAW	40
IV. DEFENDANTS VIOLATED PLAINTIFF RRASI’S RIGHTS BY UNLAWFULLY SEIZING HER FOR HER SPEECH.....	41
A. Violation of the Fourth Amendment.....	41
B. No Legislative Immunity	43
V. DEFENDANTS DEPRIVED PLAINTIFFS OF DUE PROCESS	44
VI. DEFENDANTS VIOLATED THE ESTABLISHMENT CLAUSE	46
VII. THE CITY VIOLATED THE MICHIGAN OPEN MEETINGS ACT.....	48
CONCLUSION.....	49
CERTIFICATE OF COMPLIANCE.....	51
CERTIFICATE OF SERVICE	52

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT
DOCUMENTS.....53

TABLE OF AUTHORITIES

Cases	Page
<i>Alexander v. United States</i> , 509 U.S. 544 (1993).....	35
<i>Am. Atheists, Inc. v. Duncan</i> , 637 F.3d 1095 (10th Cir. 2010)	46
<i>Arill v. Maiz</i> , 992 F. Supp. 112 (D.P.R. 1998).....	45
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963).....	35
<i>Bible Believers v. Wayne Cnty.</i> , 805 F.3d 228 (6th Cir. 2015)	27, 28, 41, 49
<i>Bloch v. Ribar</i> , 156 F.3d 673 (6th Cir. 1998)	42, 43
<i>Bd. of Regents of State Colls. v. Roth</i> , 408 U.S. 564 (1972).....	46
<i>Bose Corp. v. Consumers Union of U.S., Inc.</i> , 466 U.S. 485 (1984).....	28
<i>Canary v. Osborn</i> , 211 F.3d 324 (6th Cir. 2000)	43
<i>Centanni v. Eight Unknown Officers</i> , 15 F.3d 587 (6th Cir. 1994)	42
<i>Cleveland Cnty. Ass’n for Gov’t by the People v. Cleveland Cnty. Bd. of Comm’rs</i> , 142 F.3d 468 (D.C. Cir. 1998).....	30
<i>Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.</i> , 447 U.S. 530 (1980).....	36

Cornelius v. NAACP Legal Def. & Educ. Fund,
473 U.S. 788 (1985).....37

Dugan v. Brooks,
818 F.2d 513 (6th Cir. 1987)42

Duran v. City of Douglas,
904 F.2d 1372 (9th Cir. 1990)43

Esperance v. Chesterfield Twp.,
89 Mich. App. 456 (Mich. Ct. App. 1979)48

Glendale Assocs., Ltd. v. N.L.R.B.,
347 F.3d 1145 (9th Cir. 2003)36

Greene v. Barber,
310 F.3d 889 (6th Cir. 2002)42

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.,
515 U.S. 557 (1995).....28

Jobe v. City of Catlettsburg,
409 F. 3d 261 (6th Cir. 2005)23

Kaahumanu v. Cnty. of Maui,
315 F.3d 1215 (9th Cir. 2003)43

Kasper v. Bd. of Election Comm’rs,
814 F.2d 332 (7th Cir. 1987)30

Keith v. Volpe,
118 F.3d 1386 (9th Cir. 1997)30

Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993).....37

League of Residential Neighborhood Advocates v. City of L.A.,
498 F.3d 1052 (9th Cir. 2007)1, 28, 29, 30, 32

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982).....44

Lowery v. Jefferson Cnty. Bd. of Educ.,
586 F.3d 427 (6th Cir. 2009)36

Lynch v. Donnelly,
465 U.S. 668 (1984).....47

Macene v. MJW, Inc.,
951 F.2d 700 (6th Cir. 1991)44

Madison Joint Sch. Dist. v. Wis. Emp’t Relations Comm’n,
429 U.S. 167 (1976).....35, 41

Mapp v. Ohio,
367 U.S. 643 (1961).....41

Matal v. Tam,
137 S. Ct. 1744 (2017).....26, 38, 39

Nasierowski Bros. Inv. Co. v. City of Sterling Heights,
949 F.2d 890 (6th Cir. 1991)45, 46

Perkins v. City of Chi. Heights,
47 F.3d 212 (7th Cir. 1995)29, 32

Police Dep’t of the City of Chi. v. Mosley,
408 U.S. 92 (1972).....35, 40, 41

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819 (1995).....37, 38

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000).....46

Smith v. Jefferson Cnty. Bd. of Sch. Comm’rs,
641 F.3d 197 (6th Cir. 2011)43

St. Charles Tower, Inc. v. Kurtz,
643 F.3d 264 (8th Cir. 2011)29, 32

Terry v. Ohio,
392 U.S. 1 (1968).....41

Town of Castle Rock v. Gonzales,
545 U.S. 748 (2005).....44

Trevino v. Gates,
23 F.3d 1480 (9th Cir. 1994)43

United States v. Mendenhall,
446 U.S. 544 (1980).....41

United States v. Richardson,
949 F.2d 851 (6th Cir. 1991)42

Vestevich v. W. Bloomfield Twp.,
245 Mich. App. 759 (Mich. Ct. App. 2001)30

Ward v. Rock Against Racism,
491 U.S. 781 (1989).....36

Whitman v. Galien Twp.,
288 Mich. App. 672 (Mich. Ct. App. 2010)6, 31

Statutes

28 U.S.C. § 12913

28 U.S.C. § 13312

28 U.S.C. § 1367(a)2

42 U.S.C. § 1983.....2, 13

Mich. Comp. Laws § 15.263.....2, 21, 48

Mich. Comp. Laws § 15.270.....49

Mich. Comp. Laws § 125.3502.....8, 9, 31, 33, 44

Rules

Fed. R. Civ. P. 30(b)(6).....12, 32

Fed. R. Civ. P. 56.....28

Other

City Zoning Ordinance § 3.0034

City Zoning Ordinance § 3.025, 6, 7

City Zoning Ordinance § 3.046

City Zoning Ordinance § 23.0211

City Zoning Ordinance § 25.017, 20, 30, 32

City Zoning Ordinance § 25.028, 9, 18

City Zoning Ordinance § 25.038, 9, 31, 33, ,34

PRELIMINARY STATEMENT

This case challenges the lawfulness of the Consent Judgment entered into between the City and the American Islamic Community Center, Inc. (“AICC”) by which the City granted AICC approval to build a “Religious Community Center”—a large mosque—in a residential area in violation of the City’s Zoning Ordinance (“Zoning Ordinance”) and the Michigan Zoning Enabling Act (“MZEA”).

The legal basis for declaring the Consent Judgment invalid was set forth by the Ninth Circuit in *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007), in which the court invalidated a settlement agreement approved by a federal district court that granted an Orthodox Jewish congregation approval to operate a synagogue in a residential-zoned area. In that case, the Ninth Circuit explained that “[a] federal consent decree or settlement agreement cannot be a means for state officials to evade state law. . . . Municipalities may not waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public.” *Id.* at 1055-56.

Moreover, the process by which the City voted to enter into the Consent Judgment violated Plaintiffs’ due process rights and the Michigan Open Meetings Act. And during the City Council meeting at which the Consent Judgment agenda item was considered and approved by the City, Defendants imposed content- and viewpoint-based restrictions on Plaintiffs’ speech and Defendant Taylor, the City Mayor,

directed City police officers to seize Plaintiff Rrasi because he objected to what she was saying during a recess, all in violation of the First, Fourth, and Fourteenth Amendments. The combined actions of Defendants had the effect of communicating governmental endorsement of Islam and disfavor of the religion of Plaintiffs—many of whom are Chaldean Christians who fled Islamic persecution in Iraq—in violation of the Establishment Clause. This Court should reverse.

STATEMENT OF JURISDICTION

On March 13, 2017, Plaintiffs filed this action, alleging violations under federal and state law, including violations of the First, Fourth, and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and the Michigan Open Meetings Act (Mich. Comp. Laws § 15.263). (Compl., R.1, Pg. ID 1-34). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367(a).

Following the close of discovery, the parties filed cross-motions for summary judgment.

On August 1, 2018, the district court entered an opinion and order granting Defendants' motion for summary judgment and denying Plaintiffs' motion for summary judgment. (Op. & Order, R.89, Pg. ID 4443-65 [hereinafter "Order"]). That same day, Judgment was entered in favor of Defendants and against Plaintiffs. (J., R.90, Pg. ID 4466).

On August 1, 2018, Plaintiffs timely filed a notice of appeal, (Notice of Appeal,

R.91, Pg. ID 4467), seeking review of the District Court's Order. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES FOR REVIEW

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.

STATEMENT OF THE CASE

A. AICC Permit Application.

On July 8, 2015, Jaafar Chehab, on behalf of AICC, submitted an "Application for Planning Commission Approval" (hereinafter "AICC application") for a "Special Approval Land Use" in which he requested approval to build a "Religious Community

Center” on Fifteen Mile Road. (AICC application, R.67-3, Pg. ID 1637-38). The location for this structure is zoned R-60, which is residential. (*Id.*). The proposed “Religious Community Center” is approximately 28,000 square feet (McLeod Dep. at 86:8-10, R.67-4, Pg. ID 1649), with a dome and spires that exceed 60 feet in height. (9/10/15 Staff Report at 4, R.67-5, Pg. ID 1657). It will be located on 4.3 acres. (McLeod Dep. at 87:5-7, R.67-4, Pg. ID 1649). While the building is 28,000 square feet, only 3,024 square feet is designated as “worship space.” Consequently, only approximately one-eighth of the building is designated for religious worship. (McLeod Dep. at 120:11-23, R.67-4, Pg. ID 1651; Architectural plans, R.67-6, Pg. ID 1660-76).

The City’s zoning regulations permit the construction of “[c]hurches, synagogues, mosques and places of group worship” in areas zoned residential. (ZO at § 3.02, R.67-7, Pg. ID 1679). “Such facilities may include *related* community centers.”¹ (*Id.* at § 3.02A4 [emphasis added]). However, a community center, as a principal use, is not permitted in a residential area; it is permitted in the planned office district.² (McLeod Dep. at 66:24-25 to 68:1-7, R.67-4, Pg. ID 1646).

AICC is currently worshipping at a Madison Heights, Michigan location that advertises a broad range of activities beyond those presented during its application

¹ AICC has “approximately 100 members” (AICC Compl. ¶ 7, R.9-2, Pg ID 87), which begs the question: why build a 28,000 square-foot structure?

² While *factually* the building is more like a “community center” with a small worship space, for purposes of this brief, it will be referred to as a “mosque.”

process. (8/13/15 Staff Report at 1 [citing daily prayer, Friday prayer service and Ramadan services], R.67-8, Pg. ID 1702). In fact, AICC was looking for new space for the purpose of offering “educational activities, youth activities, and special events” that the existing space would not accommodate.³ (Norgrove Decl. ¶ 24, R.9-4, Pg. ID 256).

B. Local and State Zoning Regulations.

For the City to approve a special approval land use, the proposed construction must comply with all of the “specific” and “general” standards under the Zoning Ordinance, (McLeod Dep. at 72:17-23, R.67-4, Pg. ID 1647), as well as the MZEA, *see, e.g., Whitman v. Galien Twp.*, 288 Mich. App. 672, 687 (Mich. Ct. App. 2010) (“Because the zoning ordinance does not comply with the MZEA, the zoning board’s decision to grant a special-use permit did not comport with the law . . .”).

Section 3.02 of the Zoning Ordinance addresses special approval land uses, such as “[c]hurches, synagogues, mosques and places of group worship,” which “may be permitted by the Planning Commission subject to the *general* standards of section 25.02 and the *specific* standards imposed for each use.” (ZO at § 3.02 [emphasis added], R.67-7, Pg. ID 1679). The maximum height allowed for a building located within a residentially-zoned district is 30 feet. (*Id.* at § 3.04, Pg. ID 1688-90). However, a place of worship *may* exceed this height so long as it meets other

³ Per AICC, it “offers a variety of services to the local Muslim community.” (Br. of *Amicus Curiae* Am. Islamic Cmty. Ctr. at 1, R.27, Pg. ID 1076).

requirements set forth in the Zoning Ordinance. (McLeod Dep. at 74:23-25 to 76:1-4 [noting that this is a *permissive* requirement], R.67-4, Pg. ID 1648; ZO at § 3.02A1, R.67-7, Pg. ID 1679).

The “authority” for approving a special land use is set forth in § 25.01, which states, in relevant part, that the “Planning Commission shall have the power to approve or disapprove all special approval land uses, except that the City Council shall be the *approving authority*⁴ with respect to special approval land uses which have been *approved* by the City Council . . . 4. As a development pursuant to a consent judgment approved by the City Council.” (ZO at § 25.01, R.67-7, Pg. ID 1691). When considering “all applications for special approval land use except those *reviewed and approved by the City Council as provided in the preceding sentence*, the Planning Commission shall *review* each case individually as to its appropriateness and *consider*” the applicable standards. (*Id.* at § 25.01B, R.67-7, Pg. ID 1691). And “[w]hen the City Council is the reviewing authority with respect to a special approval land use, it . . . *shall consider the same standards as the Planning Commission*.” (*Id.* at § 25.01C [emphasis added], R.67-7, Pg. ID 1692). Thus, when the City Council is approving a special approval land use development pursuant to a consent judgment, as

⁴ In order to “approve” an application for special land use, the requested construction must comply with the zoning regulations. Thus, in order to “approve” the application, there must be a “review” to ensure such compliance. “Approval” necessarily presupposes a “review.”

in this case, it must ensure compliance with the same regulations considered by the Planning Commission (unless federal law requires otherwise).⁵

The “general standards” applicable to *all* special approval land uses are set forth in § 25.02. And each of these standards is *mandatory*. (*Id.* at § 25.02 [stating that the “proposed special approval land use *shall*” comply with the stated standard], Pg. ID 1692-93). Thus, while these standards are considered “general,” they are *mandatory* (“shall”) and they require *facts* to demonstrate compliance. (McLeod Dep. at 37:2-19, R.67-4, Pg. ID 1643; ZO § 25.03B1, R.67-7, Pg. ID 1694; Mich. Comp. Laws § 125.3502).

Section 25.03 sets forth the required “Procedures” that apply to special approval land uses. Subsection A, “*Public Hearing*,”⁶ states, in relevant part, that “[i]f the City Council is the *reviewing authority* for a special approval land use under consideration that is proposed. . . [w]ithin or as part of a development proposed to be developed pursuant to a consent judgment (or amendment) *approved* by the City Council, the City Council *shall* investigate the circumstances of the case prior to approving or denying the request.” (ZO at § 25.03A [emphasis added], R.67-7, Pg. ID 1693-94).

⁵ The City’s position revealed during discovery and accepted by the district court is that when a special approval land use is approved as part of a consent judgment, the City Council *is not required to consider nor comply with any of the standards for such use*. (See McLeod Dep. at 55:15-17, R.67-5, Pg. ID 1645; see also *id.* at 38:6-24, Pg. ID 1643). The City is forced to take this position because the Consent Judgment does not comply with the required standards.

⁶ Plaintiffs’ due process claim is not based upon what the zoning regulations may or may not provide, but with what the Fourteenth Amendment *requires*. See *infra*.

Under subsection B, the ordinance sets forth the required procedures for *approving* a special approval land use. Subsection B states, in relevant part, that “in instances where [the City Council] is the reviewing authority . . . [if] the particular special approval land use(s) is in compliance with the standards [including § 25.02 and state statutes] it shall be approved. The decision shall be incorporated in a statement of findings and conclusions which specifies the basis for the decision and any conditions imposed.” (*Id.* at § 25.03B1 [emphasis added], R.67-7, Pg. ID 1694).

Regardless of the Zoning Ordinance requirements, the MZEA *separately mandates* “a statement of findings and conclusions . . . which specifies the basis for the decision” for all special land use approvals. Mich. Comp. Laws § 125.3502.

Consequently, under both the Zoning Ordinance and the MZEA, when a special land use is approved, regardless of the entity that does the approving, a statement of findings and conclusions specifying the basis for the *approval* is required. This ensures the public that the entity responsible for approving the land use has in fact complied with the requisite standards. The City Council did not do this here when it reversed the unanimous decision of the Planning Commission, which specifically found that the construction does not comply with the zoning standards.

C. Actions of the Planning Commission.

The Planning Commission held a hearing on August 13, 2015, to review AICC’s application. No final decision was rendered. Rather, the Planning

Commission voted to continue the matter to the September 10, 2015 Planning Commission meeting so that it could consider additional information it had requested from AICC and so that a full commission would be present to hear and decide the matter. (Tr. of 8/13/15 Hr'g at 178-82, R.67-9, Pg. ID 1753-54). During the August 13, 2015, hearing, numerous citizens spoke in opposition to the AICC construction, citing traffic and safety as the primary concerns. (*See id.* at 31-150, Pg. ID 1716-46).

Following the September 10, 2015 Planning Commission meeting, the Planning Commission voted *unanimously* to disapprove the AICC's permit application. Based on the *factual* record, the Planning Commission concluded that the proposed construction did not comply with the Zoning Ordinance. As stated in the Planning Commission Staff Report of September 10, 2015, AICC "was afforded an opportunity to consider and propose amendments to the architectural plans to address" the concerns raised by the Planning Commission. However, AICC failed to do so. (9/10/15 Staff Report at 4-5 [noting no changes to ensure compatibility with the land uses in the vicinity in terms of the height, scale, and potential impact on the neighboring areas], R.67-5, Pg. ID 1657-58). The Planning Commission ultimately concluded, *based on the facts*, that the proposed construction does not comply with the Zoning Ordinance, and it made the following specific findings:

- The location and height of the proposed building interferes with and discourages the appropriate development and use of adjacent land and buildings, with the height exceeding that of other structures in the

immediate areas by more than 30' at some points of the proposed building . . . ;

- The square footage of the proposed building in comparison to the size of the parcel is excessive and not compatible with the established long-term development patterns in this R-60 zoning district . . . ;
- Given the approximately 20,500 square foot size of the proposed building and the allocation of floor space to ancillary uses, there is a likely shortage of off-street parking when the principal and ancillary uses of the building are combined, especially on busy prayer hall days. Section 23.02 B.1 of the Ordinance requires additional parking spaces for ancillary uses, which are not addressed in the architectural plans . . . ; and
- The scale and height of the proposed building on the site are not harmonious with the character of existing buildings in the vicinity of this R-60 zoning district

(9/10/15 Staff Report at 4, R.67-5, Pg. ID 1657; Tr. of 9/10/15 Hr'g at 7:23-25 to 13:1-2, R.67-10, Pg. ID 1758-59; Mende Dep. at 16:10-25 to 18:1-25 [reviewing hearing transcript where he explains why the mosque does not, *as a matter of fact*, comply with the zoning ordinance and testifying that his explanation was true], R.67-11, Pg. ID 1769-70). During his testimony, Defendant Taylor confirmed that he “support[ed] the planning commission’s decision in this case,” that “the planning commission arrived at the right decision” and that this decision was “based on legitimate planning and zoning issues.” (Taylor Dep. at 69:2-25 to 76:1-4, R.67-12, Pg. ID 1781-82). Per the testimony of Defendant Taylor:

Q. So as you sit here today, was it your understanding the planning commission properly applied the zoning ordinance to deny the special approval land use application of the AICC?

A. That is my belief, yes.

(Taylor Dep. at 75:25 to 76:1-4, R.67-12, Pg. ID 1782). Christopher McLeod, the City's designated Rule 30(b)(6) witness, testified that "the planning commission clearly outlined their rationale for denying the application. And their specific requirements in terms of their view, the specific requirements—general requirements of special land use were not met. So, from that standpoint, I agree with the planning commission's determination." (McLeod Dep. at 111:21-25 to 112:1-2, R.67-4, Pg. ID 1650).

D. Litigation Against the City.

As a result of the Planning Commission's denial of the AICC application, AICC sued the City. (AICC Compl., R.9-2, Pg ID 84-138). The City denied all wrongdoing. (Answer to AICC Compl., R.9-2, Pg ID 140-93).

E. City Council Meeting of February 21, 2017.

On February 21, 2017, a City Council meeting was held, during which the City Council considered whether to enter into a consent decree that would resolve the pending litigation and approve AICC's request to build the mosque. Counsel for the City prepared only one Agenda Statement for the meeting, and the only "Suggested Action" provided was to approve the Consent Judgment. (Agenda Statement, R.67-13, Pg. ID 1788-89; McLeod Dep. at 135:1-24, R.67-4, Pg. ID 1652). Noticeably, no AICC supporters were present at this meeting—indicating to Plaintiffs that the

decision had already been made. (Youkhanna Dep. at 35:20-25 to 36:1-11; 39:2-25 to 40:1-9, R.67-14, Pg. ID 1793-94). Counsel for the City also suggested to Plaintiff Norgrove that he not attend. (Norgrove Dep. at 91:22-25 to 92:1-23, R.67-15, Pg. ID 1800).

During this meeting, Defendant Taylor, the Mayor and Chairman of the City Council,⁷ imposed a restriction on speakers who wanted to address the Consent Judgment agenda item. More specifically, the Mayor warned the speakers prior to the public comment period on the mosque issue that he would not permit “any comments about anybody’s religion. . . . And any comments regarding other religions or disagreements with religions will be called out of order.” (Taylor Dep. at 52:9-15, R.67-12, Pg. ID 1776). Defendant Taylor testified that he was enforcing a City Council rule that prohibits public comments that “make attacks on people or institutions.”⁸ (Taylor Dep. at 50:23-25 to 51:1-14, R.67-12, Pg. ID 1776; *id.* at 53:8-13 [“If somebody came up at any council meeting and started to talk about somebody else’s religious beliefs or attacking them for their religious beliefs, they would be

⁷ As the chairperson, Defendant Taylor enforces the City Council’s rules, and he is “responsible for giving people the floor, calling people out of order, ruling on points of order . . . [and he] generally [is] responsible for running the meetings.” (Taylor Dep. at 30:12-24, R.67-12, Pg. ID 1775).

⁸ Consequently, City Council “rules” were the moving force behind the violation of Plaintiffs’ constitutional rights. Thus, the municipality is liable. *See Monell v. N.Y. Dep’t of Soc. Servs.*, 436 U.S. 658, 694-95 (1978) (holding that municipalities are liable under 42 U.S.C. § 1983 if municipal policy or custom was the “moving force” behind the alleged unconstitutional action).

called out of order. I was just specifying it at this meeting.”], Pg. ID 1777). The application and enforcement of this speech restriction was demonstrated throughout the meeting, particularly when Defendant Taylor interrupted a woman speaker, calling her out of order and stating, “You’re out of order. You cannot say that you don’t want them to build the mosque because you want to be safe. Do you understand? I’ve made that ruling already.” (Taylor Dep. at 56:23-25 to 57:1-3, R.67-12, Pg. ID 1777-78; *see id.* at 59:4-5 [“I believed that she was making an attack on the AICC.”], Pg. ID 1778; *id.* at 59:20-25 to 60:1-2 [“It related to what was going on back home, and my understanding of what’s going on back home—and back home I understood to be Iraq—is that Christians are being brutally persecuted by Islamic terrorists, and so I found that she was equating the AICC and the mosque with ISIS, and I viewed that as an attack on the AICC. That was not in order with our council rules.”], Pg. ID 1778). This prior restraint on the speakers at the City Council meeting restricted Plaintiffs’ speech.⁹

And while “religion” was off-limits for the citizen speakers, Defendant Taylor allowed council member Doug Skrzyaniarz to lecture the citizens about “religious

⁹ (Youkhanna Dep. at 59:10-25 to 60:1-25, R.67-14, Pg. ID 1796; *see also id.* at 39:18-25 to 40:1-7, Pg. ID 1794; Rrasi Dep. at 43:5-25 to 45:1-7, R.67-16, Pg. ID 1804-05; Catcho Dep. at 33:17-25 to 34:1-11, 22-25; 35:1-25 to 36:1-20; 54:21-25; 56:1-14, R.67-17, Pg. ID 1813-14); Jabbo Dep. at 37:1-22, R.67-18, Pg. ID 1819; McHugh Dep. at 34:25 to 40:1-3, R.67-19, Pg. ID 1825-26; *see also* McHugh Decl. ¶¶ 3-4, R.67-21, Pg. ID 1850-51; Youkhanna Decl. ¶¶ 4-8, R.67-22, Pg. ID 1855-56; Rrasi Decl. ¶ 7, R.67-23, Pg. ID 1859; Catcho Decl. ¶¶ 4-5, R.67-24, Pg. ID 1863).

wars,” “religious liberty,” and the so-called “wall of separation between church and state,” among others, prompting (not surprisingly) an adverse response from some in attendance. (Taylor Dep. at 61:4-25 to 68:1-24; 95:15-25 to 96:1-22, R.67-12, Pg. ID 1779-80, 1783; Youkhanna Dep. at 50:17-21, R.67-14, Pg. ID 1795).

*During a recess,*¹⁰ Plaintiff Rrasi approached Defendant Taylor to express her concerns to the Mayor. Defendant Taylor objected, so he directed two City police officers to seize Plaintiff Rrasi and remove her from the council chambers. (Taylor Dep. at 100:24-25 to 104:1-6, R.67-2, Pg. ID 1784-85; Rrasi Dep. at 45:21-25 to 46:1-7; 47:6-25 to 58:13-19, R.67-16, Pg. ID 1805-08). Defendant Taylor testified that he “[didn’t] have a specific recollection of what she was saying” (Taylor Dep. at 101:5-6, R.67-12, Pg. ID 1785) and that he “[didn’t] think she was threatening harm to me” (*id.* at 102:1-2) (which is contrary to the district court’s conclusion, *see* Order at 20, R.89, Pg. ID 4462 [incorrectly stating that Plaintiff “approached the dais and used gestures in a threatening manner”]). Plaintiff Rrasi does have a specific recollection of what she was saying to the Mayor:

When the [M]ayor called recess, I approached the desk, the bench, whatever you want to call it, and I told them my concerns, why was he [council member Skrzyniarz] allowed to talk about religion when we wasn’t.

¹⁰ Because it was during a recess, there is no basis to argue that Plaintiff Rrasi disrupted any business being conducted during the meeting.

(Rrasi Dep. at 47:16-19, R.67-16, Pg. ID 1805). As a result, Defendant Taylor ordered City police officers to seize Plaintiff Rrasi and remove her from the meeting room. (*See id.* at 47:23-25).

While in police custody, Plaintiff Rrasi was not free to leave. (Rrasi Dep. at 46:3-4; 50:11-17; 58:13-19, R.67-16, Pg. ID 1805, 1806, 1808).

Prior to voting on the Consent Judgment, Defendant Taylor ordered all of the private citizens (except the media), including Plaintiffs Youkhanna, Catcho, Jabbo, and McHugh (Plaintiff Rrasi had already been removed by the police), out of the City Council chambers. (McHugh Decl. ¶ 5, R.67-21, Pg. ID 1851). However, none of the Plaintiffs engaged in any disruption or breach of the peace during the meeting. (Rrasi Dep. at 61:14-22, R.67-21, Pg. ID 1851; Jabbo Dep. 37:23-25 to 38:1, R.67-18, Pg. ID 1819; Youkhanna Dep. 59:1-9, R.67-14, Pg. ID 1796; McHugh Decl. ¶ 5, R.67-21, Pg. ID 1851; Catcho Decl. ¶ 5, R.67-24, Pg. ID 1863).

F. Consent Judgment.

To resolve the AICC litigation “without any admission of liability,” AICC and the City entered into the Consent Judgment. (Consent J. at 2, R.67-20, Pg. ID 1831). On March 10, 2017, the district court approved the Consent Judgment without making any findings that there has been or will be an actual violation of federal law. (*See id.*).

Plaintiffs did not receive notice of the City’s pending decision to reverse the Planning Commission nor were they provided with a copy of the proposed Consent

Judgment prior to the City Council meeting. (Rrasi Decl. ¶ 4, R.9-3, Pg. ID 244). The terms were not accurately and fully disclosed until it was filed by AICC on February 28, 2017. (*Id.*).

The Consent Judgment approved AICC’s request to build a mosque:

AICC is hereby granted special land use approval to develop a 20,500 square foot mosque on the Property. The dome at the center of the mosque and the spires on each end of the building shall be no higher than fifty-three and one-half (53 ½) feet from the base of the building. The dome will have a totally decorative crescent¹¹ on top that will be no taller than five (5) feet, and the spires will include a pole and crescent that is eight (8) feet higher than the top of the spire, as shown on the approved site plan. Details of the dome and crest are attached as Exhibit B. . . .

(Consent J. ¶ 1.1 [emphasis added], R.67-20, Pg. ID 1832). The Consent Judgment does not include the required “statement of findings and conclusions,” which would set forth facts demonstrating that the construction complies with *all* of the zoning standards as mandated by the Zoning Ordinance and the MZEA. (*See id.*). Per the Consent Judgment, the number of parking spaces “was determined based upon *only* the worship area in the building containing 3,205 square feet”—no ancillary uses were considered. (*Id.* at ¶ 2.2 [emphasis added], Pg. ID 1835). The Consent Judgment only requires AICC to make “reasonable efforts” to provide off-site parking and to “monitor parking so that members and guests do not park on adjacent residential streets.” (*Id.*). “[T]he City may institute residential permit parking on the neighboring

¹¹ A “crescent” is a well-known and recognized symbol associated with Islam. (Youkhanna Decl. ¶ 8, R.67-22, Pg. ID 1856).

residential streets to ensure compliance with this provision,” but only so long as the City “appl[ies] a residential parking permit system in an area in the City found to be similarly-situated to the [mosque property].” (*Id.* at ¶ 2.2, Pg. ID 1835-36). The Consent Judgment does not prohibit noisy outdoor activities, such as sports. (*See id.*). The Consent Judgment does not set forth facts explaining how this enormous structure satisfies the mandatory standards set forth in § 25.02. (*See id.*). By its own terms, the Consent Judgment trumps local zoning regulations. (*Id.* at § 2.6 [“Except as modified by this Consent Judgment, AICC shall comply with all City codes”], Pg. ID 1837; § 3.4 [“To the extent that this Consent Judgment *conflicts* with any City Ordinance . . . , the terms of this Consent Judgment shall control.”], Pg. ID 1838).

G. Plaintiffs’ “Good Faith Concerns” about the Mosque.

As Defendant Taylor testified:

A. I heard from a number of Chaldean people that they were upset with the mosque being built on 15 Mile Road, yes.

Q. And what was your understanding of their objections to the mosque being built on 15 Mile Road?

A. Well, I can’t speak for every Chaldean person, but the general theme I heard was that when they lived in Iraq, and they would have a Christian community in Iraq, that Muslims would build a mosque or try to get a foothold near their community as a way to antagonize them and as a way to let them know that Christians could not escape Muslims, and that Muslims would follow them wherever they went. And so when the Chaldean community that lives in Sterling Heights—I think lives throughout the city but it’s concentrated in the 15 mile and Ryan area, and this mosque was proposed in fairly close proximity to 15 Mile and Ryan, and so the Chaldeans that I talked to, a number of them expressed to me that this seemed to be similar to what would happen to them back at home; and as we talked about earlier, a number of Chaldeans—

probably most of them were trying to escape religious persecution in Iraq and saw this as antagonistic, the AICC deciding to put their mosque on 15 Mile Road, and so that's generally what I got from talking with Chaldeans in Sterling Heights.

Q. Are you dismissive of those concerns or do you think they're real concerns that they have expressed to you?

A. I'm not dismissive of those concerns and I believe they're good faith concerns from the Chaldean people who expressed them to me.

(Taylor Dep. at 22:17-25 to 24:1-6 [emphasis added], R.67-12, Pg. ID 1774). It was similar "good faith concerns" that Plaintiffs wanted to express at the February 21, 2017, City Council meeting, but were prevented from doing so by Defendant Taylor's enforcement of the challenged speech restriction. (*See supra* Sec. E & n.9).

H. The District Court's Opinion and Order.

1. Consent Judgment Ruling.

In its ruling, the district court accepted Defendants' argument and held that the Consent Judgment did not violate any zoning regulations because the City Council was authorized to approve the construction of the mosque *without having to comply or demonstrate compliance in any way* with the Zoning Ordinance because the City Council was acting as an "approving authority" and not a "reviewing authority." Per the district court:

[T]he Zoning Code unambiguously requires the City Council to consider the discretionary standards with respect to a special land use application when it is the "reviewing authority." Conversely, when City Council is designated the "approving authority" only, the Zoning Code is silent with respect to the same requirement to consider the discretionary

standards under the Code.¹² *Id.* at § 25.01(A)(4) (stating that the City Council shall be the approving authority with respect to special approval land use pursuant to a consent judgment).

(Order at 11, R.89, Pg. ID 4453).

The district court also held that the Consent Judgment did not violate the MZEA's notice requirement because notice is only required when an "application" for special land use is filed, and while the AICC did file an application, the City complied with the MZEA's notice requirement because it (*i.e.*, the Planning Commission) held two public hearings on the application and denied it. (*Id.* at 13, Pg. ID 4455).

The district court did not address Plaintiffs' arguments, set forth in further detail below, that the Zoning Ordinance does consider the City Council a "reviewing" and "approving" authority when approving a special approval land use via a consent decree and regardless of what the Zoning Ordinance requires, the MZEA, which trumps the Zoning Ordinance, requires *all* special approval land uses, including those approved via a consent decree, to comply with the zoning standards. (*See* Pls.' Mot. for Summ. J. & Br. in Supp. at 2-5, 16-17 [arguing that the Consent Judgment fails to comply with the MZEA as well as the Zoning Ordinance], R.67, Pg. ID 1600-03, 1614-15). Here, the City Council reversed the unanimous decision of the Planning Commission, which made specific findings that the construction did *not* comply with

¹² As noted previously, these standards are not "discretionary," they are required.

the required standards, and the City Council did so without any contrary findings to support its approval decision. *See supra*.

2. Michigan Open Meetings Act Ruling.

The district court concluded that the City did not violate the Open Meetings Act because “the Mayor removed audience members only after public comment was completed and 26 interruptions, several warnings, and 3 forced recesses so that Council could conclude the agenda item.” (Order at 14-15, R.89, Pg. ID 4456-57). After “remov[ing] audience members,” the meeting was thus closed to the general public during the City Council’s crucial vote on the contentious agenda item. Notably, however, the evidence demonstrates that none of the Plaintiffs engaged in any disruptive behavior during the meeting and, as discussed below, the plain language of the Open Meetings Act does not permit the Mayor to close *any* portion of a public meeting to persons who have not committed a “breach of the peace.” *See Mich. Comp. Laws § 15.263*.

3. Due Process Ruling.

The district court concluded that Plaintiffs’ due process claim fails because “Plaintiffs have alleged no cognizable property interest,” claiming that “even neighboring landowners do not have a legally protected property interest with respect to claims of increased traffic and generalized aesthetic and economic loss.” (Order at 14-15, R.89, Pg. ID 4456-57). The district court concluded further:

Here, Plaintiffs Norgrove, Jabbo, Catcho, and Rrasi do not own property near the location of the proposed mosque.¹³ While Youkhanna and McHugh own real property $\frac{3}{4}$ of a mile and 3 miles away from the site of the proposed mosque, there is no evidence that they have been deprived of any interest in that property, or, if they were, that the alleged deprivation is anything other than generalized, unsupported grievances concerning traffic and loss of aesthetic and economic value.

(*Id.* at 16, Pg. ID 4458). As discussed further below, the district court is wrong as a matter of fact (Plaintiffs Rrasi, Catcho, and Jabbo reside *across the street* from the proposed mosque location)¹⁴ and law (as occupiers of land adjacent to the proposed construction, they do have a protected property interest as a matter of state law).

4. First Amendment and Equal Protection Rulings.

As an initial matter, the district court concluded that “[b]ecause [Plaintiffs’] claim involves an intersection of the First Amendment and the Equal Protection Clause, the United States Supreme Court has instructed courts to decide both claims under a First Amendment analysis.” (Order at 17, R.89, Pg. ID 4459). Thus, the district court proceeded to do so.

Citing this Court’s precedent, the district court described the applicable standard as follows: during a City Council meeting, the City “may apply restrictions to

¹³ While the district court is wrong about the requirement to “own” (as opposed to occupy) property affected by the City’s decision, following the district court’s ruling, Plaintiff Rrasi did become the “owner” of the home she resides in (and has been residing in for many years) across the street from the proposed construction location. She was in the process of finalizing this while the case was pending. (*See* Rrasi Decl. ¶ 5, R.67-23, Pg. ID 1859).

¹⁴ (Rrasi Decl. ¶ 2, R.67-23, Pg. ID 1858; Catcho Decl. ¶¶ 2-3, R.67-24, Pg. ID 1862).

the time, place, and manner of speech so long as those restrictions ‘are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications.’” (*Id.* at 17 [quoting *Jobe v. City of Catlettsburg*, 409 F. 3d 261, 266 (6th Cir. 2005)], Pg. ID 4459). Claiming to apply this standard, the district court concluded as follows:

In this case, the purpose of the February 21, 2017 meeting was to discuss the approval of the Consent Judgment, thus comments about Islam were irrelevant to the discussion before the Council. Moreover, Defendant Taylor indicated at the outset that commentary regarding anyone’s religion was not relevant to whether the Consent Judgment should be approved and the reason for the speaking limitation and removal provision was to maintain order and to ensure that all audience members wishing to speak had the opportunity to do so. As such, Plaintiffs have failed to come forward with any evidence that the City’s rules were not content-neutral or narrowly tailored.

Additionally, Plaintiffs had ample alternative channels of communication. The City established a location just outside City Hall, where individuals, including the Plaintiffs, could gather and express their opinions and concerns about individuals who practice Islam, terrorism and other views not germane to whether the Consent Judgment should be approved. Lastly, the contact information for each Councilmember is available on the City’s website and Plaintiffs were able to contact the members to express their views.

(Order at 19, R.89, Pg. ID 4461). As discussed below, the district court is mistaken.

The challenged restrictions are content- *and* viewpoint-based in violation of the First and Fourteenth Amendments.

5. Fourth Amendment Ruling.

The district court began its ruling on the unlawful seizure issue by stating that “the February 21, 2017 meeting was a limited public forum and Defendant Taylor was allowed to restrict non-germane speech and remove individuals who were being disruptive without violating the Constitution.” (Order at 20, R.89, Pg. ID 4462). The district court also noted that “interference with a city official during the performance of official duties is a misdemeanor offense.” (*Id.*).

The district court based its ruling in favor of Defendants on an erroneous finding that “the record reveals that Plaintiff Rrasi approached the dais and used gestures in a threatening manner.” (*Id.*). The district court then incorrectly asserted that Plaintiff Rrasi was “escorted out of Chambers when she refused to leave after being called out of order by Defendant Taylor.” (*Id.*). Alternatively, the district court concluded, with no analysis, that “even if an unlawful seizure occurred, Defendant Taylor would be entitled to immunity because he was engaged in a legislative activity.” (*Id.*).

6. Establishment Clause Ruling.

The district court began its analysis by stating that “Government action does not violate the Establishment Clause where it has a secular legislative purpose, its principal or primary effect neither advances nor inhibits religion by conveying a message that the government was endorsing a religion, and it does not foster an

excessive government entanglement with religion.” (Order at 21, R.89, Pg. ID 4463).

The district court noted that when determining the purpose or effect of government action under the Establishment Clause, the court views the evidence from the perspective of an informed, reasonable observer. (*Id.*). The district court concluded as follows:

Based on the evidence, the Court is compelled to conclude that a reasonable observer would know that the purpose of the speech restrictions at the Council meeting were designed to facilitate an orderly and productive meeting that permitted all audience members an opportunity to speak on whether the Consent Judgment should be approved. The purpose of the Consent Judgment was to permit the AICC the free exercise of religion through a special land use and to resolve pending litigation against the City. Moreover, the City has no connection to the AICC or the proposed mosque, thus there is no entanglement with Islam. Here, the City did not violate the Establishment Clause by enabling the AICC’s members the free exercise of religion by approving the Consent Judgment and thereby permitting a special land use for the construction of the mosque.

(*Id.* at 21-22, Pg. ID 4463-64).

SUMMARY OF THE ARGUMENT

The Consent Judgment is invalid because it permits the construction of the AICC mosque without complying with the Zoning Ordinance and the MZEA, and there are no findings that the Consent Judgment was necessary to rectify an actual violation of federal law. Indeed, the Consent Judgment fails to set forth the required findings and conclusion demonstrating compliance with state and local zoning regulations (because it does not comply), rendering it invalid as a matter of law.

Defendants' speech restriction is both content- and viewpoint-based. The very basis for this restriction (*i.e.*, Defendants did not want any comments during the public hearing on the Consent Judgment agenda item to offend anyone's religion) demonstrates that it is an unlawful viewpoint-based restriction as a matter of law. U.S. Supreme Court precedent requires this Court to reverse and rule in Plaintiffs' favor. *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("Giving offense is a viewpoint.").

Pursuant to the Equal Protection Clause, the government may not grant the use of a forum, such as a City Council meeting, to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views, which is precisely what Defendants have done here.

Defendant Taylor directed the seizure of Plaintiff Rrasi during a recess without probable cause and in retaliation for Plaintiff Rrasi's speech in violation of the First and Fourth Amendments. Defendant Taylor's *ad hoc* decision to seize Plaintiff Rrasi during a recess was not a "legislative" function. Therefore, he does not enjoy immunity from the claims advanced against him in his individual capacity.

The Planning Commission unanimously denied AICC's permit application. However, the City Council *completely reversed* this decision without notifying persons whose property is affected by this decision (Plaintiffs) that it was going to do so, and the City Council failed to provide notice of the terms and conditions of the

Consent Judgment, which was not publicly disclosed until after it was approved, in violation of the Due Process Clause of the Fourteenth Amendment.

The Establishment Clause forbids the government from making adherence to a religion relevant in any way to a person's standing in the political community. Actions which have the effect of communicating governmental endorsement or disapproval of religion, *whether intentionally or unintentionally*, make religion relevant, in reality *or public perception*, to status in the political community and run afoul of this prohibition. Defendants' actions here had the effect of communicating governmental endorsement of Islam and disfavor of the Chaldean Christians who opposed the mosque construction in violation of the Establishment Clause.

Finally, during the City Council's crucial vote on the Consent Judgment agenda item, Defendant Taylor ordered all private citizens (excluding media but including certain Plaintiffs) to leave the council chambers. However, *none* of the Plaintiffs engaged in any disruptive behavior during the meeting and the plain language of the Open Meetings Act does not permit the Mayor to close *any* portion of a public meeting to persons who have *not* committed a "breach of the peace."

STANDARD OF REVIEW

This Court reviews *de novo* an appeal from a grant of summary judgment. *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 242 (6th Cir. 2015). Summary judgment is appropriate when there exists no genuine dispute with respect to the

material facts and, in light of the facts presented, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. However, “[t]he facts must be viewed in the light most favorable to the non-moving party and the benefit of all reasonable inferences in favor of the non-movant must be afforded to those facts.” *Bible Believers*, 805 F.3d at 242 (reversing the grant of summary judgment by the district court in favor of the defendants and remanding for entry of summary judgment in favor of the plaintiffs).

Additionally, because this case implicates First Amendment rights, this Court must closely scrutinize the record without any deference to the district court. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995) (requiring courts to “conduct an independent examination of the record as a whole, without deference to the trial court” in cases involving the First Amendment); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (same).

ARGUMENT

I. THE CONSENT JUDGMENT IS INVALID.

In *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007), the court invalidated a settlement agreement approved by a federal district court that granted an Orthodox Jewish congregation approval to operate a synagogue in a residential-zoned area, explaining that “[a] federal consent decree or settlement agreement cannot be a means for state officials to evade state

law. . . . Municipalities may not waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public.” *Id.* at 1055-56.

In its decision, the court observed that “[b]y placing its imprimatur on the Settlement Agreement, the district court effectively authorized the City to disregard its local ordinances in the name of RLUIPA.” *Id.* at 1058. Per the court:

Before approving any settlement agreement that authorizes a state or municipal entity to disregard its own statutes in the name of federal 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 Consent Judgment was approved by the district court without any findings that it was necessary to rectify a *violation of federal law*. *Perkins v. City of Chi. Heights*, 47 F.3d 212, 216 (7th Cir. 1995) (stating that without “properly supported findings that such a remedy is necessary to rectify a violation of federal law,” the “parties can only agree to that which they have the power to do outside of litigation”); *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 270 (8th Cir. 2011) (invalidating a consent decree and stating, “State 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”); *Kasper v. Bd. of Election Comm’rs*, 814 F.2d 332, 341-42 (7th Cir. 1987) (same); *Cleveland Cnty. Ass’n for Gov’t by the People v. Cleveland Cnty. Bd. of Comm’rs*, 142 F.3d 468, 477-79 (D.C. Cir. 1998) (same); *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (same); *Vestevich v. W. Bloomfield Twp.*, 245 Mich. App. 759, 764-65 (Mich. Ct. App. 2001) (same).

League of Residential Neighborhood Advocates (and the other cases cited here) are not distinguishable from the instant matter. While the City Council has authority under the Zoning Ordinance to approve a special approval land use via a Consent Judgment, it must still do so pursuant to the requirements of the Zoning Ordinance and the MZEA because there was no finding that the Consent Judgment was necessary to rectify a federal law violation. Section § 25.01 expressly requires the City Council to “consider the same standards as the Planning Commission under the special approval land use criteria.” And this makes sense. The Zoning Ordinance is not a mere inconvenience that the council members can dispense with by simply raising their hands in a vote so as to end a politically-charged lawsuit, particularly when federal law does not necessitate such action. *See League of Residential Neighborhood Advocates*, 498 F.3d at 1057 (“[W]e reject any argument that the City may circumvent its zoning procedures by referencing its general authority to settle litigation under § 273(c) of the city charter.”). As the *approval* authority (which necessarily

encompasses reviewing the proposed construction, particularly when it is reversing the unanimous decision of the Planning Commission), the City Council is required to consider and comply with all of the zoning regulations. And because a standard is “general” does not mean it can be ignored. It means that there must be some *factual* findings to demonstrate that the applicant meets the standard. There is *nothing* in the Consent Judgment to show that the proposed mosque meets the standards that served as the basis for the Planning Commission’s unanimous denial of the AICC application (because it can’t), as required by the Zoning Ordinance¹⁵ and the MZEA. Thus, irrespective of the Zoning Ordinance requirements, the MZEA requires a statement of factual findings and conclusions to support every approval of a special land use. *See* Mich. Comp. Laws § 125.3502 (mandating “a statement of findings and conclusions . . . which specifies the basis for the decision” for all special land use approvals). And because the City Council did not comply with the MZEA, it cannot hide behind the language (or alleged “silence,” per the district court) of its Zoning Ordinance because doing so conflicts with the MZEA. *See Whitman*, 288 Mich. App. at 687 (“Because the zoning ordinance does not comply with the MZEA, the zoning board’s decision to grant a special-use permit did not comport with the law, and the circuit court erred by affirming the board’s decision. . . . We vacate the special-use permit.”).

¹⁵ (ZO at § 25.03B1 [requiring (“shall”) the approval decision to “be incorporated in a statement of findings and conclusions which specifies the basis for the decision and any conditions imposed”], R.67-7, Pg. ID 1694).

The district court concluded that because the City Council is only an “approving authority” under the Zoning Ordinance, it need not apply *any* standards. This is the position the City was forced to take, and which the district court accepted, because the Consent Judgment does not comply with the Zoning Ordinance standards. Indeed, per the City’s position (as testified to by its designated witness under Rule 30(b)(6)), the City Council could theoretically approve the construction of a nuclear power plant in a residential area via a consent judgment. (McLeod Dep. at 43:14-25 to 44:1-11, R.67-4, Pg. ID 1644).

As the case law demonstrates, 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*, 498 F.3d at 1055-56; *Perkins*, 47 F.3d at 216; *St. Charles Tower, Inc.*, 643 F.3d at 270. Defendants were in a legal quandary from the very beginning. They originally told the district 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.¹⁶ (*See* Defs.’ Br. in Opp’n to Pls.’ Mot. for Prelim. Inj. at 12 [“[T]he Zoning Ordinance grants the City Council the same

¹⁶ As noted, the general standards of § 25.01 are not “discretionary”—they are *required*. 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.

authority as the Planning Commission to approve a special land use so long as the same ‘standards’ are ‘considered.’”], R.14, Pg. ID. 520). Realizing that this position was untenable,¹⁷ Defendants changed course and argued 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, as noted above, to concede that the Council could approve a nuclear power plant in a residential neighborhood via a consent judgment. (McLeod Dep. at 43:14-25 to 44:1-11, R.67-4, Pg. ID 1644). Defendants (and the district court) also dismiss the entire MZEA by claiming that it only ever applies when considering an “application” for special land use.¹⁸ Yet, the Consent Judgment itself proclaims that “AICC is hereby granted special land use approval” (Consent J. ¶ 1.1, R.67-20, Pg. ID 1832), thereby reversing the Planning Commission’s unanimous decision and effectively approving AICC’s application. Defendants had 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

¹⁷ 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); (ZO at § 25.03B, R.67-7, Pg. ID 1694

¹⁸ Defendants and the district court 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)

it is the latter do they apply—the district court accepted this argument. 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. (ZO at § 25.03A, R.67-7, Pg. ID 1693-94). Defendants’ (and the district court’s) parsing of the ordinance and their dismissing of the MZEA¹⁹ not only requires pretzel twisting, it requires Defendants (and the district court) to disregard the stated intent of the ordinance, which should guide the resolution of any ambiguities (which there are none, but for those Defendants and the district court create). Indeed, this stated intent breaks the “silence” relied upon by the district court. (*See* Order at 11 [asserting that the “Zoning Code is silent” as to whether the City Council must apply the zoning standards when it is “designated the ‘approving authority’ only”], R.89, Pg. ID 4453). Per the Zoning 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.

(ZO at § 3.00 [emphasis added], R.67-7, Pg. ID 1678). The Consent Judgment is invalid.

¹⁹ There is no MZEA section that authorizes municipalities to completely disregard zoning regulations in order to settle a lawsuit via a consent decree.

II. DEFENDANTS' CONTENT- AND VIEWPOINT-BASED SPEECH RESTRICTION VIOLATES THE FIRST AMENDMENT.

To begin, the speech restriction at issue here operated as a prior restraint. *Alexander v. United States*, 509 U.S. 544, 550 (1993) (“The term ‘prior restraint’ is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.”) (internal quotations and citation omitted). And “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases).

There is no dispute that the City Council meeting is a public forum for Plaintiffs’ speech.²⁰ *See Madison Joint Sch. Dist. v. Wis. Emp’t Relations Comm’n*, 429 U.S. 167, 176 (1976) (“[W]hen the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of . . . the content of their speech.”) (citing *Police Dep’t of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972)). And when the government designates a particular forum for speech, such as a City Council meeting, it may impose reasonable restrictions on the time, place, or manner of speech, so long as those

²⁰ (*See* Answer ¶ 38 [admitting that the City Council meeting is a public forum and that the City “may apply restrictions to the time, place, and manner of speech so long as those restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications”] R.29, Pg. ID 1147); *see also* City’s Answer to AICC Compl. ¶ 77 admitting that “[a] public hearing is exactly that – a right for residents to exercise their First Amendment rights”], R.9-2, Pg. ID 160).

restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications. *Lowery v. Jefferson Cnty. Bd. of Educ.*, 586 F.3d 427, 432 (6th Cir. 2009) (citing standard) (*see also* Order at 17, R.89, Pg. ID 4459 [citing same standard]). Consequently, the City may not restrict speech at its City Council meetings *based on its content*. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that in a public forum the government may impose “reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified *without reference to the content of the regulated speech*”) (citation and quotations omitted) (emphasis added). And to determine whether a restriction is content based, the Court looks at whether it “restrict(s) expression because of its message, its ideas, its subject matter, or its content.” *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980). “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.” *Glendale Assocs., Ltd. v. N.L.R.B.*, 347 F.3d 1145, 1155 (9th Cir. 2003).

Here, there is no dispute that Defendants imposed a content-based restriction on speech. The speech restriction is not based on the time, place, or manner of expression; it is based on the content of the speaker’s message. In order for Defendant Taylor to impose the restriction, he “must examine the speech to determine if it is

acceptable”—which is precisely what he did in this case—in violation of the First Amendment.

The challenged speech restriction is also viewpoint based. Viewpoint discrimination is an egregious form of content discrimination that is prohibited in all forums. *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) (noting that “the First Amendment forbids” viewpoint discrimination). Indeed, “[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” *Rosenberger*, 515 U.S. at 829. Thus, 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,” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985), as in this case.

In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), for example, the Court concluded that the challenged restriction was viewpoint based. In doing so, the Court stated that “[t]he *prohibited perspective*, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.” *Id.* at 831 (emphasis added).

As the Court further explained:

The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. *The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.*

Id. at 831-32 (emphasis added). Consequently, any argument that the challenged speech restriction was viewpoint neutral because *all* religious viewpoints were excluded is wrong as a matter of law. Moreover, as the Supreme Court recently affirmed, “[g]iving offense is a viewpoint.” *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion). To summarize Justice Kennedy’s concurring opinion (joined by Justices Ginsburg, Sotomayor, and Kagan):

The [challenged] law [prohibiting disparaging trademarks] thus reflects the Government’s disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination. . . . To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. . . . By mandating positivity, the law here might silence dissent and distort the marketplace of ideas. . . . [T]he Court’s cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed. . . .

Id. at 1766-67 (Kennedy, J., concurring) (emphasis added).

As stated by the Court in *Matal*:

Our *cases* use the term “viewpoint” discrimination in a broad sense, and in that sense, the disparagement clause discriminates on the bases of “viewpoint.” To be sure, the clause even-handedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

Matal, 137 S. Ct. at 1763 (citation omitted, emphasis added). Despite the fact that Plaintiffs cited *Matal v. Tam* in their briefing, the district court never addressed (let alone distinguish) this controlling precedent.

The agenda item at issue involved whether the City should enter into the Consent Judgment, which would then permit AICC to build a mosque in the middle of a Chaldean Christian neighborhood. Despite the obvious religious implications, Defendants would not permit any speaker to address the matter from a religious viewpoint (except council member Skrzyniarz). Per Defendant Taylor:

Q. And you were specifying it [*i.e.*, the speech restriction] at this meeting because the subject of the consent judgment was the construction of a mosque; correct?

A. I was specifying it at this meeting because I anticipated that some speakers would want to talk about religion.

Q. In the context of the construction of this mosque on 15 Mile Road; correct?

A. Yes, and the context of that agenda typically was to approve the consent judgment.

Q. And the consent judgment was effectively the approval of the construction of the mosque on 15 Mile Road?

* * *

THE WITNESS: The consent judgment speaks for itself, obviously, but, yes, the subject matter was a mosque.

BY MR. MUISE:

Q. And so a mosque is a religious place of worship?

A. Yes, of course.

(Taylor Dep. at 53:14-25 to 54:1-9, R.67-12, Pg. ID 1777). Moreover, Defendant Taylor would not permit any speaker to make a comment that he deemed critical of (*i.e.*, an “attack” on) Islam.²¹ Defendant Taylor’s testimony confirms that the restriction was viewpoint-based:

Q. With regard to the public comment period at the February 21, 2017, city council meeting, you previously testified that private citizens who were going to comment were not permitted to attack another person or institution in their comments; is that right?

A. That’s correct.

Q. So, for example, the private citizen would not be permitted to oppose the construction of the mosque *based on the view* that Islam is a religion of violence. That would be considered an attack on Islam?

A. Yeah, I would view that as an attack on an institution, the institution of Islam, and also on the AICC.

Q. Similarly, then, not to permit—wouldn’t permit a private citizen to express opposition to the mosque *based on the speaker’s view* that AICC was associated with terrorism in some way; correct?

A. I would not have tolerated that.

(Taylor Dep. at 118:1-20, R.67-12, Pg. ID 1786) (emphasis added). Defendants’ prior restraint on Plaintiffs’ speech cannot withstand constitutional scrutiny.

III. DEFENDANTS DEPRIVED PLAINTIFFS OF THE EQUAL PROTECTION OF THE LAW.

In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), the Court stated, “[U]nder the Equal Protection Clause, not to mention the First

²¹ (See Answer ¶ 52 [admitting that the speaker was called out of order because her comment “was disparaging to Muslims”], R.29, Pg. ID 1149-50).

Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.” This principle of law is applicable here. *See, e.g., Madison Joint Sch. Dist.*, 429 U.S. at 176 (citing *Mosley*, 408 U.S. at 96).

Defendants denied Plaintiffs Youkhanna, Rrasi, Catcho, Jabbo, and McHugh the right to express their views during the City Council meeting, thus denying them use of this forum, because Defendants found their views unacceptable in violation of the equal protection guarantee of the Fourteenth Amendment. *See supra*. And this violation is further evidenced by the fact that Defendant Taylor permitted council member Skrzyniarz to express a view on religion in this forum while denying Plaintiffs this same right. *See also Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 256 (6th Cir. 2015) (finding speech restriction violated equal protection).

IV. DEFENDANTS VIOLATED PLAINTIFF RRASI’S RIGHTS BY UNLAWFULLY SEIZING HER FOR HER SPEECH.

A. Violation of the Fourth Amendment.

The Fourth Amendment protects private citizens against unlawful police seizures. *See Mapp v. Ohio*, 367 U.S. 643 (1961). “[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); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (stating that a “seizure” occurs when “a reasonable person would have believed that he was not free

to leave”); *United States v. Richardson*, 949 F.2d 851, 856-57 (6th Cir. 1991) (“It does not take formal words of arrest or booking at a police station to complete an arrest. It takes simply the deprivation of liberty under the authority of law.”) (internal quotations and citations omitted); *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 590 (6th Cir. 1994) (same).

City police officers “seized” Plaintiff Rrasi at the direction of Defendant Taylor. To justify this seizure, there must be probable cause to believe that Plaintiff Rrasi committed a criminal offense. *Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987) (stating that “a ‘seizure’ under the Fourth Amendment . . . is a violation of a right secured by the amendment if there is not probable cause”). Here, there is no such legal basis for the seizure. As a result, Defendants violated Plaintiff Rrasi’s rights protected by the Fourth Amendment. Indeed, this is particularly the case in that Defendant Taylor directed the actions of the police in retaliation for Plaintiff Rrasi’s speech, in violation of the First Amendment. *See Greene v. Barber*, 310 F.3d 889, 893 (6th Cir. 2002); *id.* at 895 (establishing that “‘an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper’”) (quoting *Bloch v. Ribar*, 156 F.3d 673, 681-82 (6th Cir. 1998)). Indeed, “government 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.” *Bloch*, 156 F.3d at 682 (quoting *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990)).

B. No Legislative Immunity.

Defendant Taylor does not enjoy legislative immunity for violating Plaintiff Rrasi’s rights under the First and Fourth Amendments. “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. Also, legislative immunity only applies to individual (and not official) capacity claims. *Smith v. Jefferson Cnty. Bd. of Sch. Comm’rs*, 641 F.3d 197, 218 (6th Cir. 2011). Defendant Taylor was sued in his individual and official capacity.

Here, Defendant Taylor’s *ad hoc* decision to seize Plaintiff Rrasi 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). Therefore, Defendant Taylor does not enjoy immunity in his individual capacity.

V. DEFENDANTS DEPRIVED PLAINTIFFS OF DUE PROCESS.

Plaintiffs' due process claim arises under the Fourteenth Amendment and not any particular procedure set forth in the zoning regulations. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005) (“Although the underlying substantive interest is created by an independent source such as state law, *federal constitutional law* determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.”) (internal quotation marks omitted). A procedural rule set forth in a local zoning regulation which deprives a private citizen proper notice and an opportunity to be heard could, as in this case, technically comply with the zoning regulation but nonetheless violate the Fourteenth Amendment. *Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991) (“In this Circuit, . . . a § 1983 plaintiff may prevail on a procedural due process claim by . . . demonstrating that he is deprived of property as a result of established state procedure that itself violates due process rights.”).

What state law does affirm is Plaintiffs' claim that they, as occupiers of adjacent land, have a “property” interest in zoning decisions that affect *their* property, including their quiet use and enjoyment of it, even when the zoning decision is directed at adjacent property.²² *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430

²² See, e.g., Mich. Comp. Laws § 125.3502 (requiring notice to “any property owner *or the occupant* of any structure located within 300 feet of the property being considered for a special land use”) (emphasis added). Thus, Michigan law vests an

(1982) (“The hallmark of property . . . is an individual entitlement grounded in state law.”); *Arill v. Maiz*, 992 F. Supp. 112, 117 (D.P.R. 1998) (holding that the complaint fully alleged a due process claim under § 1983 based on the deprivation of a cognizable property interest in the plaintiffs’ quiet use and enjoyment of their property). Here, the Planning Commission unanimously denied AICC’s permit application. However, the City Council *completely reversed* this decision without notifying persons whose property is affected by this decision (Plaintiffs) that it was going to do so, and the City Council, in a Caligula-like fashion, failed to provide notice of the terms and conditions of the Consent Judgment, which was not publicly disclosed until after it was approved, in violation of the Fourteenth Amendment.

In *Nasierowski Brothers Investment Company v. City of Sterling Heights*, 949 F.2d 890, 893-94 (6th Cir. 1991), this Court found a due process violation under *substantively* similar circumstances, stating, in relevant part, “Nasierowski’s injuries accrued and attached immediately when Council convened in executive session and *materially deviated from the recommendations of the planning commission, thus subverting the purpose of the duly conducted notice and comment process.*” (emphasis added). Here, the purpose of the notice and comment process that the

adjacent land owner or occupier with a property interest in special land use zoning decisions. This does not require ownership of the adjacent land. Therefore, the fact that Plaintiffs Rrasi, Catcho, and Jabbo reside in (*i.e.*, occupy) homes adjacent to the proposed mosque location is sufficient to trigger their property interest in the zoning at issue.

Planning Commission engaged in was completely subverted when, without proper notice, the City Council materially deviated from the Planning Commission's decision and approved the mosque. And the fact that Nasierowski owned the property that was subject to the adverse zoning decision does not distinguish it from this case where Plaintiffs are adversely affected by the zoning decision. *See, e.g., Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-72 (1972) (“The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.”).

VI. DEFENDANTS VIOLATED THE ESTABLISHMENT CLAUSE.

“[G]overnments may not make adherence to a religion relevant in any way to a person's standing in the political community. And actions which have the effect of communicating governmental endorsement or disapproval, *whether intentionally or unintentionally*, make religion relevant, in reality *or public perception*, to status in the political community” in violation of the Establishment Clause. *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1119 (10th Cir. 2010) (internal quotations and citations omitted) (emphasis added). As confirmed by the Supreme Court, “[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307, n.21 (2000). Indeed, “[e]ndorsement sends a message to nonadherents 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. Disapproval sends the opposite message.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

Accordingly, “[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the *myriad, subtle ways in which Establishment Clause values can be eroded.*” *Lynch*, 465 U.S. at 694 (O’Connor J., concurring) (emphasis added).

Defendants conveyed an unmistakable message of approval of adherents of Islam and disapproval of those who were not (in particular, the Chaldean Christians, such as Plaintiffs) by (1) approving the Consent Judgment, which was not required by RLUIPA (as Defendants admit) and which grants AICC special rights and privileges by allowing it to construct a mega-mosque—a religious symbol of Islam—in the middle of a Chaldean Christian neighborhood in violation of the zoning regulations; (2) suppressing speech deemed critical of Islam during the City Council meeting and preventing the Chaldeans from expressing their “good faith” concerns; and (3) displaying hostility to those who opposed the building of the mosque at this meeting.²³

²³ (See McHugh Dep. at 12:14-17, 24-25; 13:1-4, R.67-19, Pg. ID 1823-24; McHugh Decl. ¶¶ 3-6, R.67-21, Pg. ID 1850-52; Youkhanna Decl. ¶¶ 2-8, R.67-22, Pg. ID 1854-56; Rrasi Decl. ¶¶ 8-9, R.67-23, Pg. ID 1859-60; Catcho Decl. ¶¶ 4-6, R.67-24,

And regardless of Defendants’ purpose, the effect of such actions violates the Establishment Clause.

VII. THE CITY VIOLATED THE MICHIGAN OPEN MEETINGS ACT.

Ordering all private citizens, including certain Plaintiffs but excluding the media, to leave the public meeting when it came time for the City Council to actually vote on the Consent Judgment agenda item is contrary to the express language and the very purpose of the Michigan Open Meetings Act.

“[T]he Open Meetings Act 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). Consequently, “it implicitly requires that all parts of the meeting . . . be open to the public.” *Id.* at 463 (emphasis added). The express language of the Act requires the *entire* meeting to be open to the *public*, not just the media. And a person can be excluded from the meeting only if *that person* “actually committed” a breach of the peace²⁴—the City has no authority to remove peaceful citizens from the meeting based on the actions of others, which it did here to Plaintiffs Youkhanna, Catcho, Jabbo, McHugh, and Rrasi. See Mich. Comp. Laws § 15.263 (requiring all “meetings,” “decisions,” and “deliberations of a public body” to be “open to the public” and that “[a] person shall

Pg. ID 1863).

²⁴ See, e.g., *City of Dearborn Heights v. Bellock*, 17 Mich. App. 163, 168 (Mich. Ct. App. 1969) (observing that “a usual noise or one not calculated to create a nuisance or disturbance” is not a “breach of the peace”).

not be excluded from a meeting otherwise open to the public except for a *breach of the peace actually committed* at the meeting”) (emphasis added). By excluding peaceful citizens based on the actions of a few disruptive attendees at this public meeting, the City effectuated a type of a heckler’s veto, which the law forbids. *See generally Bible Believers*, 805 F.3d at 248 (“An especially ‘egregious’ form of content-based discrimination is that which is designed to exclude a particular point of view from the marketplace of ideas. . . . The heckler’s veto is precisely that type of odious viewpoint discrimination.”) (internal citations omitted).

Consequently, the City Council violated the rights of the public, including the rights of Plaintiffs, thereby rendering the City Council’s decision invalid. *See Mich. Comp. Laws § 15.270* (authorizing a court to invalidate a decision that fails to comply with the Act). At a minimum, the Court should declare the City’s actions in violation of the Act, regardless of whether or not it invalidates the Consent Judgment as a result. These types of anti-democratic practices should not be permitted.

CONCLUSION

Based on the foregoing, this Court should reverse the district court and grant summary judgment in Plaintiffs’ favor on all claims.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise

Robert J. Muise, Esq.

/s/ David Yerushalmi

David Yerushalmi, Esq.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32, the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 12,978 words, excluding those sections identified in Fed. R. App. P. 32(f).

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise

Robert J. Muise, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise

Robert J. Muise (P62849)

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

<u>No.</u>	<u>Page ID</u>	<u>Description</u>
R.1	1-34	Complaint
R.9-2	83-138	Plaintiffs' Exhibit A to Muise Declaration: Verified Complaint in <i>American Islamic Community Center, Inc. v. City of Sterling Heights</i> , No. 1:16-cv-12920 (E.D. Mich. filed Aug. 10, 2016)
R.9-2	139-193	Plaintiffs' Exhibit B to Muise Declaration: Answer filed by the City in <i>American Islamic Community Center, Inc. v. City of Sterling Heights</i> , No. 1:16-cv-12920 (E.D. Mich. filed Aug. 10, 2016)
R.9-3	242-245	Plaintiffs' Exhibit 2: Declaration of Debi Rrasi
R.9-4	246-262	Plaintiffs' Exhibit 3: Declaration of Jeffrey Norgrove
R.14	506-34	Defendant City of Sterling Heights Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction
R.27	1069-1100	Brief of <i>Amicus Curiae</i> The American Islamic Community Center in Opposition to Plaintiffs' Motion for Preliminary Injunction.
R.29	1138-70	Answer
R.67	1593-1629	Plaintiffs' Motion for Summary Judgment and Brief in Support.
R.67-2	1632-35	Declaration of Robert J. Muise
R.67-3	1636-38	Plaintiffs' Exhibit A to Muise Declaration: American Islamic Community Center's "Application for Planning Commission Approval" [Dep. Ex. 32]

- R.67-4 1639-52 Plaintiffs' Exhibit B to Muise Declaration: Deposition Excerpts of Christopher McLeod, the Rule 30(b)(6) witness designated by Defendant City of Sterling Heights
- R.67-5 1653-58 Plaintiffs Exhibit C to Muise Declaration: Planning Commission Staff Report dated September 10, 2015 [Dep. Ex. 19]
- R.67-6 1659-76 Plaintiffs' Exhibit D to Muise Declaration: AICC Architectural Plans [Dep. Ex. 31]
- R.67-7 1677-1700 Plaintiffs' Exhibit E to Muise Declaration: City of Sterling Heights Zoning Ordinance (relevant excerpts)
- R.67-8 1701-06 Plaintiffs' Exhibit F to Muise Declaration: Planning Commission Staff Report dated August 13, 2015 [Dep. Ex. 18]
- R.67-9 1707-54 Plaintiffs' Exhibit G to Muise Declaration: Transcript of Planning Commission Hearing of August 13, 2015 [Dep. Ex. 17]
- R.67-10 1755-65 Plaintiffs' Exhibit H to Muise Declaration: Transcript of Planning Commission Hearing of September 10, 2015 [Dep. Ex. 11]
- R.67-11 1766-70 Plaintiffs' Exhibit I to Muise Declaration: Deposition Excerpts of Donald Mende
- R.67-12 1771-86 Plaintiffs' Exhibit J to Muise Declaration: Deposition Excerpts of Defendant Michael C. Taylor
- R.67-13 1787-89 Plaintiffs' Exhibit K to Muise Declaration: Agenda Statement [Dep. Ex. 38]
- R.67-14 1790-96 Plaintiffs' Exhibit L to Muise Declaration: Deposition Excerpts of Plaintiff Kamal Youkhanna
- R.67-15 1797-1800 Plaintiffs' Exhibit M to Muise Declaration: Deposition Excerpts of Plaintiff Jeffrey Norgrove

R.67-16	1801-09	Plaintiffs' Exhibit N to Muise Declaration: Deposition Excerpts of Plaintiff Debi Rrasi
R.67-17	1810-15	Plaintiffs' Exhibit O to Muise Declaration: Deposition Excerpts of Plaintiff Wafa Catcho
R.67-18	1816-19	Plaintiffs' Exhibit P to Muise Declaration: Deposition Excerpts of Plaintiff Marey Jabbo
R.67-19	1820-26	Plaintiffs' Exhibit Q to Muise Declaration: Deposition Excerpts of Plaintiff Megan McHugh
R.67-20	1827-48	Plaintiffs' Exhibit R to Muise Declaration: Consent Judgment entered by Court on March 10, 2017 in <i>American Islamic Community Center, Inc. v. City of Sterling Heights</i> , No. 1:16-cv-12920 (E.D. Mich. filed Aug. 10, 2016) [ECF No. 20] [Dep. Ex. 33]
R.67-21	1849-52	Plaintiffs' Exhibit 2: Declaration of Megan McHugh
R.67-22	1853-56	Plaintiffs' Exhibit 3: Declaration of Kamal Youkhanna
R.67-23	1857-60	Plaintiffs' Exhibit 4: Declaration of Debi Rrasi
R.67-24	1861-64	Plaintiffs' Exhibit 5: Declaration of Wafa Catcho
R.89	4443-65	Opinion and Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment
R.90	4466	Judgment
R.91	4467-69	Notice of Appeal