UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CATHOLIC HEALTHCARE INTERNATIONAL, INC., *et al.*, Plaintiffs, v. GENOA CHARTER TOWNSHIP, *et al.*, Defendants.	No. 21−cv−11303−SDK−DRG Hon. Shalina D. Kumar Magistrate Judge David R. Grand **EXPEDITED CONSIDERATION REQUESTED**

PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs Catholic Healthcare International, Inc. ("CHI") and Jere Palazzolo (collectively referred to as "Plaintiffs"), hereby move this Court for an injunction pending appeal. *See* Fed. R. App. P. 8. Plaintiffs request expedited consideration.

On December 20, 2022, the Court denied in part and granted in part Plaintiffs' motion for a preliminary injunction. (Order, ECF No. 70). The next day, Plaintiffs filed a notice of interlocutory appeal. (ECF No. 71).[1]

In its order denying Plaintiffs' request for injunctive relief with regard to the Township's ban on their religious displays (the Court granted Plaintiffs' request for an injunction with regard to the Township's ban on "organized gatherings"), the

[1] A denial of a motion for a preliminary injunction is immediately appealable to the U.S. Court of Appeals for the Sixth Circuit as a matter of right. 28 U.S.C. § 1292.

Court concluded that Plaintiffs' challenge was not ripe. (Order on Prelim. Inj. ("Order") at 8-9, ECF No. 70, PageID. 3509-10).

Plaintiffs intend to file a motion for an injunction pending appeal in the Sixth Circuit. However, before doing so, Plaintiffs are "ordinarily" required to "move first in the district court." *See* Fed. R. App. P. 8; *see LaPorte v. Gordon*, No. 20-1269, 2020 U.S. App. LEXIS 10951, at *2 (6th Cir. Apr. 7, 2020) ("Just because the district court denied an injunction pending its own ultimate determination on the merits does not necessarily mean that the district court would deny an injunction pending the interlocutory appeal to this court.").

As set forth in Plaintiffs' brief, declarations, and exhibits filed in support of their motion for a preliminary injunction, as well as their supplemental filings and the brief and exhibits accompanying this motion, all of which Plaintiffs rely on and incorporate here by reference, Plaintiffs' First Amendment and Religious Land Use and Institutionalized Persons, 42 U.S.C. § 2000cc *et seq*. ("RLUIPA"), claims are ripe and an injunction is warranted.

As a direct result of the Township's actions, Plaintiffs are suffering, and will continue to suffer, irreparable harm absent the requested injunction. The balance of equities favors granting the injunction. And it is in the public interest to grant the requested relief. *See Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon

First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Bonnell v. Lorenzo,* 241 F.3d 800, 809 (6th Cir. 2001) ("[W]hen reviewing a motion for preliminary injunction, if it is found that a constitutional right is being *threatened* or *impaired*, a finding of irreparable injury is *mandated*.") (emphasis added); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); (*see also* Order at 10 [finding that "plaintiffs satisfy the standard for preliminary injunctive relief from the now-unsupported prohibition on organized gatherings—likelihood of success on merits, irreparable harm to the plaintiffs, absence of irreparable harm to others, and the public interest"], ECF No. 70, PageID.3511).

Pursuant to E.D. Mich. LR 7.1, on December 22, 2022, Plaintiffs' counsel, Robert J. Muise, sent an email to Defendants' counsel, T. Joseph Seward and David D. Buress, requesting concurrence in the relief sought by this motion. That same day, Mr. Seward responded, informing counsel that Defendants do not concur.

WHEREFORE, Plaintiffs respectfully request that the Court grant the requested motion for an injunction pending appeal by enjoining the Township's ban on Plaintiffs' religious displays. Plaintiffs further request expedited consideration of this motion.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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BRIEF IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

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ISSUE PRESENTED

Whether the Court should enter an injunction pending appeal where (1) Plaintiffs' claims arising under the First Amendment and RLUIPA are ripe; (2) Plaintiffs are likely to succeed on these claims; (3) Plaintiffs are currently suffering irreparable harm; (4) granting the injunction will not cause substantial harm to others because the exercise of constitutionally protected rights can never harm any of Defendants' or others' legitimate interests; and (5) granting the injunction is in the public interest as it is always in the public interest to prevent the violation of a party's constitutional rights.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001)

Elrod v. Burns, 427 U.S. 347 (1976)

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42 U.S.C. § 2000cc *et seq.*

Fed. R. App. P. 8

PROCEDURAL BACKGROUND

On September 19, 2021, Plaintiffs filed an emergency motion for a temporary restraining order (TRO) and for a preliminary injunction. (ECF No. 23). This motion was compelled by the fact that the Township filed an enforcement action on September 17, 2021 in state court, seeking an *ex parte* TRO to prohibit Plaintiffs from displaying religious symbols and from engaging in "organized gatherings"—religious worship—on their private property in the Township. (*See* Pls.' Mot. for TRO and Prelim. Inj. at 1-4, ECF No. 23, PageID. 1122-25).

The Court held a hearing on Plaintiffs' motion on September 21, 2021. (Minute Entry, 9/21/21). The Court denied the TRO that same day (ECF No. 28), and on September 29, 2021, the Court denied the request for a preliminary injunction (ECF No. 30). The following day, Plaintiffs filed a Notice of Interlocutory Appeal (ECF No. 31), appealing the denial of the request for a preliminary injunction.

On December 20, 2021, the Sixth Circuit issued its mandate, remanding the case for the Court to reconsider "whether this case involves a civil-enforcement action that is 'akin to a criminal prosecution' and thus eligible for *Younger* abstention," *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp.*, No. 21-2987, 2021 U.S. App. LEXIS 33937, at *3 (6th Cir. Nov. 12, 2021), and it "expand[ed] the scope of [its] remand to include reconsideration of the district court's ripeness

analysis," *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp.*, No. 21-2987, 2021 U.S. App. LEXIS 36609, at *1 (6th Cir. Dec. 10, 2021).

In light of the Sixth Circuit's mandate, on January 6, 2022, this Court ordered the parties to file supplemental briefs on the *Younger* abstention and ripeness issues. (Briefing Schedule, ECF No. 38). Those briefs were filed.

On April 25, 2022, the state court stayed all proceedings pending final resolution of this federal case. (ECF No. 51-3). Consequently, as this Court recently concluded, *Younger* abstention does not apply in this case. (Order at 7-8 [citing, *inter alia*, *Jones & Jones Leasing Co., LLC v. Zepsa Indus.*, No. 19-12746, 2020 U.S. Dist. LEXIS 177260, at *6 (E.D. Mich. Sep. 28, 2020) (citing *Walnut Properties, Inc. v. Whittier*, 861 F.2d 1102, 1107 (9th Cir. 1988))], ECF No. 70, PageID.3506-07).

On May 5, 2022, the Court ordered "the parties to submit supplemental briefs by May 26, 2022 on the applicability of *Rooker-Feldman* [23] to Plaintiffs' Emergency MOTION for Temporary Restraining Order/Preliminary Injunction." (Text Order, May 5, 2022). Those briefs were filed. And as this Court also concluded in its Order, "the *Rooker-Feldman* doctrine does not apply." (Order at 8 n.3, ECF No. 70, PageID.3509).

In its Order denying Plaintiffs' motion to enjoin the Township's ban on Plaintiffs' religious displays, the Court concluded that the challenge was not ripe.

(Order at 8-9, ECF No. 70, PageID.3509-10). The Court "adopt[ed] the ripeness analysis and holding found at section III.C of" its "recent opinion on defendants' motion to dismiss." (*Id.*). In that opinion, the Court concluded that Plaintiffs' challenge was not ripe because they "never sought approval from the Township to simply install or erect the desired religious symbols"; therefore, "the Township never reached a final decision on how the Zoning Ordinance applies to the installation or erection of the religiously symbolic structures CHI seeks to place on the Property."[1] (Order on Mot. to Dismiss at 19, ECF No. 69, PageID.3485). Plaintiffs disagree. This challenge is ripe.

SUMMARY OF RELEVANT FACTS

In December 2020, CHI submitted a special land use application, ***which included the religious displays at issue***. (Muise Decl., Ex. C [Hr'g Tr. at 38, 54], ECF No. 39-2, PageID. 1566; Palazzolo Decl. ¶¶ 51-67, ECF No. 23-3, PageID. 1326-31). This application is what the Township demanded for the religious displays, even without the chapel. (*See infra*). This burdensome process cost CHI in excess of $30,000. (Palazzolo Decl. ¶ 4, ECF No. 39-3, PageID. 1617). Yet, after undertaking this permitting process, the Township Board's response was an

[1] The Court did not directly address the RLUIPA aspect of Plaintiffs' request for a preliminary injunction.

unequivocal, "No." The entire application was denied on May 3, 2021. (Palazzolo Decl.¶ 65, ECF No. 23-3, PageID. 1330).

Following this denial, the Township sent CHI a letter dated May 7, 2021, demanding the removal of the religious displays at issue by June 4, 2021, thereby prompting Plaintiffs to file this federal lawsuit on June 2, 2021. (Compl., ECF No. 1; Palazzolo Decl. ¶¶ 72-73, ECF No. 23-3, PageID. 1332).

As stated in the Township's letter, "After denial of the proposed project at 3280 Chilson Road, the *signs/temporary signs* are in violation of the *sign ordinance* and will need to be removed."[2] The Township also stated that the display of the image of Our Lady of Grace is a "structure/grotto sign [that] does not have a permit and will also need to be removed." The Township included with the letter a copy of the Township's "sign standards and accessory structure ordinance," which are part of the Zoning Ordinance. (Palazzolo Decl., ¶¶ 72-74, ECF No. 23-3, PageID. 1332).

Unfortunately, there is *no permitting process* that would allow Plaintiffs to display the religious symbols at issue other than the full-blown special land use application process, even though such activity would be less impactful than other similar secular activity permitted by the Township *in this very same neighborhood*

[2] The Township's position was clear: the removal of the Stations of the Cross was based *solely* on the Township's conclusion that they violated the Sign Ordinance.

without the owners having to undergo this burdensome and costly process. (*See, e.g.,* O'Reilly Decl. ¶¶ 4-8, 20-25, ECF No. 23-4, PageID. 1340-41, 1344-46).

On Friday, September 17, 2021, just days before a scheduled religious assembly in celebration of St. Pio's Feast Day (September 23, 2021) that Plaintiffs had been planning for many months (and which the Township had known about for at least 6 months),[3] the Township filed a verified complaint and *ex parte* TRO request in the 44th Circuit Court for Livingston County, asking the county circuit court to order Plaintiffs "to remove a 12-foot-tall stone structure [the image of Our Lady of Grace], altar, and 14 stations of the cross housing structures that have been installed at the [CHI] Property" and to prevent Plaintiffs from holding religious worship on the property, claiming that a Livingston County Road Commission permit (which Plaintiffs have never used and which has now expired) "forbids" this. (Verified Compl., ¶¶ 2, 62, Ex. 15 [Permit], ECF No. 23-2, PageID. 1163, 1271). The Township's demands regarding the removal of the religious displays are the same as those set forth in the May 7, 2021 letter, which prompted the filing of this lawsuit. The driveway issue was a red herring, but yet another way in which the Township was enforcing its Zoning Ordinance to restrict Plaintiffs' right to religious exercise on the CHI property.

[3] (*See* Verified Compl., ECF No. 23-2, PageID. 1223).

On September 20, 2021, the state court judge signed the *ex parte* TRO, forcing CHI to immediately remove the religious symbols and to immediately "cease all unlawful use and occupancy of the Property for organized gatherings," thus prohibiting religious expression, worship, and assembly. (Muise Decl., Ex. A [TRO], ECF No. 39-2, PageID. 1550).

On September 21, 2021, Plaintiffs were notified that the state court judge signed the TRO, at which time CHI promptly filed a motion to dissolve the TRO as Plaintiffs had a religious assembly scheduled for September 23, 2021. (Emergency Mot., ECF No. 27-3, PageID. 1428-48). The state court did not dissolve the TRO as requested (the court "denied" a proposed order that would have done so). Rather, the court set a hearing on CHI's motion to dissolve and the Township's motion for a preliminary injunction for September 28, 2021. By that time, all of the religious displays had been removed per the TRO's requirement that they be removed "immediately." (Palazzolo Decl. ¶¶ 6-9, ECF No. 39-3, PageID. 1617-20).

The hearing on CHI's motion to dissolve and the Township's motion for preliminary injunction commenced on September 28, 2021, but it was adjourned after nearly a full day of testimony from the Township's witness to determine whether the matter could be resolved between the parties. During cross-examination, the Township's witnessed testified, *inter alia*, that if the CHI property had been a private residence, Plaintiffs could erect 14 bird houses, display a picnic

table, and construct a 12-foot stone wall outside of the setbacks for just a $50 permit per "structure" and without having to undergo the burdensome and costly special application for land use process[4] (Muise Decl., Ex. C [Hr'g Tr. at 78], ECF No. 39-2, PageID. 1573)—a process which grants discretionary authority to the Township Board to grant or deny a request (*id*. at 103, PageID. 1575). The witness also confirmed, *inter alia*, that there is no burdensome special land use application required prior to having 200 people at a home for a football party in the Township. (*Id*. at 62, PageID. 1571).

In other words, unlike Plaintiffs' religious displays, which are structurally no different in size or scope, the secular "structures" identified could be constructed on the property *next door* to the CHI property for just a $50 permit per item and without the need to undergo the costly, burdensome, and subjective Planning Commission and Township Board approval process (the special land use application process), and 200 people could gather to watch football at the neighbor's property, but they could not come to pray at the CHI property. *See Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 540 (6th Cir. 2010) ("While the United States Code

[4] As stated throughout these proceedings, Plaintiffs would have no objection to paying for a $50 permit per religious display and having a building inspector inspect each display to ensure that it was safe. *Plaintiffs told the Township from the very beginning* that they were "willing to comply with reasonable permitting requirements." (Verified Compl., Ex. 7 [Atty ltr. of 11/5/20], ECF No. 23-2, PageID 1210-12). But the Township's answer has always been, "No."

contains a Religious Freedom and Restoration Act and a Religious Land Use and Institutionalized Persons Act, one will search in vain for a Freedom to Watch Football on a Sunday Afternoon Act.").

Unfortunately (but not surprising given the Township's position from the very beginning), there was no reasonable resolution available that would protect Plaintiffs' right to religious exercise. The *only* option for CHI was to engage, once again, in the burdensome special land use approval process, which itself is no guarantee as the Township Board retains discretion to deny the request on subjective grounds. As a result, the *parties stipulated to* and submitted a proposed order to the state court judge, notifying the court of the following:

> The parties hereby advise the Court that [CHI] intends to submit, under protest and with a reservation of all rights, claims, and defenses, by October 15, 2021, a special application for land use, site plan, and associated documents to permit the display of religious symbols and the use of [CHI's] private property for religious worship. This submission will include the prayer trails with prayer stations, Stations of the Cross, altar, mural wall with the image of Our Lady of Grace, and a commercial driveway with parking.

(Muise Decl., ¶ 6, Ex. A [Consent Order / Stip. ¶ C], ECF No. 39-2, PageID. 1550-51, 1559). What is stated in the stipulation is what the partied agreed would need to be submitted and what CHI in fact submitted. Below are the relevant excerpts from the email exchange between Plaintiffs' counsel and the Township's counsel regarding precisely what Plaintiffs would be submitting *in order to comply with the Township's permitting requirements*:

> As a follow up to our prior discussion, CHI will submit, under protest and with a reservation of all rights, claims, and defenses, a special land use application, site plan, and associated documents to develop the *prayer campus portion* of its property located in Genoa Township ("CHI Property"). This submission will include the prayer trails with prayer stations, Stations of the Cross, altar, mural wall with the image of Our Lady of Grace, and a commercial driveway with parking. As noted, CHI will reserve all rights, claims, and defenses as set forth in the current federal litigation in *Catholic Healthcare International v. Genoa Township*, Case No. 5:21-cv-11303-JEL-DRG, specifically including the right to construct the St. Pio adoration chapel on the CHI Property should CHI ultimately prevail in the federal litigation.
>
> CHI, through Boss Engineering, will plan to have the application and associated documents submitted to the Township by next Friday, **October 15, 2021**. *Since the plans are substantially the same as before and the Planning Commission has already seen and approved them (with the chapel—these new plans will obviously not include the chapel*), we would ask that this matter be placed on the **November 8, 2021**, planning commission calendar. As I understand it, the Township would then have an opportunity to approve or reject the application at the November 15, 2021 board meeting. This would move the process along in an expedited fashion.
>
> * * *
>
> This plan (the submission) coincides with our prior discussion . . . .
>
> Let me know your thoughts as soon as possible as I am trying to get this moving quickly, and *I do not want CHI to waste additional resources on the new special land use application, modified site plan, etc. if it will be a futile effort*.

(Muise Decl. ¶ 2, Ex. A [emphasis added], ECF No. 47, PageID.2138-39).

On October 15, 2021, CHI in fact submitted, yet again, another costly (in excess of $9,000) and burdensome special application for land use per the stipulation of the parties (*and the agreement of counsel*). This too proved to be a futile effort, and it caused *additional injury demonstrating ripeness*.

On December 13, 2021, the Planning Commission refused to approve the application based on the Township Board's *previous* denial of CHI's application on May 3, 2021. (Muise Decl., Ex. A [Planning Comm'n Meeting Mins.], ECF No. 48-2, PageID. 2168-78; *see also* Palazzolo Decl. ¶¶ 10-16, Ex. A [Oct. 15, 2021 submission], ECF No. 39-3, PageID. 1620-22, 1625-52).

More specifically, the Planning Commission rejected the prayer campus submission, concluding that there were no new grounds or substantial new evidence presented to consider the new application in light of the Township Board's denial on May 3, 2021 of CHI's original application—even though the main structure, the chapel, had been removed. (Muise Decl., Ex. A [Planning Comm'n Meeting Mins.], ECF No. 48-2, PageID. 2168-78; Palazzolo Decl. ¶¶ 16, 17, ECF No. 39-3, PageID. 1622).

In its reply submission to the Planning Commission, CHI submitted a letter to Ms. Kelly VanMarter, the Township's Community Development Director/Assistant Township Manager, asking pertinent questions regarding the application of the Zoning Ordinance to its property. The letter stated, in relevant part, the following:

> Why is CHI's 40-acre property a "church[] or temple[or a] *similar* place[] of worship"? The only applicable definition in the Zoning Ordinance defines a "Church or temple" as "[a]ny structure *wherein* persons regularly assemble for religious activity." § 25.02. There is no "church or temple" or any other "similar" "structure" on the property nor proposed here, so why is a special land use application necessary? If people gathered at a private residence for the purpose of outdoor religious worship, does that transform that property into a church or

temple or similar place of worship requiring this burdensome and costly application process that the Township is requiring CHI to undergo? If not, why not?

How many people are permitted to gather outdoors on private property to engage in religious worship? The Township's assembly ordinance permits assemblies up to 1,000 people before a special permit is necessary. *See* https://www.genoa.org/government/ordinances/ordinance- assembly ("An ordinance to license, regulate and control, in the interest of the public health, safety and welfare, outdoor assemblies of persons in excess of 1,000 in number, to provide penalties for violations thereof and to repeal all ordinances or parts of ordinances inconsistent therewith.").

Private residences in the same neighborhood as the CHI property are permitted to hold secular events with numbers that will far exceed the number of people who will be engaging in religious worship on CHI's property. What is the number of people that the Township will permit on CHI's 40-acre property for outdoor religious worship? And what is that number based upon? Once we know that number, then we can explain more fully the events that CHI would like to hold in greater detail, and it will permit a better evaluation of the traffic issue. CHI should not be discriminated against nor treated less favorably because its assemblies or events are for the purpose of religious worship. The Township's Park, for example, is on a parcel of land that is smaller (38 acres) than CHI's property. Yet, there are over 200 parking spaces for this park. How many people are permitted to gather at any one time at this park? That would be a good number to start with for CHI's property.

Here, CHI is proposing only 39 parking spaces. There is no basis to question this limited parking or the traffic that it will generate on Chilson Road, particularly when the Township would permit neighboring property owners to hold a secular event (like a "Family Fun Day") with many times that number of cars going to the property.

CHI believes that secular events such as the recent "Family Fun Day" held at 3800 Chilson Road (approximately 1 mile away from CHI's property) this past September are great events and should continue.

> Similarly, CHI should be permitted to hold religious assemblies on its private property that are at least similar in size and scope to the secular assemblies permitted on neighboring properties and other properties throughout the Township, and CHI should be permitted to do so under the same terms and conditions. Upon information and belief, the owners of the property located at 3800 Chilson Road did not have to go through this burdensome and costly application process, nor should CHI have to. Similarly, CHI should not have to endure the burdens and costs associated with this current application in order for CHI to engage in its religious activity.
>
> During the state court proceedings, you testified under oath as to the following:
>
> > Q: So looking at the property that CHI has, if it had been a private residence you could put up 14 bird houses, $50 per, a picnic table for $50 permit, and a ten foot by 12-foot stone wall outside of the setbacks for $50, correct?
> > A: That's correct.
> > Q: And it wouldn't require the $2,875 application fee, correct?
> > A: Single family residential is a permitted use so they do not need to pay that fee.
>
> In other words, unlike CHI's religious displays, which are structurally no different in size or scope, displaying these secular symbols/items on private residential property does not require a costly special land use application or the Township Board's prior approval as these secular items are "permitted." Why isn't the display of religious symbols and associated *outdoor* religious worship a "permitted use" on private property like CHI's property?

(Palazzolo Decl. ¶ 12, Ex. C, ECF No. 39-3, PageID.1682-84). The Township refused to respond to CHI's inquiries. (*Id.* ¶ 13, Ex. D, ECF No. 39-3, PageID.1704).

CHI appealed the Planning Commission's adverse decision to the ZBA, and the ZBA affirmed. (Muise Decl., Ex. B [ZBA Mins.], ECF No. 48-2, PageID. 2179-87). This is a final decision.

On April 5, 2021, the state court continued the hearing on CHI's motion to dissolve the TRO and the Township's motion for a preliminary injunction. At the close of the hearing, the state court judge denied CHI's motion and granted the Township's request for a preliminary injunction, thereby continuing the enforcement of the Township's Zoning Ordinance to prohibit Plaintiffs' religious assembly, worship, and expression on the CHI property. (Muise Decl. ¶ 4, ECF No. 48-2, PageID. 2167). During the hearing, the Township's witness testified as follows:

> Q: * * * If CHI was willing to pay a $50 permit per religious display, the religious displays at issue here, which is the mural wall, the altar, stations of the cross, make them permanent and would have a building inspector come out to inspect them, and on the CHI property, would the zoning ordinance permit that?
> A *After you've received site plan approval, yes*.
> Q: [M]y question is, if they, if they did this tomorrow, they went in as all, all things being equal as they are sitting here today, if they went in, applied for the $50 permits per items [the religious displays at issue], had them inspected on the property, would the zoning ordinance permit that?
> A: *No*.

(Muise Decl. ¶ 1, Ex. A [Hr'g Tr. at 94-95 (emphasis added)] at Ex. 1). In other words, there *is no permit process available* to erect the religious displays at issue until the Township approves a special land use application. The Township has now twice denied Plaintiffs' applications—applications which expressly included the religious displays at issue.[5] In short, it is factually incorrect to conclude, as this

[5] There is *no* basis for claiming that Plaintiffs have not sought permits for their religious displays. The Township has rejected every attempt by Plaintiffs to do so.

Court did in its order on Defendants' motion to dismiss, that "plaintiffs have never sought approval from the Township to simply install or erect the desired religious symbols." (Order on Mot. to Dismiss at 19, ECF No. 69, PageID.3485).

As of today, and as a direct result of the Township's enforcement of its Zoning Ordinance (including its Sign Ordinance, which is part of the zoning regulations), the religious displays at issue have been removed.[6] The harm caused by the Township is not speculative nor is it based on a subjective chill. The harm is real, irreparable, and ripe. (*See* Palazzolo Decl. ¶ 19, ECF No. 39-3, PageID. 623).

ARGUMENT

I. Plaintiffs' Challenge Is Ripe.

Ripeness requirements are relaxed in the First Amendment context. *See Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002); *see also Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (holding challenge ripe given that a contrary finding may place the "plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity").

The ripeness doctrine prevents courts from "entangling themselves in abstract disagreements" through premature adjudications. *Grace Cmty. Church v. Lenox Twp.*, 544 F.3d 609, 615 (6th Cir. 2008) (citation omitted). Per the Sixth Circuit:

[6] Per the Court's Order, Plaintiffs are able to use the property for outdoor religious worship once again; however, they cannot use temporary religious displays such as the Stations of the Cross as part of their prayer and religious worship. *See supra*.

> In ascertaining whether a claim is ripe for judicial resolution, we ask two basic questions: (1) is the claim "fit[] . . . for judicial decision" in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass? and (2) what is "the hardship to the parties of withholding court consideration"?

Warshak v. United States, 532 F.3d 521, 525 (6th Cir. 2008) (citations omitted); *see, e.g., Grace Cmty. Church*, 544 F.3d at 614-18 (finding case not ripe where the parties' positions were ill defined).

Here, we have a (1) concrete factual context and dispute that has come to pass, (2) causing irreparable harm to Plaintiffs. Indeed, the Township has plainly reached a definitive position on Plaintiffs' use of its property, having denied the use, including denying two special land use applications, and obtaining a state court order preventing such use. And the Township's decisions have inflicted an actual, concrete injury. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985) ("[T]he finality requirement [in the land use context] is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.").[7] The case is ripe.

In *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533 (6th Cir. 2010) ("*Miles Christi*"), for example, the Sixth Circuit found that the case was not ripe for review as there were unresolved questions as to <u>*how*</u> the regulations

[7] As noted by the Sixth Circuit, "The finality rule . . . is a 'prudential requirement[],' and we need not follow it when its application 'would not accord with sound process.'" *Miles Christi Religious Order*, 629 F.3d at 541 (citation omitted).

would apply to Miles Christi's five-bedroom house located within the township. As the court noted, a "definitive statement from . . . the entity charged with interpreting Northville's zoning ordinances . . . about *which* ordinances apply to Miles Christi and about *whether Miles Christ must submit a site plan* under the ordinances" would assist the court with resolving the dispute. *Id*. at 539 (emphasis added). Per the court, "As things now stand, 'we have no idea.'" *Id*. The court further noted that there would be no hardship to Miles Christi if the court stayed its hand because "Miles Christi may potentially resolve the issue (at less expense) by appealing to the zoning board,[8] . . . a route that does *not* require Miles Christi to cancel any bible studies, masses or other religious activities and a route that does *not* require it to pay for an engineering study. . . ." *Id*. at 540 (emphasis added). Moreover, an appeal to the zoning board would stay all enforcement action. *Id*. at 542.

Miles Christi provides a good comparison. In this case, there is no question as to *how* the Township is enforcing its Zoning Ordinance. There is no question that Plaintiffs ***must*** submit to the onerous and subjective special land use application process—a costly process which requires a special land use application, site plan, and environmental impact study as well as approvals by the Planning Commission

[8] Under the Northville Zoning Ordinance, the zoning board is "empowered . . . to participate in the . . . decision making process from the outset." *See Miles Christi*, 629 F.3d at 541. The same is not true under Genoa's Zoning Ordinance, as the Township Board has plenary and final authority over special land use decisions and not the ZBA. *See* Z.O. §§ 19.02.04(f) & 19.04.

and the Township Board—to display any of the religious symbols at issue or to engage in outdoor religious worship on the CHI property. Plaintiffs have already *twice* completed that process (a process which included the very religious symbols at issue), and they were *twice* denied. There is no simple appeal to a zoning board that would have permitted Plaintiffs to continue with their expressive religious activity, as in *Miles Christi*. Indeed, the Township initiated a state court enforcement action that removed the religious symbols and halted the outdoor religious worship. As a result of the state court filing, Plaintiffs were forced, yet again and under protest, to resubmit a special land use application for the religious symbols, driveway, and parking, and the Planning Commission denied it. Plaintiffs appealed that decision to the ZBA, and the ZBA affirmed. The ZBA had no authority to grant CHI permission to display the religious symbols. (*See* Muise Decl., Ex. D [Z.O. § 19.04] at Ex. 1, ECF No. 39-2, PageID.1580). In other words, the ZBA is not involved in the decision-making process. *Miles Christi* demonstrates that the issues presented are ripe for review.

Additionally, ripeness is found where the plaintiff is challenging the statutory scheme that is imposing a burden on his rights protected by the First Amendment, *as in this case*. *See Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir. 2010) (finding a challenge to the sponsorship or collaboration requirement ripe for review even though the plaintiffs did not first seek collaboration with any individual official

who could have sponsored and allowed the free speech activity); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 399-400 (6th Cir. 2001) (finding a challenge to a permitting scheme ripe even though the challengers were not under any threat of enforcement and had not yet sought a permit).

Here, Plaintiffs are *currently* harmed by the Zoning Ordinance and the Township's application of this permitting scheme. Plaintiffs have had to pay exorbitant fees as a result of being forced to comply with the unconstitutional and discriminatory demands of the ordinance, and whether Plaintiffs can engage in their right to religious expression and worship on their private property is entirely dependent upon the subjective judgment of the Planning Commission and Township Board. Indeed, as the facts demonstrate, the Township is engaging in cynical form of gamesmanship that is causing direct and irreparable harm to Plaintiffs. In sum, Plaintiffs are *currently* subject to and injured by the Zoning Ordinance, having been formally denied (twice) the right to engage in religious expression and worship on the CHI property as a result of the ordinance, and they are currently being denied the right to display religious symbols on the property because of the ordinance. "Ripeness requires that the injury in fact be certainly impending." *NRA of Am. v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997) (internal quotations and citation omitted). Here, not only is the injury "certainly impending," it has actually occurred.

In the final analysis, not only have Plaintiffs been harmed economically by having to undergo (twice) a burdensome permitting process and pay exorbitant fees (a process and fees that secular owners of property in the very same neighborhood are not required to undergo or pay for similar secular displays/construction or activity), Plaintiffs have lost their First Amendment freedoms, causing immediate and irreparable harm. *Elrod*, 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also Heid v. Mohr*, No. 2:18-CV-311, 2019 U.S. Dist. LEXIS 33895, at *33 (S.D. Ohio Mar. 4, 2019) ("Although RLUIPA imposes standards different from those under the First Amendment, RLUIPA provides statutory protection for First Amendment values. Therefore, the likelihood of success on the merits is also key in the RLUIPA context. . . . Supreme Court precedent is clear that 'even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.'"); *Roman Catholic Archdiocese of Kan. City in Kan. v. City of Mission Woods*, 385 F. Supp. 3d 1171, 1175-76 (D. Kan. 2019) (concluding that "a RLUIPA violation—whether based on the statute's Substantial Burden, Equal Terms, or Nondiscrimination provisions—infringes on the free exercise of religion" and thus establishes irreparable harm); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (concluding that "although the plaintiff's free exercise claim is

statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs" is "irreparable harm"). This challenge is ripe.

II. Plaintiffs Satisfy the Standard for the Requested Injunction.

When considering a motion for an injunction pending appeal, the Court applies the same factors it would for a motion for a preliminary injunction. *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 572-73 (6th Cir. 2002). And "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). Plaintiffs have established a likelihood of success on their claims arising under the First Amendment and RLUIPA. The requested injunction should issue.

Plaintiffs' religious displays, and their use of the CHI property to erect such displays for religious worship, are fully protected by the First Amendment and RLUIPA. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (concluding that "[r]espondents' religious display in Capitol Square was private expression . . . fully protected under the Free Speech Clause"); *Satawa v. Macomb Cty. Rd. Comm'n*, 689 F.3d 506, 529 (6th Cir. 2012) (observing that "[t]he crèche . . . is private religious expression, 'fully protected under the Free Speech Clause'") (quoting *Pinette*, 515 U.S. at 760); 42 U.S.C. § 2000cc-5(7) (defining

"religious exercise" to include "any exercise of religion," including "[t]he use . . . of real property for the purpose of religious exercise").

The Zoning Ordinance (including the Sign Ordinance, which was the expressed basis for ordering the removal of the Stations of the Cross per the Township's May 7 letter)[9] restricts Plaintiffs' right to freedom of speech and religious exercise. The ordinance operates as a prior restraint as it requires Plaintiffs to obtain a permit before being allowed to engage in their religious expression. *See Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 698 (6th Cir. 2020) (holding that the sign ordinance was a prior restraint because the right to display a sign that did not come within an exception *depended on obtaining either a permit or a variance*). "Any 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). Defendants cannot carry this burden.

The Sign Ordinance is also content based, thereby triggering strict scrutiny. "Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). And "[a] law

[9] Plaintiffs are challenging the Township's *entire* permitting scheme—the application of the Zoning Ordinance, which includes the Sign Ordinance—to restrict their right to display their religious symbols. One component of this scheme—the Sign Ordinance—is unconstitutional on its face and as applied in this case.

that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 165. In *International Outdoor, Inc.*, the Sixth Circuit concluded that the challenged "Sign Ordinance imposed a content-based restriction by exempting certain types of messages from the permitting requirements, such as flags and 'temporary signs' . . . , [thereby] requiring the City of Troy to consider the content of the message before deciding which treatment it should be afforded," and thus triggering strict scrutiny.[10] 974 F.3d at 707-08. The Township's ordinance does the same here. It expressly *exempts*, for example, "Decorative displays in connection with a recognized holiday, provided that the display doesn't exceed 75 days" (an arbitrary number) and "Flags of any country, state, municipality, university, college or school." (Muise Decl., Ex. C [Sign Standards, § 16.02.20], at Ex. 1, ECF No. 23-2, PageID.1293-94). There are no permit requirements or size limitations for "holiday displays" as they are exempt from the Sign Ordinance by way of definition. Indeed, the Township permits the

[10] *International Outdoor, Inc.*, which expressly relied on *Reed*, was not overruled by *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464, 1467 (2022). *City of Austin* addressed a challenge to an outdoor advertising ordinance that made distinctions between on-premises and off-premises signs. Unlike the sign ordinance at issue in *Reed*, the City of Austin's sign ordinances did not single out any topic or subject matter for differential treatment. Rather, a sign's message *only mattered* to the extent that it informed the sign's relative location. Thus, the City's on-/off-premises distinction was similar to time, place, or manner restrictions, which are content neutral and do not require the application of strict scrutiny.

display of 12-foot skeletons, presumably for Halloween, for at least 75 days. (O'Reilly Decl. ¶ 6, ECF No. 39-4, PageID.1708-09). Plaintiffs' temporary religious displays should *at least* be afforded the same preferential treatment. Additionally, pursuant to the Zoning Ordinance, "[m]anufactured landscape features and minor structures" are permitted in all "yards" subject to certain location and size restrictions. (Ex. 13 [Z.O. § 11.04.03(e) & (f)], ECF No. 55-14, PageID.2473). All of Plaintiffs' religious displays, including the mural wall with the image of Our Lady of Grace, satisfy these location and size restrictions; yet they are still prohibited. The Township does not have a compelling interest for such disparate treatment that burdens Plaintiffs' fundamental rights.

Moreover, under RLUIPA, "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1)(A), (B); *see also Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2431 (2021) (Gorsuch, J., concurring) ("*Fulton* [*v. City of Philadelphia*, 141 S. Ct. 1868 (2021)] makes clear that the County and courts below misapprehended RLUIPA's demands.").

Here, the Township has prohibited Plaintiffs from exercising their right to religious expression and worship on the CHI property and has thus placed a substantial burden on those fundamental rights, thereby triggering strict scrutiny, the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Strict Scrutiny "requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.' . . . That standard 'is not watered down'; it 'really means what it says.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (internal citation omitted). Under this rigorous test, "so long as the government can achieve its interests in a manner that does not burden religion, it *must* do so." *Fulton*, 141 S. Ct. at 1881 (emphasis added). Pursuant to *Fulton*, the question is not whether the Township has a compelling interest in enforcing its Zoning Ordinance generally, but whether it has such an interest in enforcing it against Plaintiffs (and their religious displays) under the circumstances of this case—circumstances where secular exemptions abound. *See id*. The Township cannot (nor has it ever tried to) meet its heavy burden under strict scrutiny.

In addition to establishing a substantial likelihood of success, Plaintiffs are currently suffering irreparable harm as a direct result of the Township's actions. *Newsome*, 888 F.2d at 378 ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*, 427 U.S. at 373);

Bonnell, 241 F.3d at 809 ("[W]hen reviewing a motion for preliminary injunction, if it is found that a constitutional right is being *threatened* or *impaired*, a finding of irreparable injury is *mandated*.") (emphasis added). And the public interest favors issuing the injunction. *See G & V Lounge, Inc.*, 23 F.3d at 1079 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

CONCLUSION

The Court should grant this motion and issue the requested injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2022, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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