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' REPLY BRIEF

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ARGUMENT IN REPLY

In light of arguments advanced by Defendants, we begin by emphasizing a critical point: AICC's rights under the First Amendment and RLUIPA were not violated by *anyone* or *any entity*, including the City and any Plaintiff. Moreover, any such claims are not before this Court and thus have no relevance here, despite Defendants' efforts to the contrary. (Defs.' Br. at xii ["Appellants' claims, at their core, seek to force the City to discriminate against Muslims and violate AICC's right to free exercise of religion."]; *id.* at 14 [same]). Indeed, in its answers to the AICC and Department of Justice litigation, the City *unequivocally denied* any such wrongdoing, and the Consent Judgment at issue here similarly denies *any* such wrongdoing. As Defendants concede, "In response to the lawsuits, the City *denied wrongdoing*, *maintaining that the decision by the Commission was based on legitimate land use concerns*." (Defs.' Br. at 6 [emphasis added]). Defendants further concede that the Consent Judgment was *not* necessary to rectify a violation of federal law. (Defs.' Br. at 8 [acknowledging that "the City was not admitting liability" in the Consent Judgment]). Defendants' effort to seek sympathy for its unlawful actions directed against Plaintiffs by advancing arguments that are not relevant to the issues presented here must be rejected.[1] We turn now to the issues presented by *this* litigation.

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[1] Seeking to impugn Plaintiffs' character and motives does not change this. (*See*

I. The Consent Judgment Is Invalid.

Defendants argue here, as they did below, "that Council is not required to consider § 25.02 standards when it approves a special land use by consent judgment or to comply with [the Michigan Zoning Enabling Act ("MZEA")]. The MZEA applies only to applications for special land use, and not to the settlement of a lawsuit by a consent judgment." (Defs.' Br. at 15). It is worth reading that again. Per Defendants, the City Council was not required to comply with *any* zoning regulations for special land use, *local or state*, when it approved AICC's special land use request via the challenged Consent Judgment. The law provides otherwise.

In this reply, we will walk the Court through the relevant statutory framework in light of the undisputed material facts, demonstrating that the Consent Judgment is invalid. We will begin by briefly reviewing the critical *material* facts. But before doing so, we pause here momentarily to note our agreement with Defendants on the following points: when interpreting the Zoning Ordinance, its "[p]rovisions 'must be read in the context of the entire [ordinance] so as to produce a harmonious whole'" and courts "should avoid constructions that render any part of an ordinance surplusage or nugatory." (Defs.' Br. at 19 [quoting and citing cases]). These interpretive rules would also apply when reviewing the MZEA.

Defs.' Br. at 14 [accusing Plaintiffs of "manufactur[ing] constitutional violations and . . . mask[ing] the religious animus underlying [their] unwarranted claims"]).

Here, the City Planning Commission *unanimously* <u>dis</u>approved the construction of the AICC mosque. And in doing so, the Commission set forth specific findings and conclusions based on the *<u>mandatory</u>* general and specific zoning standards set forth in the Zoning Ordinance.[2] However, without any contrary findings and conclusions demonstrating that the mosque complies with these *mandatory* standards (general and specific), as required by the Zoning Ordinance and the MZEA, the City Council approved the special approval land use via the Consent Judgment in order to extricate itself from two controversial lawsuits.

As noted, the City defends its position—and the district court judge who approved the challenged Consent Judgment agreed with the City—by claiming that when the City Council is the "approving authority" for a special approval land use application via a consent decree, the Council need not comply with *<u>any</u>* zoning regulations. This position forced the City's Rule 30(b)(6) witness to concede during his deposition that the City Council could theoretically approve the construction of a nuclear power plant in a residential district to resolve litigation via a consent decree. (McLeod Dep. at 43:14-25 to 44:1-11, R.67-4, PgID 1644).

[2] It is wrong for Defendants to refer to the applicable standards as "discretionary." (*See* Defs.' Br. at 2, 3, 7, 17 n.9, 23). The standards are "general" and "specific," and the general standards in particular are not "discretionary"; they are *mandatory*. (*See* ZO § 25.03B1 [using the word "shall"], R.67-7, PgID 169). The City's Rule 30(b)(6) witness agrees. (McLeod Dep. at 72:13-16, R.67-4, PgID 1647).

As noted in Plaintiffs opening brief (Pls.' Br. at 32-33), when this litigation commenced, the City's attorneys (the same attorneys who drafted and recommended approval of the Consent Judgment)[3] argued that the City Council need only "consider" the zoning standards (*i.e.*, the Council was not required to make any record whatsoever demonstrating *compliance* with the standards), and thus it was Plaintiffs' burden to prove a negative (*i.e.*, that the Council did not simply "consider" the standards).[4] (*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.'"], R.14, PgID 520). The district court accepted this argument when it denied Plaintiffs' request for a preliminary injunction. (*See* Order Denying Mot. for Prelim. Inj. at 18 ["While it is true that the City Council *must consider the same factors under the SHZO*, it is not required to reach the same conclusion as the Planning Commission."] [emphasis added], R.42, PgID 1265).

[3] The City attorney also prepared only *one* Agenda Statement for the City Council meeting, and the only "Suggested Action" provided was to *approve* the Consent Judgment. (Pls.' Opening Br. at 12 [citing Agenda Statement, R.67-13, PgID 1788-89; McLeod Dep. at 135:1-24, R.67-4, PgID 1652]). Thus, the decision to approve the Consent Judgment was a *fait accompli*. AICC was no doubt aware of this as none of its supporters showed up for the Council meeting—a glaring fact that was not lost on Plaintiffs. (Youkhanna Dep. at 35:20-25 to 36:1-11; 39:2-25 to 40:1-9, R.67-14, PgID 1793-94).

[4] Defendants object to this assertion (*see* Defs.' Br. at 18 n.10), but their objection is refuted by the record, which includes the district court's acceptance of this argument in its order on the preliminary injunction motion.

Following the close of discovery, the City's argument changed to the one it presents here: when "approving" a special approval land use via a consent decree, the City Council is not required to comply with *any* zoning standards. (Defs.' Br. at 20 ["Since Council is only the *approving* authority, it is *not required* to consider the § 25.02 standards or find that a consent judgment complies with those standards before approval . . . ."). The district court once again agreed with the City, and it did so by concluding 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." (Order at 11, R.89, PgID 4453).

The City and the district court are wrong. Not only does the Zoning Ordinance not support this position, particularly when read as "a harmonious whole," the MZEA, which trumps the Zoning Ordinance, expressly rejects it, and for good reason: zoning laws "are enacted for the benefit of the public," *League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d 1052, 1055-56 (9th Cir. 2007), not for the benefit of politicians or city lawyers who want to avoid controversial litigation. Indeed, consider the serious policy implications of the City's position: if an application for special zoning couldn't get approval through the Planning Commission, the party seeking the special zoning could simply "sue and settle," relying on the fact that potentially costly and controversial litigation would force the City Council to exercise this super-zoning-authority the City claims it possesses. In short, that theoretical

nuclear power plant could become a reality. But the Zoning Ordinance and the MZEA do not permit such an abuse of power.

We turn now to the Zoning Ordinance. It is the City's position that the City Council is only required to comply with the zoning standards when it is the "reviewing authority," and that when a consent decree is involved, the City Council is *only* ever an "approving authority," which then, per the City, permits the Council to ignore the zoning standards. The City further argues that a 2009 modification to the Zoning Ordinance (a modification which was made well before the "need-only-consider" argument the City advanced previously in this litigation) supports its position. (*See* Defs.' Br. at 20-21). The Zoning Ordinance shows otherwise.

We begin with the section addressing "authority," which states in relevant part:

> **SECTION 25.01. AUTHORITY.**
>
> A. The City of Sterling Heights 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 . . .
>
> B. In consideration of 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 be subject to conditions, restrictions and safeguards deemed necessary to the interest of public health, safety and welfare.
>
> C. When the City Council *is the reviewing authority* with respect to a special approval land use, it shall have the same reviewing authority and

> *shall consider the same standards as the Planning Commission* under the special approval land use criteria applicable to such use in the particular zoning district and Article 25.

(ZO at § 25.01 [emphasis added], R.67-7, PgID 1691). Thus, per subsection A, the City Council is the "approving authority" for those situations enumerated in 1 through 5, with number 4 being developments "pursuant to a consent judgment." However, subsection B states that the City Council "***reviews** and approves*" special approval land uses as set forth in numbers 1 through 5 ("the preceding sentence"),[5] which includes approvals via consent judgments (number 4). And subsection C states that when the City Council is doing its review, it must comply with the same standards as the Planning Commission. Thus, "approval," particularly as read in this section, presupposes a "review" by the "approving authority" (*i.e.*, "approving authority" presupposes a "reviewing authority"—thus, they are interchangeable here). And any such "review," whether by the Planning Commission or the City Council when it has the authority to do so (numbers 1 through 5), must apply ("consider") the special approval land use zoning regulations. This is the only reading of the ordinance that is "harmonious" and which does not render other sections of the ordinance "nugatory."

Indeed, section 25.03, as set forth below, makes clear that the City Council *is* a "reviewing authority" when considering a special approval land use approval via a

[5] The drafting of this section is sloppy, to say the least. Numbers 1 through 5 are part of the same "preceding sentence" in context. Thus, each section should have been separated by a semicolon and the "or" should have followed number 4 in order for it to make sense grammatically.

consent judgment. Consequently, it is wrong as an initial matter to argue that the City is never a "reviewing authority" when a special approval land use decision is made via a consent decree, as noted above and here. Per this section:

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

(ZO at § 25.03A [emphasis added], R.67-7, PgID 1693-94). Thus, while the City Council may not need to hold a public hearing,[6] it is still nonetheless required to investigate and thus apply the zoning standards. Consequently, as the structure of the ordinance makes clear, an "approving authority" must necessarily conduct a review of the special approval land use request (it is necessarily a "reviewing authority") before

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[6] 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." (ZO at § 25.03A, R.67-7, PgID 1693-94; *see* Defs.' Br. at 20 n.13 [claiming that this section is "inapplicable," but then relying on it to conclude that no public hearing is necessary]). Consequently, under the ordinance, the City Council need not hold a public hearing, but it still must *investigate* the circumstances of the case because it is a "*reviewing authority*" (as well as the "*approving authority*") when considering approval via a consent judgment.

the request can be approved.[7] And this makes sense, and it makes most sense when the City Council is approving a special approval land use that was disapproved unanimously by the Planning Commission, as in this case. If the Court were to read the Zoning Ordinance as Defendants suggest (and as the district court did), then this provision where the City Council is identified as a *reviewing authority* when approving a special land use pursuant to a consent judgment is rendered nugatory.

The Zoning Ordinance further provides:

> **SECTION 25.03. PROCEDURES.**
>
> * * *
>
> B. *Approval.* The following shall apply to approval of a special approval land use by the Planning Commission, or City Council in instances where it is the reviewing authority:
>
> 1. If the particular special approval land use is in compliance with the standards set forth in Section 25.02, the requirements specific to the particular zoning district in which the special approval land use is proposed, the conditions imposed under Section 25.03(D), other applicable ordinances, and state and federal 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*.

(ZO § 25.03B1, R.67-7, PgID 1694). Consequently, when approving a special approval land use, the decision to do so must "*be incorporated in a statement of findings and conclusions which specifies the basis for the decision and any conditions imposed*." In this case, the findings and conclusions by the Planning Commission

[7] Defendants' view of the Zoning Ordinance is illogical. Per Defendants, the body designated to approve a special approval land use can do so in complete disregard of the Zoning Ordinance. However, if that body also must review the proposal before approving it (or are just reviewing it), it must comply with the ordinance's standards.

justified disapproving AICC's application. When the City Council completely reversed that decision, it was required to incorporate a statement of findings and conclusions demonstrating that the application complied with the requisite zoning standards. That was not done in this case—nor could it be, as the Planning Commission's decision demonstrates.

Indeed, even if the Zoning Ordinance were "silent" as to whether the City Council must apply the zoning standards when it is "designated the 'approving authority' only," as the district court concluded (Order at 11, R.89, PgID 4453), the "Intent" of the Zoning Ordinance compels this Court to interpret that silence in favor of finding that the approval of the mosque construction was unlawful. The Zoning Ordinance provides, *inter alia*, that "[t]he 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 . . . ." (ZO at § 3.00, R.67-7, PgID 1678). Clearly, disregarding the general standards of the Zoning Ordinance when approving a special approval land use in a residential district via a consent judgment is contrary to this stated intent. And "special" land use approval decisions in particular are critical—they impose a special duty to "protect the community" from uses not "compatible." (ZO § 25.00 ["Intent"], R.67-7, PgID 1691). Thus, because of their "actual or potential impacts," there is "a need to carefully regulate them." (*Id.*). Defendants are noticeably silent on

this point.

Finally, even if the alleged "silence" of the Zoning Ordinance is sufficient for the City Council to completely disregard the standards of its ordinance (or to interpret it in ways that directly contradict its stated intent), this "silence" does not license the Council to ignore the MZEA, which gives the City its authorization to regulate in this area in the first instance. *Whitman v. Galien Twp.*, 288 Mich. App. 672, 679 (2010) ("Municipalities have no inherent power to regulate land use through the enactment of zoning legislation; instead, a local unit of government must be specifically authorized by the Legislature to exercise any zoning authority."). And contrary to Defendants' assertion (Defs.' Br. at 22), the Michigan Home Rule Cities Act does not change this analysis. *See Korash v. Livonia*, 388 Mich. 737, 746 (1972) (holding that the citizens of a home rule city could not, absent compliance with the MZEA, employ a voter initiative to rezone property and stating that "the amendment to the ordinance, having been enacted by a procedure different from and contrary to the procedure required by the zoning-enabling act, is invalid"). Not only is a statement of findings and conclusions demonstrating compliance with the zoning standards required by the Zoning Ordinance (as Plaintiffs contend is the proper reading of the Zoning Ordinance), it is nonetheless mandated by the MZEA.[8] Thus, whatever vagaries of the

[8] This is not a "new" argument, as Defendants wrongly state. (Defs.' Br. at 18). Plaintiffs made this precise and dispositive argument below. (Pls.' Mot. for Summ. J. & Br. in Supp. at 2-5, 16-17, R.67, PgID 1600-03, 1614-15). And the "authority" for

Zoning Ordinance that the City and the district court seek to rely upon to sidestep the Zoning Ordinance's requirement to demonstrate compliance with the zoning regulations in this case, the MZEA makes clear that there is no authority to do so, rendering the City Council's decision invalid. *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."). Plaintiffs are not aware of any provision of the MZEA that authorizes the City Council to disregard zoning regulations when approving a special approval land use via a consent judgment, and Defendants have cited to none in their brief. We turn now to the MZEA.

Section 125.3502 of the MZEA authorizes the City to engage in special land use zoning. As noted, any provision of the Zoning Ordinance that runs contrary to the MZEA is unlawful and void. *See id.* Per subsection (4) of § 125.3502,

> (4) The body or official designated to review and approve special land uses may deny, approve, or approve with conditions a request for special land use approval. *The* ***decision*** *on a special land use* ***shall*** *be incorporated in a statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed.*[9]

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this argument is found in the MZEA itself and in *Whitman v. Galien Twp.*, 288 Mich. App. 672 (2010), which was also cited by Plaintiffs. (*See id.*).

[9] Noticeably, the Zoning Ordinance parrots this provision of the MZEA, because it must. (*See* ZO § 25.03B1, R.67-7, PgID 1694).

Mich. Comp. Laws § 125.3502(4) (emphasis added). Here, the Consent Judgment was without question a "decision on a special land use," as the Consent Judgment itself expressly states: "AICC is hereby granted special land use approval to develop a 20,500 square foot mosque on the Property." (Consent J. ¶ 1.1, R.67-20, PgID 1832). Defendants' argument that the MZEA does not apply because the approval of the special land use via the Consent Judgment was not the approval of an "application" or a "request" (Defs.' Br. at 22-23) is nonsense.

In the final analysis, there are at least three undisputed material facts demonstrating that the approval of the mosque construction via the Consent Judgment was invalid: (1) the City Planning Commission *unanimously* disapproved the construction of the AICC mosque based on specific factual findings and conclusions that the proposed construction does not comply with the standards set forth in the Zoning Ordinance; (2) the City Council's decision to approve AICC's special approval land use via the Consent Judgment was not "incorporated in a statement of findings and conclusions" demonstrating that the proposed construction complies with the required general and specific zoning standards (because it does not, as the Planning Commission concluded—a conclusion the Mayor and the City's Rule 30(b)(6) witness agreed was correct)[10]; and (3) there are no findings that the Consent

[10] (Taylor Dep. at 69:2-25 to 76:1-4 [stating that "the planning commission arrived at the right decision" and that this decision was "based on legitimate planning and zoning issues"], R.67-12, PgID 1781-82; McLeod Dep. at 111:21-25 to 112:1-2 ["I

Judgment was necessary to rectify an actual violation of federal law. In sum, the Consent Judgment approves a zoning decision that violates local and state zoning regulations without any findings that this decision was necessary to rectify a federal law violation. The Consent Judgment is invalid. *See League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d 1052 (9th Cir. 2007); *Perkins v. City of Chi. Heights*, 47 F.3d 212, 216 (7th Cir. 1995); *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 270 (8th Cir. 2011); *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 341-42 (7th Cir. 1987); *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); *Vestevich v. W. Bloomfield Twp.*, 245 Mich. App. 759, 764-65 (Mich. Ct. App. 2001).

II. Defendants' Speech Restriction Is Unlawful.

A. The Restriction Violates the Free Speech Clause.

Defendants complain that Plaintiffs are "reverse engineering" a viewpoint discrimination claim. (Defs.' Br. at 15, 39). They are mistaken. It is evident that Defendants misapprehend the concept of viewpoint (and content)[11] discrimination.

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agree with the planning commission's determination."], R.67-4, PgID 1650).

[11] There is no dispute that the speech restriction is, at a minimum, content based. "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). And in light of this Circuit's precedent, content-based restrictions are prohibited in the forum at issue. (*See* Defs.' Br. at 32 [citing *Lowery v. Jefferson Cnty. Bd. of Educ.,* 586 F.3d 427, 432 (6th Cir. 2009), and the requirement that such restrictions be "(1) 'content-neutral,'").

Here, Defendants' speech restriction is both content- and viewpoint-based.[12] The very basis for this restriction (*i.e.*, Defendants did not want any comments during the public hearing on the Consent Judgment agenda item—an agenda item involving the decision to approve the construction of a mosque in a largely Chaldean Christian neighborhood—to offend anyone's religion) demonstrates that it is an unlawful viewpoint-based restriction as a matter of fact and law. Defendants repeat in their brief the same arguments regarding viewpoint neutrality that the Supreme Court has repeatedly rejected and forcefully foreclosed most recently in *Matal v. Tam*, 137 S. Ct. 1744 (2017), *a case about viewpoint discrimination*. *id*. at 1763 ("Giving offense is a viewpoint."). The holding in *Matal* compels this Court to reverse and rule in Plaintiffs' favor. There is no basis to argue otherwise.

Defendants cite and rely upon *American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority,* 901 F.3d 356 (D.C. Cir. 2018), and *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, 897 F.3d 314 (D.C. Cir. 2018) (Defs.' Br. at 36, 38, 39), but neither of these cases involved a restriction on demeaning, disparaging, or offensive speech, as in this case.

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[12] Defendants never address the fact that their speech restriction 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); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") (collecting cases).

As Defendant Taylor testified, he was enforcing a City Council rule that prohibits public comments that "make attacks on people or institutions." (Taylor Dep. at 50:23-25 to 51:1-14, R.67-12, PgID 1776). And as Defendants admitted in their answer, this restriction prohibits comments deemed to be "disparaging to Muslims." (Answer ¶ 52 [admitting that the speaker was called out of order because her comment "was disparaging to Muslims"], R.29, PgID 1149-50). Indeed, Defendant Taylor admitted that the restriction prohibited certain *viewpoints* on the *subject matter* being discussed: the approval of the mosque construction. (Taylor Dep. at 118:1-20, R.67-12, PgID 1786). There is no "reverse engineering" involved whatsoever.

American Freedom Defense Initiative v. King County, No. 17-35897, 2018 U.S. App. LEXIS 27581, at *11 (9th Cir. Sep. 27, 2018), is on point. In this case, the Ninth Circuit held that the County's refusal to display an ad in a nonpublic forum based on a claim that the ad was demeaning and disparaging toward Muslims was a viewpoint-based restriction in violation of the First Amendment. The court rejected an argument advanced here by Defendants, stating that the County "emphasizes that the disparagement clause applies equally to all proposed ads: none may give offense, regardless of its content. But the fact that no one may express a particular viewpoint—here, giving offense—does not alter the viewpoint-discriminatory nature of the regulation." *Id.* at *11. The court specifically relied upon *Matal v. Tam* to reach its unanimous conclusion. *See id.* at *10-14; *see also Wandering Dago, Inc. v.*

Destito, 879 F.3d 20, 24 (2d Cir. 2018) (holding that "*Matal* compels the conclusion that defendants have unconstitutionally discriminated against WD's viewpoint by denying its Lunch Program application because WD branded itself and its products with ethnic slurs").

Defendants improperly conflate subject matter restrictions with viewpoint restrictions. (Defs.' Br. at 32-40). *Every* Plaintiff at the City Council meeting wanted to address the *subject* open for discussion: the City Council's decision as to whether it should permit AICC to build the proposed mosque via the Consent Judgment. There is no dispute about this fact. Plaintiffs were not at the meeting to speak about who should be the next City dog catcher. Defendants prohibited Plaintiffs from expressing their viewpoints on the subject matter at issue. This is viewpoint discrimination, plain and simple. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

B. The Restriction Violates the Equal Protection Clause.

"[U]nder the Equal Protection Clause, not to mention the First 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," which is precisely what Defendants have done. *Police Dep't of the City of Chi. v. Mosley,* 408 U.S. 92, 96 (1972). This fundamental principle of law

is applicable here, *Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 176 (1976) (citing *Mosley*, 408 U.S. at 96), and it compels the conclusion that Defendants violated the Equal Protection Clause.

III. Defendant Taylor Violated Plaintiff Rrasi's Clearly Established Rights.

Defendant Taylor directed the seizure of Plaintiff Rrasi during a recess without probable cause and in retaliation for her speech in violation of Plaintiff Rrasi's clearly established rights under the First and Fourth Amendments. Defendant Taylor's *ad hoc* decision to seize Plaintiff Rrassi during a recess was not a "legislative" function. He does not enjoy legislative nor qualified immunity.

Defendants argue that Plaintiff Rrasi was seized by City officers "only *after* she stopped, turned back, and refused to leave Chambers." (Defs.' Br. at 11). This argument misrepresents the record. After speaking with Defendant Taylor *during a recess*,[13] Defendant Taylor, who objected to what Plaintiff Rrasi was saying, ordered the City police officers, under color of authority, to remove her from the chambers. The officers followed Defendant Taylor's directive. *At that moment*, Plaintiff Rrasi was seized under the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) ("[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

[13] There is no City video of this conversation because the City Council was *in recess*. The Mayor was not "in the process of calling this recess" as Defendants incorrectly state. (Defs.' Br. at 10). As soon as the Mayor calls a recess, the City's video cameras turn off, as in this case.

occurred.”). It does not take handcuffs, telling someone they are under arrest, nor a formal booking to “seize” a person under the Fourth Amendment, as Defendants suggest [*see* Defs.’ Br. at 11 n.8]). *See 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).

While the officers were removing Plaintiff Rrasi, she turned back (as the video shows, she was practically *halfway up the aisle*) and yelled at Defendant Taylor because she was angry that he ordered the officers to seize and remove her. At this point, the seizure had already occurred. Plaintiff Rrasi’s testimony was unequivocal on this point: “*After I was seized*, I was yelling.” (Rrasi Dep. at 53:17-18 [emphasis added], R-69-20, PgID 2969). Defendants’ claim that they had probable cause for this seizure is wrong as a matter of fact and law. Probable cause is determined *at the time of the seizure*, not after the seizure has already occurred. *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (“Whether that arrest was constitutionally valid depends in turn upon whether, *at the moment the arrest was made*, the officers had probable cause to make it . . . .”) (emphasis added).

Furthermore, Defendant Taylor was not performing a legislative function by retaliating against Plaintiff Rrasi because he objected to what she was saying *to him*

during a recess—such *ad hoc* decisions are not immune from challenge, *see 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'")—and Defendant Taylor's retaliatory intent proves dispositive of the qualified immunity inquiry, *see Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821-25 (6th Cir. 2007) ("Because retaliatory intent proves dispositive of Defendants' claim to qualified immunity, summary judgment was inappropriate"); *see also Leonard v. Robinson*, 477 F.3d 347, 361 (6th Cir. 2007); *Kennedy v. City of Villa Hills, Ky.*, 635 F.3d 210 (6th Cir. 2011); *Greene v. Barber*, 310 F.3d 889, 893 (6th Cir. 2002). 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 v. Ribar,* 156 F.3d 673, 682 (6th Cir. 1998). In sum, Defendant Taylor violated Plaintiff Rrasi's "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

IV. Defendants Deprived Plaintiffs of Due Process.

Defendants seek to convert the due process argument into an argument about standing. (Defs.' Br. at 29-30 [relying principally on standing cases]). The parties

fully briefed the standing argument below in supplemental briefing requested by the district court. The district court exercised its jurisdiction in this case because Plaintiffs plainly have standing. Standing is not an issue. (*See* Pls.' Resp. to Defs.' Supplemental Br. on Standing, R.50, PgID 1405-23; Rrasi Decl., R.50-2, PgID 1425-31). As a "property owner or the occupant of any structure located within 300 feet of the property being considered for a special land use," state law vests Plaintiffs Catcho, Jabbo, and Rrasi with a *cognizable interest in the AICC zoning decision*. Mich. Comp. Laws § 125.3502. Consequently, they had a right to proper notice and to be heard on this decision as a result of this interest. *See also Arill v. Maiz*, 992 F. Supp. 112, 117 (D.P.R. 1998) (holding that the complaint 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. The City Council *completely reversed* this decision without notifying persons whose property will be affected (Plaintiffs) that it was going to do so, and the City Council failed to provide proper notice of the terms and conditions of the Consent Judgment, which was not publicly disclosed until after it was approved. Thus, the City Council "materially deviated from the recommendations of the planning commission," thereby "subverting the purpose of the duly conducted notice and comment process" in violation of the

Fourteenth Amendment. *Nasierowski Bros. Inv. Co. v. City of Sterling Heights,* 949 F.2d 890, 893-94 (6th Cir. 1991).

V. Defendants Violated the Establishment Clause.

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. *See Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1119 (10th Cir. 2010). Contrary to Defendants' argument (*see* Defs.' Br. at 45 [conflating, purpose and effect]), there is "a distinction *with* a difference" between "purpose" and "effect" under the Establishment Clause. "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, *irrespective of government's actual purpose*, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to *either* question should render the challenged practice invalid." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor J., concurring) (emphasis added). Indeed, Defendants are not permitted to "hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of [their] actions," as they seek to do here. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290,

307, n.21 (2000). There is a reason why citizens at the Council meeting erupted in anger when after they were prohibited from expressing their religious viewpoints, Defendant Taylor allowed council member Doug Skrzyniarz to lecture them about "religious wars," "religious liberty," and the so-called "wall of separation between church and state," among others. (Taylor Dep. at 61:4-25 to 68:1-24; 95:15-25 to 96:1-22, R.67-12, PgID 1779-80, 1783; Youkhanna Dep. at 50:17-21, R.67-14, PgID 1795). And it did not go without notice that no one from AICC was at this meeting. In the words of Plaintiff Youkhanna, the decision to approve the mosque was "a baked deal ahead of time." (Youkhanna Dep. at 35:24-25 to 36:1-22, R.67-14, PgID 1793).

In the final analysis, whether done intentionally or unintentionally (and it does not matter under the Establishment Clause), this entire process conveyed a message of endorsement of AICC and its supporters and disfavor of the Chaldean Christians and their "good faith" concerns. This "effect" is palpable, and it is unlawful.

VI. Defendants Violated the Michigan Open Meetings Act.

During the City Council's *crucial vote* on the Consent Judgment agenda item, Defendant Taylor ordered all private citizens (excluding media) 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." Mich. Comp. Laws § 15.263; *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.") (emphasis added). Section 15.270 permits invalidation of a decision as follows:

> (2) A decision made by a public body may be invalidated if the public body has not complied with the requirements of section 3(1), (2), and (3) in making the decision ***or*** if *failure to give notice* in accordance *with section 5* has interfered with substantial compliance with section 3(1), (2), and (3) *and* the court finds that the noncompliance or failure has impaired the rights of the public under this act.

Mich. Comp. Laws § 15.270 (emphasis added). The noncompliance at issue here was a direct violation of section 3, not section 5. A correct reading of the Act ties the "impaired the rights of the public" provision with a "failure to give notice" violation under section 5 and *not* with a *direct violation* of section 3, as in this case.[14] The City Council's decision is invalid.

CONCLUSION

The Court should reverse the district court and grant summary judgment in Plaintiffs' favor.

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[14] The Act also provides for an award of damages against an official who willfully violates the Act, as Defendant Taylor did in this case. *See* Mich. Comp. Laws § 15.273. Also, Defendants' claim that Plaintiffs were required to name the City Council (Defs.' Br. at 24) is incorrect. *See Esperance v. Chesterfield Twp.*, 89 Mich. App. 456, 463 (Mich. Ct. App. 1979) (suing township under OMA for actions taken by the township's board). Moreover, Defendant Taylor is the chairman of the Council, and he was sued in his official capacity, which is a suit against the entity he represents. *See Ky. v. Graham*, 473 U.S. 159 (1985).

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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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 6,462 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 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.

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SUPPLEMENTAL ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

No.	Page ID	Description
R.50	1405-23	Plaintiffs' Response to Defendants' Supplemental Brief on Standing
R.50-2	1425-31	Declaration of Debi Rrasi