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

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

v.

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

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

Hon. Gershwin A. Drain

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

AMERICAN FREEDOM LAW CENTER
Robert J. Muise, Esq. (P62849)
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
(734) 635-3756

David Yerushalmi, Esq. (Ariz. Bar No. 009616; DC Bar No. 978179; Cal. Bar No. 132011; NY Bar No. 4632568)
2020 Pennsylvania Avenue NW, Suite 189
Washington, D.C. 20006
david.yerushalmi@verizon.net
(646) 262-0500

Counsel for Plaintiffs

O'REILLY RANCILIO PC
Marc D. Kaszubski (P60333)
Linda McGrail Belau (P55732)
Sterling Town Center
12900 Hall Road, Suite 350
Sterling Heights, MI 48313-1174
mkaszubski@orlaw.com
(586) 726-1000

JOHNSON, ROSATI, SCHULTZ & JOPPICH, P.C.
Anne McClorey McLaughlin (P40455)
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100

Counsel for Defendants

ISSUES PRESENTED

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

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

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

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

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

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

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

CONTROLLING AND MOST APPROPRIATE AUTHORITY

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

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

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

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

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

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

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

Police Dep't of the City of Chi. v. Mosley, 408 U.S. 92 (1972)

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

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

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

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

Mich. Comp. Laws § 15.263

Mich. Comp. Laws § 15.270

Mich. Comp. Laws § 125.3502

MATERIAL FACTS

On July 8, 2015, Jaafar Chehab, on behalf of AICC, submitted an application for a "Special Approval Land Use" in which he requested approval to build a "Religious Community Center" on Fifteen Mile Road, a residential-zoned area. (Ex. A, AICC application).[1] The proposed structure is approximately 28,000 square feet (Ex. B, McLeod Dep. at 86:8-10), with a dome and spires that exceed 60 feet in height,[2] (Ex. C, 9/10/15 Staff Report at 4). It will be located on 4.3 acres. (Ex. B, McLeod Dep. at 87:5-7). Only 3,024 square feet, or approximately one-eighth of the building, is designated as "worship space." (Ex. B, McLeod Dep. at 120:11-23; Ex. D, Architectural plans). AICC is currently worshipping at a Madison Heights location that advertises a broad range of activities beyond those presented during its application process. (Ex. F, 8/13/15 Staff Report at 1 [citing daily prayer, Friday prayer service, and Ramadan services]). AICC was looking for new space for "educational activities, youth activities, and special events" that the existing space would not accommodate. (Norgrove Decl. ¶ 24 [Doc. No. 9-4]; *see* Br. of *Amicus Curiae* Am. Islamic Cmty. Ctr. at 8 [AICC "offers a variety of services to the local Muslim community."] [Doc. No. 27]). For the City to approve AICC's request, the proposed construction had to comply with all of the "specific"

[1] The exhibits referenced in this response are those filed in support of Plaintiffs' motion for summary judgment. [Doc. No. 67].
[2] The height was later marginally reduced. (Ex. R, Consent J.).

and "general" standards under the Zoning Ordinance, (Ex. B, McLeod Dep. at 72:17-23), as well as the MZEA.

Section 3.02 of the Zoning Ordinance addresses special approval land uses, 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." (Ex. E, ZO at § 3.02). The maximum height allowed for a building located within a residential-zoned district is 30 feet. (*Id*. at § 3.04). A place of worship ***may*** exceed this height so long as it meets other requirements in the Zoning Ordinance. (Ex. B, McLeod Dep. at 74:23-25 to 76:1-4; Ex. E, ZO at § 3.02A1). 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 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." (Ex. E, ZO at § 25.01). "When 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). The "general standards" applicable to all special approval land uses are set forth in § 25.02. Each of these standards is mandatory (*id*. at § 25.02 [stating that the "proposed special approval land use ***shall***" comply]) and require ***facts*** to demonstrate

compliance, (Ex. B, McLeod Dep. at 37:2-19; Ex. E, ZO § 25.03B1 [emphasis added]; Mich. Comp. Laws § 125.3502).

Section 25.03 sets forth the "Procedures" that apply to special approval land uses. Subsection A, "*Public Hearing*," states that "[i]f the City Council is the *reviewing authority*[3] 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." (Ex. E, ZO at § 25.03A [emphasis added]). Subsection B sets forth the procedures for *approving* a special approval land use and states 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 . . . 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 § 25.03B). 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.

The Planning Commission held a hearing on August 13, 2015, to review AICC's application. No final decision was rendered. (Ex. G, Tr. of 8/13/15 Hr'g

[3] This section uses "reviewing authority" interchangeably with "approving authority," particularly when read in conjunction with § 25.01.

at 178-182). During the hearing, numerous citizens spoke in opposition to the mosque, citing traffic and safety concerns. (Ex. G, Tr. of 8/13/15 Hr'g).

Following the September 10, 2015 Planning Commission meeting, the Planning Commission voted *unanimously* to deny AICC's application. Based on the factual record, the Planning Commission concluded that the proposed construction did not comply with the Zoning Ordinance. (Ex. C, 9/10/15 Staff Report at 4 [setting forth factual findings and conclusions demonstrating non-compliance with the Zoning Ordinance]; Ex. H, Tr. of 9/10/15 Hr'g at 7:23-25 to 13:1-2; Ex. I, 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]). 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 . . . based on legitimate planning and zoning issues." (Ex. J, Taylor Dep. at 69:2-25 to 76:1-4; 75:25 to 76:1-4). The City's Rule 30(b)(6) witness testified that he too "agree[d] with the planning commission's determination." (Ex. B, McLeod Dep. at 111:21-25 to 112:1-2).

As a result of the Planning Commission's denial of the application, AICC sued the City. (AICC Compl. [Doc. No. 9-2, Pg ID 84-138]). The City denied all wrongdoing. (Answer to AICC Compl. [Doc. No. 9-2, Pg ID 140-193]).

On February 21, 2017, a City Council meeting was held to decide whether to enter into a consent decree that would approve AICC's request to build the mosque. Only *one* Agenda Statement was prepared for the meeting, and the only "Suggested Action" was to *approve* the Consent Judgment. (Ex. K, Agenda Statement; Ex. B, McLeod Dep. at 135:1-24). Noticeably, no AICC supporters were present at this meeting. (Ex. L, Youkhanna Dep. at 35:20-25 to 36:1-11; 39:2-25 to 40:1-9). Counsel for the City also suggested to Plaintiff Norgrove that he not attend. (Ex. M, Norgrove Dep. at 91:22-25 to 92:1-23).

During this meeting, Defendant Taylor[4] imposed a prior restraint on speakers who wanted to address the Consent Judgment agenda item, warning the speakers prior to the public comment period 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." (Ex. J, Taylor Dep. at 52:9-15). Defendant Taylor testified that he was enforcing a City Council rule that prohibits public comments that "make attacks on people or institutions."[5] (Ex. J, Taylor Dep. at 50:23-25 to 51:1-14; *id*. at 53:8-13). For

[4] 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." (Ex. J, Taylor Dep. at 30:15-24).

[5] 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).

example, Defendant Taylor interrupted a woman speaker and stated, "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." (Ex. J, Taylor Dep. at 56:23-25 to 57:1-3; *see id.* at 59:4-5 ["I believed that she was making an attack on the AICC."]; *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."]). This prior restraint restricted Plaintiffs' speech. (Ex. L, Youkhanna Dep. at 59:10-25 to 60:1-25; *see also id.* at 63:11-25 to 65:1-18; 39:18-25 to 40:1-7; Ex. N, Rrasi Dep. at 43:5-25 to 45:1-7; Ex. O, 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); Ex. P, Jabbo Dep. at 37:1-22; Ex. Q, McHugh Dep. at 34:25 to 40:1-3; *see also* Ex. 2, McHugh Decl. ¶¶ 3-4; Ex. 3, Youkhanna Decl. ¶¶ 4-8; Ex. 4, Rrasi Decl. ¶ 7; Ex. 5, Catcho Decl. ¶¶ 4-5). And while "religion" was off-limits for the citizen speakers, Defendant Taylor allowed council member Skrzyniarz to express a view on religion, prompting objections from some in attendance. (Ex. J, Taylor Dep. at 61:4-25 to 68:1-24; 95:15-25 to 96:1-22; Ex. L, Youkhanna Dep. at 50:17-21).

During a recess, Plaintiff Rrasi approached Defendant Taylor to express her concerns.[6] Defendant Taylor objected, so he directed two City police officers to seize Plaintiff Rrasi and remove her from the council chambers. (Ex. J, Taylor Dep. at 100:24-25 to 104:1-6; Ex. N, Rrasi Dep. at 45:21-25 to 46:1-7; 47:6-25 to 58:13-19). While in police custody, Plaintiff Rrasi was not free to leave. (Ex. N, Rrasi Dep. at 46:3-4; 50:11-17; 58:13-19; Rrasi Decl. ¶ 4, Ex. B [Doc. No. 50-2]).

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. (Ex. 2, McHugh Decl. ¶ 5). However, none of the Plaintiffs engaged in any disruption or breach of the peace during the meeting. (Ex. N, Rrasi Dep. at 61:14-22; Ex. P, Jabbo Dep. 37:23-25 to 38:1; Ex. L, Youkhanna Dep. 59:1-9; Ex. 2, McHugh Decl. ¶ 5; Ex. 5, Catcho Decl. ¶ 5).

To resolve the AICC litigation "without any admission of liability," AICC and the City entered into the Consent Judgment. (Ex. R, Consent J. at 3). On

[6] Defendant Taylor testified that he "[didn't] have a specific recollection of what she was saying" (Ex. J, Taylor Dep. at 101:5-6) and that he "[didn't] think she was threatening harm to me" (*id*. at 102:1-2). Plaintiff Rrasi does have a specific recollection of what she was saying to the mayor: "When the mayor 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." (Ex. N, Rrasi Dep. at 47:16-19). The video offered by Defendants shows Plaintiff Rrasi *after* she was taken into custody, (*see* Defs.' Br. at 8; Defs.' Ex. U [WDIV Video 1]), confirming the fact of her seizure.

March 10, 2017, the 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 proper 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 [Doc. No. 9-3]). The terms were not fully disclosed until it was filed by AICC on February 28, 2017. (Rrasi Decl. ¶ 4 [Doc. No. 9-3]).

The Consent Judgment approved AICC's special land use request:

> *AICC is hereby granted special land use approval*[7] 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 crescent[8] 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. . . .

(Ex. R, Consent J. ¶ 1.1 [emphasis added]). 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 requirements. (Ex. R, Consent J.). The number of parking spaces "was determined based upon only the worship area in the building containing 3,205 (sic) square feet"—no ancillary uses were considered. (*Id*. at ¶ 2.2). The Consent

[7] While Defendants make the irrelevant claim that the Consent Judgment "is not a special land use application" (Defs.' Br. at 18), it most certainly is a "special land use approval," (Ex. R, Consent J. ¶ 1.1).

[8] A "crescent" is a symbol associated with Islam. (Ex. 3, Youkhanna Decl. ¶ 8).

Judgment only requires AICC to make "*reasonable* efforts" to provide off-site parking and to "*monitor* parking so that members and guests do not part on *adjacent* residential streets. . . . [T]he City may institute residential permit parking on the neighboring 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 [emphasis added]). The Consent Judgment does not prohibit noisy outdoor activities, such as sports. (*See id*.). It does not set forth facts explaining how this enormous structure satisfies the mandatory standards set forth in § 25.02. (*See id*.). In fact, it does not mention the standards. (*See id*.). By its own terms, it trumps local zoning regulations. (*Id*. at § 2.6 ["Except as modified by this Consent Judgment, AICC shall comply with all City codes . . . ."]; § 3.4 ["To the extent that this Consent Judgment *conflicts* with any City Ordinance . . . , the terms of this Consent Judgment shall control."] [emphasis added]).[9]

As Defendant Taylor testified, many of the Chaldean Christians were upset with the mosque being built in their neighborhood. He explained 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] this seemed to be similar to what would happen to them back at home . . .

[9] This is a tacit admission that the Zoning Ordinance does in fact apply.

(Ex. J, Taylor Dep. at 22:17-25 to 24:1-6). Defendant Taylor testified that these were "good faith concerns from the Chaldean people." (*Id.*). It was similar "good faith concerns" that Plaintiffs wanted to express at the City Council meeting but were prevented from doing so by the speech restriction. (*See supra*).

ARGUMENT

I. THE CONSENT JUDGMENT IS INVALID.

Absent a finding that a consent decree is necessary to rectify an *actual* violation of federal law, it cannot be used as a means to circumvent local and state zoning regulations. *League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d 1052, 1055-56 (9th Cir. 2007) (hereinafter "*League*") (invalidating a settlement agreement approved by a federal district court that granted a Jewish congregation approval to operate a synagogue in a residential-zoned area and 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.").[10] Consequently, "[b]efore approving any settlement agreement that

[10] Contrary to Defendants' emotional plea, this case, like *League*, which involved a *Jewish place of worship*, is not at all about "the country's bedrock principle" of the free exercise of religion. (Defs.' Br. at 1). Defendants expressly disavowed any RLUIPA/Free Exercise Clause liability—so that plea is irrelevant. So too are Defendants' unsubstantiated allegations of anti-Muslim bias leveled at Plaintiff Norgrove. (Defs.' Br. at 4-5); *Cleveland Cnty. Ass'n for Gov't by the People*, 142 F.3d at 477 (vacating consent decree implementing an election plan, rejecting the

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," *id*. at 1058, which is not possible when, as here, the municipality denies all liability, *id*. *See also 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) (same); *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*, 142 F.3d at 477-79 (same); *Vestevich v. W. Bloomfield Twp.*, 245 Mich. App. 759, 764-65 (Mich. Ct. App. 2001) (same).

Defendants are in a predicament. They admit, at least tacitly, that the Consent Judgment does not make *any* factual findings or conclusions explaining how the proposed mosque complies with the zoning standards (a requirement under the Zoning Ordinance and the MZEA).[11] (*See* Ex. R, Consent J.). When this

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parties attempts to remedy it after the fact, and stating that "the Supreme Court has specifically held that consent decrees should be construed simply as contracts, without reference to the legislation that motivated the plaintiffs to bring suit").

[11] The Zoning Ordinance requires the City Council's decision to include "a statement of findings and conclusions," specifying the basis for the decision. (Ex. E, ZO at § 25.03B1). Irrespective of this requirement, the MZEA separately mandates "a statement of findings and conclusions" for special land use approvals. Mich. Comp. Laws § 125.3502. Consequently, regardless of Defendants' view of the Zoning Ordinance, their position cannot trump the MZEA. *See Whitman v.*

litigation started, Defendants took the (erroneous) position that all the City Council had to do was "*consider*" the zoning standards. (*See* Defs.' Br. in Opp'n to Pls.' Mot. for Prelim. Inj. at 12 ["[T]he Zoning Ordinance grants the City Council the same authority as the Planning Commission to approve a special land use so long as the same 'standards' are 'considered.'"] [Doc. No. 14]). Meaning, all that it had to do was sit back and scratch its collective chin and think about the standards, not actually comply with them, and then argue that it was Plaintiffs' burden to prove a negative. The Court accepted this erroneous argument.[12]/[13] Now, Defendants take a completely different (and similarly erroneous) position, arguing that the City Council need not even "*consider*" the standards because there are <u>*no*</u> standards to follow when approving a special land use via a Consent Judgment. (Defs.' Br. 16

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, and the circuit court erred by affirming the board's decision. . . . We vacate the special-use permit.").

[12] During the argument on Plaintiffs' request for a preliminary injunction, the Court asked the following question of Plaintiffs' counsel: "What evidence do you have that the City Council did not consider the general standards of Section 25.02 of the City Zoning Ordinance?" (Mot. Hr'g Tr. at 10 [Doc. No. 53]).

[13] The Court's decision on Plaintiffs' request for a preliminary injunction is not binding at trial or when deciding a motion for summary judgment. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."); *Wilcox v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (holding that the trial court's denial of a preliminary injunction did not establish the law of the case with respect to the court's subsequent summary judgment determination); *Technical Publ'g Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984) (same); *City of Angoon v. Hodel*, 803 F.2d 1016, 1024, n.4 (9th Cir. 1986) (same).

["Council was not required to consider the standards of § 25.02 prior to the approval of the Consent Judgment."]; Ex. B, McLeod Dep. at 38:6-20; 40:5-21). Defendants must engage in mental gymnastics (parsing "approving" and "reviewing" authority language) to arrive at this position because the Zoning Ordinance and the MZEA require the City Council to set forth findings and conclusions demonstrating compliance (Ex. E, ZO at § 25.03B1; Mich. Comp. Laws § 125.3502), which it failed to do.

The absurdity of Defendants' position was tested during the deposition of the City's Rule 30(b)(6) witness, who was thus forced to take the untenable position that under Defendants' view of the Zoning Ordinance, the City Council could *approve the construction of a nuclear power plant in a residential area via a consent judgment*. (Ex. B, McLeod Dep. at 43:14-25 to 44:1-11). This dramatic, mid-litigation change is remarkable since the counsel representing Defendants are the same counsel who approved the Consent Judgment.

Here, the Planning Commission made specific findings of *fact* and conclusions based on the Zoning Ordinance,[14] and it properly (per the testimony of Defendant Taylor and the City's Rule 30(b)(6) witness)[15] denied AICC's request

[14] (Ex. C, 9/10/15 Staff Report at 4; Ex. H, Tr. of 9/10/15 Hr'g at 7:23-25 to 13:1-2; Ex. I, 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]).

[15] Defendant Taylor, a voting member of the City Council, testified that "the

for special approval land use. The City Council completely reversed that decision, yet we have no counter findings and conclusions to demonstrate how this mega-mosque complies with the standards, because it does not (and Defendants know it, which is why they are now forced to take the position they are taking).

Defendants' entire position is premised on the legal claim[16] that the Zoning Ordinance (and MZEA by extension) permits the City Council to ignore *all* of the zoning standards when it approves a special approval land use via a consent judgment because the City Council is only ever an "approving" authority and never a "reviewing" authority when a consent judgment is involved. Defendants boldly claim that "Plaintiffs can cite to no provision of the Zoning Code (as none exists) that also designates Council as the *reviewing authority* when it approves a special approval land use by consent judgment to settle pending litigation." (Defs.' Br. at 15). Plaintiffs will accept that challenge. Here is one:

> **SECTION 25.03 PROCEDURES**
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>
> *A. Public Hearing*
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> * * *
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> 2. If the City Council is the ***reviewing authority*** for a special approval land use under consideration that is proposed:

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planning commission arrived at the right decision" and that this decision was "based on legitimate planning and zoning issues." (Ex. J, Taylor Dep. at 69:2-25 to 76:1-4; *see also id.* at 75:25 to 76:1-4). The City's designated Rule 30(b)(6) witness testified that he "agree[s] with the planning commission's determination." (Ex. B, McLeod Dep. at 111:21-25 to 112:1-2).

[16] Defendants' citations to the testimony of Plaintiff Norgrove and Mr. McLeod as to this *legal question* (Defs.' Br. at 14-15) are irrelevant and evidence of nothing.

* * *

> d. ***Within or as part of a development proposed to be developed pursuant to a consent judgment (or amendment) approved by City Council***, the City Council shall ***investigate the circumstances*** of the case prior to approving or denying the request.

(Ex. E, ZO § 25.03A2d [emphasis added]).[17] So how can this be? According to Defendants, the City Council is *never* a "reviewing authority" when a consent judgment is involved. The simple and straightforward answer is that Defendants are wrong as a matter of law, and they are wrong as a matter of sound public policy since zoning regulations are in place to protect the public and not mere inconveniences to be discarded when it is politically expedient to do so. *League*, 498 F.3d at 1055-56 ("Municipalities may not waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public."). Thus, Defendants' entire argument is premised upon a false legal argument that the City Council can ignore the Zoning Ordinance when a consent judgment is involved. But even then, Defendants cannot ignore the requirements of the MZEA, which

[17] Later in *this* section, the public hearing requirement is excused when "[t]he special approval land use proposed to be approved is within a development proposed to be developed pursuant to a consent judgment that is approved by the City Council to resolve pending litigation with the city." (Ex. E, ZO § 25.03A3b; *see* Defs.' Br. at 18 [relying on this section to conclude that no public hearing is necessary]). Consequently, under the Zoning Ordinance, the City Council need not hold a public hearing, but it still must *investigate* the circumstances of the case because it is the "*reviewing authority*" (as well as the "*approving authority*") when it is considering approval of a special land use via a consent judgment.

serve as a separate and independent basis for declaring the Consent Judgment invalid. *See Whitman*, 288 Mich. App. at 687.

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

Defendants acknowledge that a City Council meeting is a public forum for Plaintiffs' speech. (Defs.' Br. at 24); *see also Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 176 (1976). Accordingly, Defendants agree that they may impose reasonable restrictions on the time, place, or manner of speech, so long as those restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications. (Defs.' Br. at 24); *see also Lowery v. Jefferson Cty. Bd. of Educ.*, 586 F.3d 427, 432 (6th Cir. 2009) (citing standard). Therefore, as Defendants acknowledge, they may *not* restrict speech at a City Council meeting *based on its content*. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that such restrictions must be justified "without reference to the content of the regulated speech") (citation and quotations omitted). Aside from agreeing that the forum is a public forum and that content-based restrictions are therefore prohibited, the remainder of Defendants' argument is simply conclusory assertions devoid of analysis, demonstrating a misapprehension of what it means to be a content- or viewpoint-based restriction on speech.

To begin, the challenged restriction is a *prior restraint* on speech. *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." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases). 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 fact dispute that Defendants imposed a content-based restriction. In order for Defendant Taylor to enforce the restriction, he "must examine the speech to determine if it is acceptable."[18] And worse yet, the challenged restriction is also viewpoint based. Viewpoint discrimination is an

[18] It is no defense to argue that Plaintiffs might have alternative ways of communicating their message. *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 607 (6th Cir. 2005) ("[B]ecause we have already found that the Ordinance is not narrowly tailored, whether the City of Dearborn has provided ample alternatives of communication is now irrelevant in this case. . . .").

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). "When 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. Defendants argue that the restriction was permissible because no one could express a view regarding "*anyone's religion*." (Defs.' Br. at 25). Not only is this an admission that the restriction is unlawfully content based, it provides no defense to the fact that the restriction is also viewpoint based. *Rosenberger*, 515 U.S. at 831-32 (stating that this view of viewpoint discrimination "reflects an insupportable assumption that all debate is bipolar . . . . 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"). And the Supreme Court recently affirmed that "[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 "essence of viewpoint discrimination" is "disapproval

of a subset of messages [the government] finds offensive. . . . To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so. . . ." *Id*. at 1766-67 (Kennedy, J., concurring). Here, the subject involved was whether the City should enter into the Consent Judgment, which would permit AICC to build a mosque in a Chaldean Christian neighborhood. Despite the obvious religious implications (Ex. J, Taylor Dep. at 53:14-25 to 54:1-9 [admitting that "the subject matter was a mosque" and "of course" a mosque is a religious place of worship]), Defendants would not permit any speaker to address the matter from a religious viewpoint (except council member Skrzyniarz). Moreover, Defendant Taylor would not permit any speaker to make a comment that he deemed critical of (*i.e.*, an "attack" on) Islam.[19] Defendant Taylor's testimony confirms that the restriction was not just content based, it was viewpoint based. (Ex. J, Taylor Dep. at 118:1-20 [admitting that a private citizen would not be permitted to oppose the construction of the mosque *based on the view* that Islam is a religion of violence or to express opposition to the mosque *based on the speaker's view* that AICC was associated with terrorism in some way]). Defendants' prior restraint cannot withstand constitutional scrutiny.[20]

[19] (*See* Answer ¶ 52 [admitting that the speaker was called out of order because her comment "was disparaging to Muslims"] [Doc. No. 29]).

[20] For similar reasons, this restriction also violates the Equal Protection Clause. *Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government

III. DEFENDANTS VIOLATED PLAINTIFF RRASI'S RIGHTS BY UNLAWFULLY SEIZING HER FOR HER SPEECH.

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). "It does not take formal words of arrest or booking [to effect a seizure]. It takes simply the deprivation of liberty under the authority of law." *United States v. Richardson*, 949 F.2d 851, 856-57 (6th Cir. 1991) (internal quotations and citations omitted).

City police officers "seized" Plaintiff Rrasi *during a recess* at the direction of Defendant Taylor.[21] To justify this seizure, there must be probable cause to

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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."); *Madison Joint Sch. Dist.*, 429 U.S. at 176 (citing *Mosley*, 408 U.S. at 96).

[21] Defendant Taylor raises legislative immunity in a footnote. (Defs.' Br. at 28, n.19). "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). He has not met that burden. Moreover, legislative immunity only applies to individual (and not official) capacity claims. *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 218 (6th Cir. 2011) ("Although plaintiffs may sue a local legislator in his or her *official* capacity under § 1983, local legislators may invoke legislative immunity to insulate themselves as *individuals* from liability based on their legislative activities."); *id*. (Because we determined . . . that the Board was performing a legislative function, we conclude that the members of the Board are entitled to legislative immunity in their *individual* capacities."). Nonetheless, this *ad hoc* decision to seize Plaintiff Rrassi during a recess was not a "legislative" function that would entitle Defendant Taylor to legislative immunity. Here,

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 was no probable cause for the seizure, in violation of the Fourth Amendment. Additionally, Defendant Taylor directed the seizure in retaliation for Plaintiff Rrasi's speech, in violation of the First Amendment. *See Greene v. Barber*, 310 F.3d 889, 894 (6th Cir. 2002); *see also id*. ("'[A]n 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)). "[G]overnment officials . . . may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. *Surely, anyone who takes an oath of office knows—or should know—that much*."[22] *Bloch*, 156 F.3d at 682 (citation omitted) (emphasis added).

"'stripped 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); *see also Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003) ("We determine whether an action is legislative by considering four factors: (1) 'whether the act involves *ad hoc* decision-making, or the formulation of policy'; (2) 'whether the act applies to a few individuals, or to the public at large'; (3) 'whether the act is formally legislative in character'; and (4) 'whether it bears all the hallmarks of traditional legislation.'") (citations omitted).

[22] As set forth above, Defendant Taylor violated clearly established law under the First and Fourth Amendments. Therefore, he is not entitled to qualified immunity.

IV. DEFENDANTS DEPRIVED PLAINTIFFS OF DUE PROCESS.

Plaintiffs' due process claim arises under the Fourteenth Amendment and not 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 which deprives a citizen proper notice and an opportunity to be heard could technically comply with the zoning regulation but nonetheless violate Due Process. *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."). State law affirms that Plaintiffs, as occupiers of adjacent land, have a "property" interest in zoning decisions that affect the use and enjoyment of their

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Harlow v. Fitzgerald, 457 U.S. 800 (1982) (stating that government officials enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). Also, Defendant Taylor does not enjoy qualified immunity for claims advanced against him in his official capacity. *Hall v. Tollett*, 128 F.3d 418, 430 (6th Cir. 1997) ("Qualified immunity . . . does not shield [the defendant] from the claims brought against him in his official capacity."). And finally, Defendant Taylor's retaliatory intent against Plaintiff Rrasi precludes his qualified immunity claim. *See Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821-25 (6th Cir. 2007) ("Because retaliatory intent proves dispositive of Defendants' claim to qualified immunity, summary judgment was inappropriate.").

property.[23] *Arill v. Maiz*, 992 F. Supp. 112, 117 (D.P.R. 1998) (alleging a due process claim based on the deprivation of a cognizable property interest in the plaintiffs' quiet use and enjoyment of their property); *Bd. of Regents of State Colls.*, 408 U.S. at 571-72 ("[P]roperty interests protected by procedural due process extend well beyond actual ownership of real estate . . . ."). In this case, the City Council *completely reversed* the unanimous decision of the Planning Commission 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 of the Consent Judgment, which were not publicly disclosed until after it was approved. *See Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 893-94 (6th Cir. 1991) (finding a due process violation and stating, "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").

[23] Plaintiffs Rrasi, Catcho, and Jabbo, who reside across the street from the proposed mosque (Ex 4, Rrasi Decl. ¶ 2; Ex. 5, Catcho Decl. ¶¶ 2, 3), have standing to advance a due process claim, *see* Mich. Comp. Laws § 125.3502 (requiring notice to "the occupant of any structure located within 300 feet"), and to seek invalidation of the Consent Judgment via a declaratory action, *see Goode v. City of Phil.*, 539 F.3d 311, 323 (3d Cir. 2008). It only takes one Plaintiff with standing to invoke the Court's jurisdiction. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *ACLU v. NSA*, 493 F.3d 644, 652 (6th Cir. 2007) (same).

V. DEFENDANTS VIOLATED THE ESTABLISHMENT CLAUSE.

"Every 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 v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). Accordingly,

> governments 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). "[W]hether intentionally or unintentionally," Defendants' actions communicated governmental disapproval of the Chaldean Christians and their "good faith concerns" related to the construction of this mega-mosque in their neighborhood. Whether "in reality or public perception," Defendants made the Chaldeans feel like second-class citizens.[24] And regardless of whether Defendants' purpose was pure, the effect of their actions violates the Establishment Clause.

[24] (Ex. 2, McHugh Decl. ¶¶ 3-6; Ex. 3, Youkhanna Decl. ¶¶ 2-8; Ex. 4, Rrasi Decl. ¶¶ 8-9; Ex. 5, Catcho Decl. ¶¶ 4-6).

VI. THE CITY VIOLATED THE MICHIGAN OPEN MEETINGS ACT.

Ordering *all* private citizens, excluding the media, to leave the public meeting when it came time to vote on the Consent Judgment is contrary to the express language and purpose of the Michigan Open Meetings Act, which "was enacted to provide openness and accountability in government, and is to be interpreted so as to accomplish this goal." *Esperance v. Chesterfield Twp.*, 89 Mich. App. 456, 463 (Mich. Ct. App. 1979). The Act "implicitly requires that all parts of the meeting . . . be open to the public," *id*. at 463, not just the media. And an individual Plaintiff can be excluded *only if* he or she "actually committed" a breach of the peace—the City has no authority to remove peaceful citizens based on the actions of others. Mich. Comp. Laws § 15.263. Defendants violated the rights of the public (including Plaintiffs), and the Court should rule as such, and it should also declare the City Council's decision invalid. *See* Mich. Comp. Laws § 15.270.

CONCLUSION

Plaintiffs request that the Court grant judgment in their favor.

Respectfully submitted,

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (P62849)
David Yerushalmi, Esq.
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

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