UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CATHOLIC HEALTHCARE INTERNATIONAL, INC. and JERE PALAZZOLO,

Plaintiffs-Appellants,

v.

GENOA CHARTER TOWNSHIP, and SHARON STONE, in her official capacity as Ordinance Officer for Genoa Charter Township,

Defendants-Appellees.

Case No. 21-2987

EXPEDITED CONSIDERATION REQUESTED

APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants hereby move this Court for an injunction pending appeal, *immediately* enjoining the unlawful enforcement of the Genoa Charter Township Zoning Ordinance as set forth below and thus returning Plaintiff Catholic Healthcare International, Inc.'s ("CHI") property to the *status quo ante* by ordering the return of religious displays and worship to this private property.[1]

The district court erred by denying Plaintiffs' request for a preliminary injunction. (R-29:Tr. of Hr'g at 36-40 [setting forth basis for denial]). Contrary to the court's ruling, the *Younger* abstention doctrine does not apply. *See Exec. Arts Studio, Inc. v. City of Grand Rapids*, 391 F.3d 783, 792 (6th Cir. 2004) (rejecting the *Younger* abstention argument and noting that "Executive Arts perceived the possibility of the prospective future enforcement of the zoning law against itself once the state court had declared Executive Arts to be a regulated use under the City's

[1] On September 19, 2021, Plaintiffs filed an *emergency* motion for a TRO/preliminary injunction in the district court. (R-23). On September 29, 2021, the district court denied the preliminary injunction request (R-30), and Plaintiffs immediately appealed (R-31). This Court has jurisdiction pursuant to 28 U.S.C. § 1292. Pursuant to Rule 8(a)(2)(A)(i) and in light of the circumstances presented here (ongoing loss of First Amendment rights), moving first in the district court following its denial of the TRO and preliminary injunction (and given the bases for the denial) would be futile and impracticable, and it would only prolong the irreparable harm. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (explaining prior motion preference overcome when it would "serve little purpose").

zoning law, preemptively filing in federal court attacking the constitutionality of the Ordinance before any enforcement action could occur."); (R-27:Pls.' Reply, PageID.1417-23). Contrary to the court's ruling, the issues presented have been ripe since at least October 9, 2020, when the Township made its first unlawful demand to remove the religious symbols. *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002) (stating that the ripeness requirements are relaxed in the First Amendment context). And finally, contrary to the court's ruling, Plaintiffs have a substantial likelihood of succeeding on the merits of their claims. The requested injunction should issue immediately.

STATEMENT OF THE CASE[2]

A. Action Prompting the Need for *Immediate* Relief from this Court.

This lawsuit was filed on June 2, 2021. (R-1:Compl.). On Friday, September 17, 2021, the Township filed a Verified Complaint ("VC") and *ex parte* TRO request in the 44th Circuit Court for Livingston County, seeking to remove religious displays from the CHI property and prohibiting CHI from using the property for religious worship.[3] (R-23-2:Muise Decl., ¶ 2, Ex. A [VC], PageID.1158, 1161-1287). On

[2] The Court can take judicial notice of the state court matters set forth in the attached declarations. *United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012).

[3] Plaintiffs' counsel made a limited appearance in the state court for the purpose of challenging the injunction. CHI expressly reserved its right to assert its federal claims in federal court pursuant to *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 421-22 (1964). (R-27-3:Mot. to Dissolve, PageID.1429).

Sunday, September 19, 2021, Plaintiffs filed an emergency motion for a TRO and preliminary injunction in the district court, seeking to halt the unlawful enforcement of the Township's Zoning Ordinance. (R-23). On September 20, 2021, the state court judge signed the *ex parte* TRO, thereby ordering CHI to immediately remove the religious symbols at issue from its private property and to immediately "cease all unlawful use and occupancy of the Property for organized gatherings," thus prohibiting any religious worship on the property based on the Township's enforcement of its Zoning Ordinance.[4] (Muise Decl., ¶ 4, Ex. A, attached at Ex. 1). The district court denied Plaintiffs' emergency request for a TRO to prevent this unlawful enforcement of the Zoning Ordinance (R-28), and then it denied Plaintiffs' request for a preliminary injunction on September 29, 2021 (R-30:Order Denying Prelim. Inj., PageID.1495-96), prompting the filing of this appeal on September 30, 2021, (R-31:Notice of Appeal). *The religious symbols have now been removed from the property, and CHI is prohibited from using its property for religious worship, thereby causing irreparable harm*. (Palazzolo Decl. ¶¶ 8-11, attached as Ex. 2).

[4] Even if the state court eventually dissolves the TRO or denies any further injunctive relief, Plaintiffs have been irreparably harmed, and they remain under threat of penalties if they return the property to the *status quo ante* without an order from this Court. (*See* ZO § 21.04 [setting forth penalties]).

B. Statement of Facts.

CHI is formally recognized as a private association of the faithful by the Catholic Diocese of Lansing, Michigan ("Diocese"). CHI uses its property located within the Township ("CHI Property") for religious exercise. (R-23-3:Palazzolo Decl. ¶¶ 1-23, PageID.1314-19).

The 40-acre CHI Property was acquired from the Diocese in October 2020. Upon acquiring the property, Plaintiffs had a reasonable expectation of developing it into a prayer campus, which would include an adoration chapel (St. Pio Chapel) and various religious displays, including a small outdoor altar, Stations of the Cross, and the display of the image of Santa Maria delle Grazie ("Our Lady of Grace")—the religious symbols at issue here. (R-23-3:Palazzolo Decl. ¶¶ 9, 11-14, 16-27, PageID.1315-20).[5]

The current entrance to the CHI Property is the same entrance that has been used by CHI since it acquired the property, and it was the entrance used prior to that. CHI applied for a permit with the Livingston County Road Commission to make some modifications to this entrance. However, *CHI has not taken any action on this permit*. The entrance, which the Township has been aware of since well before CHI owned the property, *has not changed nor has it been modified*. Moreover, private

[5] "Churches, temples and similar places of worship" are an allowed use on the CHI Property upon special land use approval by the Township. (R-23-3:Palazzolo Decl. ¶ 12, 15, PageID.1316).

residences located near the CHI Property have been used for organized gatherings in numbers that far exceed the number of people who gather for religious worship on the CHI Property. (R-23-4:O'Reilly Decl. ¶¶ 20-25, 31, PageID.1344-49).

Prior to their recent removal, the Stations of the Cross, the image of Our Lady of Grace, and the small altar had been displayed on the property *since September 2020*, and they were used for prayer and worship. Neither wind nor rain nor any other factors caused any safety issues whatsoever. Time and experience refute any claim that the displays were unsafe. Moreover, the displays were not erected along any public right of way or thoroughfare. They could not be seen from the road; they were located in a wooded, isolated area. (R-23-4:O'Reilly Decl. ¶¶ 7-18, PageID.1341-44).

This dispute over the religious displays began on or about October 9, 2020, when the Township first ordered CHI to remove them based on its claim that by displaying these religious symbols and using them for religious worship, CHI had now miraculously converted the secluded, wooded area where they were displayed into a "church or temple" under § 25.02 of the Zoning Ordinance, which defines

"church or temple" as "any structure *wherein* persons regularly assemble for religious activity." To comply with the Township's (unlawful) demand, CHI would have had to undertake a costly (in excess of $20,000) and burdensome zoning process.[6] The Township's determination was, and remains, factually inaccurate and unconstitutional. There was no "structure" on the CHI Property "wherein" regular religious assemblies took place. Nor were any of these religious symbols "accessory structures" requiring the Township's prior approval. Consequently, CHI rejected the unlawful demand. (R-23-2:Ltr. from Muise, PageID.1320-21).

As noted in correspondence from CHI's counsel to the Township (responding to the October 9 demand), the Township's Sign Ordinance "expressly *exempts* certain *permanent* signs (§ 16.03.11), it *exempts* real estate signs (§ 16.03.15), it *exempts all* flags (§ 16.03.03), and it *exempts all* temporary political signs (§ 16.03.14)," and "[b]y permitting unlimited, temporary political signs . . . , but prohibiting CHI's temporary religious 'sign,' the Township is engaging in a form of content-based discrimination [in violation of the law, citing *Reed v. Town of Gilbert*,

[6] In October 2020, CHI did not have the benefit of the work its consultants had completed on its special land use application (which the Township denied). Consequently, at that point in time (October 2020), the cost would have exceeded $20,000. The current demand by the Township to "appl[y] for and obtain[] all necessary permits, including land use permits and building permits for the structures," as demanded in the Verified Complaint, would cost CHI nearly $10,000, as approximately $15,000 of the work already completed (and paid for) in the first failed attempt could be used here. (Palazzolo Decl. ¶¶ 4-6, attached as Ex. 2).

576 U.S. 155, 163-64 (2015) and *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690 (6th Cir. 2020)]." (R-23-2:Ltr. from Muise, PageID.1202-05). Thus, the Township was using an unconstitutional Sign Ordinance to order the removal of CHI's religious symbols. CHI properly rejected the Township's efforts.[7] (*Id.*). And the Township remained mute until May 7, 2021.

The Zoning Ordinance broadly defines a "structure" (R-23-2:VC ¶ 13, PageID.1165), such that it covers not only "***signs***" expressly (which is plainly what the religious symbols most closely resemble), but it also includes a deer hunter's tree stand, a child's playset, picnic tables, and birdhouses, *inter alia*. The small altar on the CHI Property, which the Township claims is a "structure" (*Id.* ¶ 52, PageID.1173), is smaller than the many picnic tables that are currently located on property throughout the Township, (R-23-4:O'Reilly Decl. ¶¶ 4, 19, 21, PageID.1340-45). A picnic table, unlike an altar used for religious worship, has no constitutional protection *per se*. Yet, placing a picnic table on private property does not require the burdensome and costly site plan review process the Township is imposing upon Plaintiffs for their small altar.

In order to develop the prayer campus and construct the St. Pio Chapel, CHI submitted an application for special land use in December 2019. The application

[7] The Township amended its Sign Ordinance on November 2, 2020. (*See* R-23-2:Ex. C [Sign Standards], PageID.1290-1304), but the constitutional defects remain. *See infra*.

met all of the Zoning Ordinance requirements. It was ***approved*** by the Township Planning Commission. CHI went "above and beyond and addressed all of the concerns of the Planning Commission and the consultants." However, the Township (unlawfully) ***denied*** it. (R-23-3:Palazzolo Decl. ¶¶ 52-67, PageID.1326-31).

As noted in CHI's application, there are only *two* events all year that CHI intends to hold on the CHI Property that may require extra parking (beyond the 39 spaces needed for the St. Pio Chapel).[8] To accommodate this, CHI proposed using the greenspace on their property for overflow parking. The Township denied this request even though (1) it permits private residences in the very same area of the Township to hold events that *far* exceed the number of people who will be visiting the CHI Property for these two *special* events—St. Pio's Feast Day (September 23rd) and St. Pio's Birthday (May 25th); (2) it would permit a *secular* park on this property, which, given the property area and a comparable park property within the Township, could have over 200 parking spaces; and (3) its own "Assembly Ordinance" permits assemblies up to 1,000 people, and once that threshold is met, the host could apply for a special permit.[9] CHI's religious assembly that was scheduled for September 23, 2021 (and its other special event) would have far less

[8] The Township was aware of these events at least since February 2021 (R-23-2:CHI General Operations, PageID.1222-23), yet it sought an *ex parte* TRO to stop the September 23, 2021 event on September 17, 2021.
[9] (R-23-2:Ex. D [Assembly Ordinance], PageID.1306-09).

people attending. Finally, CHI went above and beyond the legal requirements by proposing least restrictive measures to address traffic for these two *special* events by offering to provide a shuttle service or "staged/multiple receptions." (R-23-3:Palazzolo Decl. ¶ 62, PageID.1329-30; R-23-2:CHI General Operations, PageID.1222-23; R-23-4:O'Reilly Decl. ¶¶ 20-24, PageID.1344-46). The Township rejected these measures and denied the application. And it again rejected this least restrictive alternative by obtaining the *ex parte* TRO even though these measures would mitigate traffic concerns for these special events.

Following the denial of CHI's special land use application, the Township, via a letter dated May 7, 2021, demanded, once again, that CHI remove the religious symbols from the property by *June 4, 2021*. In this letter—*which was the **last** demand from the Township regarding the religious displays **before** it filed its Verified Complaint and ex parte motion for a TRO*—the Township stated the following:

> 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. Also, the structure/grotto *sign* does not have a permit and will also need to be removed. . . .
>
> Please have the *signs* and accessory structure removed by *June 4, 2021*.

(R-23-2:May 7 Ltr., PageID.1263 [emphasis added]).[10]

[10] The Township specifically relies upon this letter in its Verified Complaint, (R-23-2:VC ¶ 45, Ex.13, PageID.1171, 1263), and this letter/demand is central to this

The displays ("religious signs") did not undermine any of the Township's stated objectives for restricting signage. The displays were not "distracting to motorists and pedestrians." They did not "create[] a traffic hazard" nor did they "reduce[] the effectiveness of signs needed to direct and warn the public." They did not "overwhelm the senses, impair sightlines and vistas, create confusion, reduce desired uniform traffic flow, create potential for accidents, affect the tranquility of residential areas, impair aesthetics [or] degrade the quality of a community." (R-23-2:Ex. C [Sign Standards], PageID.1291). As noted, the religious displays were not placed within the public street right-of-way—they were not even visible from the road—and thus created no visibility or public safety issues whatsoever. And they created no visual blight. (R-23-3:Palazzolo Decl. ¶¶ 81-84, PageID.1334-35). Moreover, as argued below, the Sign Ordinance is unconstitutional.

Additionally, § 11.04.01(b) (accessory structure provision) of the Zoning Ordinance permits "(1) accessory building one hundred twenty (120) square feet or less . . . without a land use permit." (ZO § 11.04.01). This 120-square-foot limit is the *floor plan* of a "building."[11] The "floor plan" of the image of Our Lady of Grace

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federal litigation, *which was filed first*. (R-1:Compl. ¶¶ 89-100, PageID.22-25; R-14:First Amended Compl. ¶¶ 110-22, PageID.222-26). In fact, it was this demand that prompted the filing of this federal lawsuit on June 2, 2021. The district court's claim that the state court filing was the first on this issue is false, thus further undermining its *Younger* abstention reliance.

[11] "The word 'building' includes the word 'structure.'" (ZO § 25.01(e)).

is approximately 75 square feet. Moreover, this religious display could easily be reduced in height by reducing or removing the stone base. The image with the existing frame is 8 feet, 2 inches tall (without the base) and 9 feet wide (or just over 72 square feet if measured on its face as opposed to its floor plan). The image without the frame is 6 feet by 6 feet (or only 36 square feet). Demanding removal of this display (particularly in its entirety) as an "accessory structure" was contrary to the Zoning Ordinance (and the Constitution). And ordering it or any of the other religious displays to be removed as sign "structures" was also improper because, *inter alia*, the Sign Ordinance facially and as applied violates the Constitution.

In its state court filings, the Township affirms its position that the wooded area of the CHI property (the "grotto")[12] "is considered a 'church or temple' because a grotto is typically a structure that is erected where people worship." (R-23-2:VC ¶ 24, PageID.1166). Therefore, according to the Township, the religious symbols at issue were "accessory structure[s] because they are usually incidental to a church." (*Id.*). But of course, the wooded area, which the Township asserts is a "church or temple" because it is a place where people worship, is <u>not</u> *physically a structure* that is a "church or temple." Thus, per the Township, these religious displays were now "accessory structures without a principal structure." (*Id.* ¶ 70, PageID.1175). And the Township advances this argument after it unlawfully denied CHI's request to

[12] (R-23-3:Palazzolo Decl. ¶ 25 [explaining the "grotto"], PageID.1319-20).

construct the modest "principal structure" (the St. Pio Chapel)—a denial that is a central aspect of CHI's challenge in its federal case.[13] The Township further asserts that CHI's "proposed use of the Property for an organized gathering on September 23, 2021, is a violation of the Genoa Township Zoning Ordinance" (*id*., ¶ 79, PageID.1176), relying on incorrect information that CHI has acted upon the County Road Commission permit.[14] Consequently, the Township has improperly removed the religious symbols and prevented CHI from using its property for religious worship by unlawfully enforcing its Zoning Ordinance.

ARGUMENT

I. Plaintiffs Satisfy the Standard for Issuing an Injunction Pending Appeal.

> In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (same); *Salih v. Pl.'s Liaison*

[13] Per the Township, the "necessary permits, including land use permits and building permits for the structures" necessarily require the approval of CHI's special land use application to construct the St. Pio Chapel (the "principal structure"), which, of course, the Township unlawfully denied.

[14] Under the Township's logic, ten hunters could enter the CHI Property with vehicles to hunt, but ten Catholics could not enter the property with vehicles to pray together, as the latter is apparently an unlawful "organized gathering."

Counsel, No. 21-3460, 2021 U.S. App. LEXIS 25122, at *3 (6th Cir. Aug. 20, 2021) (applying same factors for Rule 8 motion). Because this case deals with a violation of Plaintiffs' First Amendment rights, the crucial and often dispositive factor is whether Plaintiffs are likely to prevail on the merits. *Connection Distributing Co.*, 154 F.3d at 288.

III. Likelihood of Success.

A. Freedom of Speech.

"Religious worship" is a "form[] of speech and association protected by the First Amendment."[15] *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). And so too is the display of religious symbols. *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 *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995)).

Plaintiffs' prayer, worship, and religious assembly and their use of religious symbols are all forms of expression protected by the First Amendment. The Township has restricted Plaintiffs' right to freedom of speech through the enforcement of its Zoning Ordinance, which includes its Sign Ordinance.

[15] This case is not about zoning for a shed or a pole barn. It is about the fundamental right to religious worship. And precisely because it is religious worship, the Township is imposing unlawful restrictions. *See text above*.

The enforcement of the Zoning Ordinance in this case triggers First Amendment protection. *Reed*, 576 U.S. at 155. Moreover, the *ordinance operates as a prior restraint on speech* as it requires Plaintiffs to obtain the Township's permission before being allowed to engage in their religious expression. *See 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); *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 698 (6th Cir. 2020) ("The original City of Troy Sign Ordinance *imposed a prior restraint* because the right to display a sign that did not come within an exception as a flag or as a 'temporary sign' depended on obtaining either a permit from the Troy Zoning Administrator or a variance from the Troy Building Code Board of Appeals.") (emphasis added). 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). Defendants cannot overcome this heavy presumption.

Moreover, the Zoning Ordinance, facially and as applied to punish Plaintiffs' religious expression, is 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*, 576 U.S. at 163. And "[a] law 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. v. City of Troy*, 974 F.3d 690, 707-08 (6th Cir. 2020), this Court concluded, in relevant part, as follows:

> [T]he Sign Ordinance imposed a content-based restriction by exempting certain types of messages from the permitting requirements, such as flags and "temporary signs" that included on- and off-premises real-estate signs, "garage, estate or yard sale" signs, "non-commercial signs[,]" "[p]olitical signs[,]" "holiday or other seasonal signs[,]" and "constructions signs . . . ." Thus, the ordinance regulated both commercial and non-commercial speech but treated them differently, requiring the City of Troy to consider the content of the message before deciding which treatment it should be afforded. But for content-based restrictions on speech, strict and not intermediate scrutiny applies pursuant to *Reed* . . . .

The Township's Sign Ordinance expressly *exempts* by way of its definition of a "sign" the following: "Legal notices," "Decorative displays in connection with a recognized holiday, provided that the display doesn't exceed 75 days";[16] "Signs required by law"; and "Flags of any country, state, municipality, university, college or school." (R-23-2:Ex. C [Sign Standards, § 16.02.20], PageID.1291-1304). By its

[16] Under this exemption, Plaintiffs could display the religious displays every 75 days. Why isn't the St. Pio Feast Day Celebration a recognized holiday, thus permitting Plaintiffs' displays under this exemption? (*See* R-23-4:O'Reilly Decl. ¶ 24, PageID.1346). This further illustrates that the ordinance is content based and unconstitutional.

own terms, the Sign Ordinance exempts from its permit and fee requirement "Historical marker[s]," "Parking lot signs," "Street address signs," and "Temporary signs." (*Id*. § 16.03.02); *see also City of Ladue v. Gilleo,* 512 U.S. 43, 52 (1994) ("Exemptions . . . may diminish the credibility of the government's rationale for restricting speech in the first place.").

Moreover, because Plaintiffs' "signs" are for the purpose of religious worship, Defendants are imposing upon Plaintiffs the additional burden of having to go through a costly and burdensome zoning process. That is, because religious worship is involved, Plaintiffs' religious displays have now converted the wooded area of the CHI Property into a "church or temple," thereby requiring the costly approvals.

In sum, the ordinance is content based on its face and as applied. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 754 (8th Cir. 2019) ("In an as-applied challenge . . . , the focus of the strict-scrutiny test is on the *actual speech being regulated*, rather than how the law might affect others who are not before the court.") (emphasis added). It cannot satisfy strict scrutiny, which is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *see infra*.

Plaintiffs' religious displays satisfy all of the "interests" asserted by the Township for regulating signage. Thus, Defendants do not have a compelling interest in ordering the removal of these symbols from the CHI Property or imposing additional costs and burdens for displaying them. And even if the Zoning Ordinance

and its application to Plaintiffs' speech were content neutral, the restrictions "still must be narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). And "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 495. Defendants do not have a "substantial interest" in ordering the removal of Plaintiffs' religious displays or imposing additional costs and burdens for displaying them.

B. Free Exercise/RLUIPA.[17]

"The principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah*, 508 U.S. 520, 523 (1993). As noted by this Court (sitting *en banc*):

> The right to free exercise of religion includes the right to engage in conduct that is motivated by the religious beliefs held by the individual asserting the claim. . . . The government cannot prohibit an individual

[17] Plaintiffs' right to religious exercise is also protected by 42 U.S.C. § 2000cc *et seq*. ("RLUIPA"). 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" satisfies strict scrutiny. 42 U.S.C. § 2000cc(a)(1)(A)(B). Here, the Township is implementing its Zoning Ordinance to deny Plaintiffs the right to use the CHI Property for religious purposes, thereby placing a substantial burden on Plaintiffs' religious exercise. This burden is not in furtherance of a compelling governmental interest nor the least restrictive means of furthering that governmental interest. *See also Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2431 (2021) (Gorsuch, J., concurring) ("*Fulton* makes clear that the County and courts below misapprehended RLUIPA's demands.").

> from engaging in religious conduct that is protected by the First Amendment. . . .

Bible Believers v. Wayne Cnty. 805 F.3d 228, 255-56 (6th Cir. 2015). Moreover, "[f]ree exercise claims are often considered in tandem with free speech claims and may rely entirely on the same set of facts." *Id.* at 256. Accordingly, for the reasons discussed above, Defendants' actions similarly violate the Free Exercise Clause.

As recently stated by the Court in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021), "[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." Moreover, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of the Lukumi Babalu Aye*, 508 U.S. at 534; *see also id*. at 542-47.

Plaintiffs want to assemble on the CHI Property for the purpose of prayer and religious worship. The Township is imposing upon Plaintiffs costly and unreasonable burdens for their displays because they are used for religious worship, and the Township is prohibiting Plaintiffs from using the CHI Property for religious worship (an "organized gathering") without a compelling reason. The fact that Defendants prohibit Plaintiffs' religious conduct "while permitting [other] secular conduct that undermines the government's asserted interests in a similar way" is

fatal for Defendants. The challenged official action is not generally applicable, and it fails strict scrutiny.

"[S]trict 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, 1298 (2021) (internal citation omitted). Under strict scrutiny, "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. And 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 under the circumstances of this case—circumstances where secular exemptions abound.

For example, many people within the Township have patio tables or picnic tables that are the same size or larger than the small altar that is located on the CHI Property. There is no burdensome or costly permit process to have these secular items on private property. Birdhouses larger than the Stations of the Cross are permitted in the Township without the need to undergo a burdensome and costly permit process. At times, more people will attend a graduation party, a football party, or other permitted secular events in the Township than will visit the CHI Property. Many large-scale events are held at private residences located near the CHI Property, including a recent "Family Fun Day." There were approximately 100

people or more that attended this event, and there were numerous picnic tables. The Township does not require the hosts of these events to undergo a burdensome and costly permit process for their secular events. Indeed, no special permits are required. In fact, secular events with up to 1,000 people have been held at residences located near the CHI Property without the Township requiring any special permits or a costly and burdensome process to obtain one. (R-23-4:O'Reilly Decl. ¶¶ 7-24, PageID.1341-46; Palazzolo Decl. ¶ 7, Ex. A, attached as Ex. 2).

"It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye*, 508 U.S. at 547 (internal quotations and citation omitted). Defendants' restrictions do not satisfy the most demanding test known to constitutional law.

III. Other Injunction Factors.

Having made a clear showing that Plaintiffs are likely to succeed on the merits, the remaining factors favor granting the requested injunction. Plaintiffs have established irreparable harm. *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."); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (confirming that "even minimal infringement upon First Amendment values constitutes irreparable

injury sufficient to justify injunctive relief"). The balance of interests favors protecting constitutional rights. *Connection Distrib. Co.*, 154 F.3d at 288. And granting the injunction is in the public interest. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). "[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003); *K.A. v. Pocono Mt. Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) (same); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (same).

CONCLUSION

The Court should *immediately* issue an order returning CHI's private property to the *status quo ante*, thus permitting the return of the religious displays and worship. The Constitution demands it.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
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rmuise@americanfreedomlawcenter.org

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 27(d), the foregoing is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 5,194 words, excluding those accompanying documents identified in Fed. R. App. P. 27(a)(2)(B).

AMERICAN FREEDOM LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

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

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CATHOLIC HEALTHCARE INTERNATIONAL, INC. and JERE PALAZZOLO, Plaintiffs-Appellants, v. GENOA CHARTER TOWNSHIP, and SHARON STONE, in her official capacity as Ordinance Officer for Genoa Charter Township, Defendants-Appellees.	Case No. 21-2987

DECLARATION OF ROBERT J. MUISE

I, Robert J. Muise, make this declaration pursuant to 28 U.S.C. § 1746 and based on my personal knowledge.

1. I am an adult citizen of the United States and counsel for Plaintiffs-Appellants in this case.

2. I have personal knowledge of the filings made in the case of *Genoa Charter Township v. Catholic Healthcare International, Inc.*, in the 44th Circuit Court for Livingston County, Michigan (Case No. 21-31255-CZ). I filed a limited notice of appearance in this state court case for the purpose of defending Catholic Healthcare International, Inc. ("CHI") against the Township's motion for a temporary restraining order and/or preliminary injunction.

3. In this state case, CHI expressly reserved its right to assert its federal claims in federal court pursuant to *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 421-22 (1964). (R-27-3:Mot. to Dissolve, PageID.1429).

4. Attached to this declaration as Exhibit A is a true and correct copy of the Temporary Restraining Order and Order to Show Cause issued by the 44th Circuit Court on September 20, 2021.

5. On September 28, 2021, a hearing was held in the Livingston County Circuit Court on the Order to Show Cause why a preliminary injunction should not issue and on CHI's motion to dissolve the TRO (the two were consolidated). The hearing was adjourned without a final resolution because during the cross examination of the Township's witness, Ms. Kelly VanMarter, Community Development Director and Assistant Township Manager for Genoa Township, Ms. VanMarter suggested, for the first time, that the altar, the Stations of the Cross, and the display of the image of Our Lady of Grace could possibly be permitted under the provision of the Zoning Ordinance that permits "[p]ublicly owned parks, parkways, scenic and recreational areas, and other public open space." The Township's attorneys expressly stated that this would not include the St. Pio Chapel. The parties agreed to adjourn the hearing to pursue whether this is actually a viable option. The TRO remains in effect. And regardless, if this path were pursued, it would still be many weeks if not months before CHI could obtain all of the necessary approvals

from the Township. This is not simply a situation involving $50 permits. It will require a costly site plan and other submissions. Consequently, to end the irreparable harm that is continuing today (and which will continue while this uncertain path, which is not a guarantee, is pursued) and to protect Plaintiffs' federal rights under the First Amendment, the injunction requested in this motion is necessary.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on the 4th day of October 2021.

/s/ *Robert J. Muise*
Robert J. Muise

EXHIBIT A

STATE OF MICHIGAN
IN THE 44TH CIRCUIT COURT FOR LIVINGSTON COUNTY

GENOA CHARTER TOWNSHIP

Plaintiffs,

v.

CATHOLIC HEALTHCARE INTERNATIONAL, INC.

Defendant.

Case No. 21 - 31255CZ

Hon.

JUDGE GEDDIS
P-35307

FILED
LIVINGSTON COUNTY CLERK
21 SEP 20 PM 4:25

SEWARD HENDERSON PLLC
By: T. Joseph Seward (P35095)
David D. Burress (P77525)
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TEMPORARY RESTRAINING ORDER
AND
ORDER TO SHOW CAUSE

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 20 day of Sept. 2021

THIS MATTER HAVING come before the Court on Plaintiff's Verified Complaint and Ex-Parte Motion for Temporary Restraining Order and Order to Show Cause, the Court having reviewed the Complaint and the exhibits attached to the Complaint, the Motion, and being further advised in the premises GRANTS the request, finding:

1. Plaintiff has a likelihood of success on the merits of its claims.

2. Plaintiff will suffer irreparable harm and loss if Defendant and/or their agents continue to maintain structures on the Property including a 12-foot-high mural wall erected on a base of "loose, stacked stone," and other structures,. without obtaining permits, inspections, or any proof that it is constructed to withstand the forces of nature acting upon them, or if Defendants are allowed to use the Property in violation of its "field driveway" permit, which prohibits the driveway form being "used for organized gatherings.".
3. Plaintiff has no adequate remedy at law.
4. Plaintiff will suffer greater injury from the denial of temporary injunctive relief than Defendant will suffer from the granting of such relief. The granting of this temporary restraining order will further the public interest.
5. Notice to Defendant was not required because Plaintiff has provided Defendant with notices of the violations and have otherwise afforded opportunities for Defendant to bring the Property into compliance.
6. There is good cause to issue an Order to Show Cause pursuant to MCR 3.310(A).

IT IS ORDERED:

A. A Temporary Restraining Order is issued:

   a. Immediately requiring Defendant to remove the structures erected on the Property, until Defendant has applied for and obtained all necessary permits, including land use permits and building permits for the structures, and

   b. Immediately prohibiting Defendant, any anyone acting in concert with them, and/or Defendant' agents, or servants, to cease all unlawful use and occupancy of the Property for organized gatherings

B. This Order shall remain in full force and effect until this Court specifically orders otherwise.

C. Plaintiff must post a copy of this order at the property by September 21, 2021.

D. Plaintiffs must serve a copy of the pleadings in this case and this order **and the Court's Zoom Hearing instructions** on Defendants by September 22 2021, via ~~certified~~ 1st class mail to the Defendant's registered agents

Michael J. Deo
21032 Lujon Drive
Northville, Mi 48167

IT IS FURTHER ORDERED THAT Defendants Catholic Healthcare International, Inc, shall appear before this Court on the 28th day of September, 2021, at 9:00AM o'clock and Show Cause why an Order entering a preliminary injunction should not issue during the pendency of this litigation pursuant to the terms of this Court's Temporary Restraining Order.

IT IS SO ORDERED.

Hon. L S Geddis
Circuit Judge

Date: 9/2/21 Time: 3:55pm

And prepared by:

/s/

David D. Burress (P77525)
Attorney for Plaintiff Livingston County
210 East Third Street, Suite 212
Royal Oak, MI 48067

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CATHOLIC HEALTHCARE INTERNATIONAL, INC. and JERE PALAZZOLO, Plaintiffs-Appellants, v. GENOA CHARTER TOWNSHIP, and SHARON STONE, in her official capacity as Ordinance Officer for Genoa Charter Township, Defendants-Appellees.	Case No. 21-2987

DECLARATION OF JERE PALAZZOLO

I, Jere Palazzolo, make this declaration pursuant to 28 U.S.C. § 1746 and based on my personal knowledge and upon information and belief where noted.

1. I am an adult citizen of the United States, and the Chairman, President, and Director of Catholic Healthcare International, Inc. ("CHI").

2. On or about May 19, 2021, I received the May 7, 2021, demand letter signed by Sharon Stone, Ordinance Officer, Genoa Township ("Township"), demanding the removal of the religious displays from CHI's property in the Township. The letter demanded that "the signs and accessory structures [be] removed by June 4, 2021." This demand prompted me and CHI to file this federal civil rights lawsuit in the U.S. District Court for the Eastern District of Michigan on

June 2, 2021.

3. This letter contained the last demand from the Township regarding the religious displays on the CHI property before it filed its Verified Complaint and *ex parte* motion for a TRO and request for a preliminary injunction in the state case.

4. The cost of hiring an engineering firm to prepare the documents required by the Township for the special land use application for the St. Pio Chapel and prayer campus that we submitted and which the Planning Commission approved but the Township Board denied cost CHI in excess of $27,000.

5. What the Township demanded on October 9, 2020, when it told CHI to remove the religious symbols, would have cost CHI in excess of $20,000, based on the estimates I received at the time. And seeing the cost for submitting the required application, site plan, and other documents associated with the St. Pio Chapel and prayer campus, that estimate was accurate.

6. Pursuant to the TRO issued by the Livingston County Circuit Court on September 20, 2021, CHI was required to remove the altar, Stations of the Cross, and "mural wall" with the image of Santa Maria delle Grazie ("Our Lady of Grace") until CHI "has applied for and obtained all necessary permits, including land use permits for the structures." Following the receipt of this TRO, I consulted with the engineering firm that assisted with our land use application for the St. Pio Chapel and prayer campus and was advised on or about September 24, 2021, of the expected

cost of complying with this demand. The application fee alone is $2,875. The engineering services to revise and resubmit a new site plan and special land use package will be approximately $7,000, and this is because the fees will be reduced by approximately $15,000 (costs which we already paid), as the engineering firm will reuse the topographic survey information and other documentation that it had already completed as part of the original contracted work with CHI. This estimate does not include any associated construction costs nor additional costs should Township consultants or officials demand revisions, which they did with the submissions for the St. Pio Chapel and prayer campus. And as we saw with the submission for the St. Pio Chapel and prayer campus, even if the application does comply with the Township's Zoning Ordinance, there is no guarantee that any of this will be approved as it appears that there are vocal people in the Township who simply don't want us (CHI and its fellow worshipers) on this property.

7. I was present during the hearing held on September 28, 2021, in the Livingston County Circuit Court on the order to show cause why an order entering a preliminary injunction should not issue during the pendency of the state court litigation, thereby extending the TRO, and CHI's motion to dissolve the TRO. During this hearing, Ms. Kelly VanMarter, Community Development Director and Assistant Township Manager for Genoa Township, testified on behalf of the Township. During her testimony, Ms. VanMarter testified that there is only a $50

permit fee (each) for displaying a birdhouse, a picnic table, or a holiday decoration on private residential property. She further testified that if the CHI property was a private residence, CHI could put up 14 bird houses (CHI had 14 Stations of the Cross that were smaller than some birdhouses displayed in the Township) for a $50 permit per house, CHI could put out a picnic table (that is larger than the altar) for a $50 permit, and CHI could construct a 10-foot by 12-foot stone wall (the size of the Our Lady of Grace mural wall display) outside of the required setbacks for a $50 permit. Yet, to display CHI's religious symbols, CHI would have to undergo a very costly and burdensome zoning process. Attached to this declaration as Exhibit A is a true and correct copy of an excerpt from the transcript of this hearing.

8. I assisted with the removal of the Stations of the Cross pursuant to the TRO requested by Genoa Township and granted by the court. We started the removal process on Wednesday, September 22, 2021, a cold and rainy afternoon, after learning that the court denied our emergency motion for clarification, which requested, among other things, that the court immediately dissolve the TRO until the hearing scheduled for September 28, 2021. It was a somber day, and it was somewhat surreal. As I was carrying a Station of the Cross on my shoulder, it reminded me of the Via Dolorosa (Christ's sorrowful way)—the path Jesus took to His crucifixion as He carried His cross to Calvary. Most of us present were reminded of the verse from a famous Christian song, "Were you there when they crucified my

Lord." Below is a true and accurate photograph of one of the leadership team members assisting us with the removal of the Stations of the Cross on Thursday, September 23, 2021 (it took us two days), another cold and rainy day, and it illustrates my point (as does the image actually appearing on this Station):

9. Below is a true and accurate picture of me removing one of the Stations of the Cross from the property on Wednesday, September 22, 2021:

10. Pursuant to the TRO, the small altar, the Stations of the Cross, and the image of Our Lady of Grace were removed from the CHI Property, and this was accomplished on or before Sunday, September 26, 2021.

11. I pray that CHI and I will be able to enjoy our right to religious freedom on the CHI Property soon as even this momentary loss of our ability to engage in religious exercise, expression, and worship on CHI's private property is causing CHI and me irreparable harm.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of October 2021.

Jere Palazzolo

EXHIBIT A

STATE OF MICHIGAN

IN THE 44th CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

GENOA CHARTER TOWNSHIP,

Plaintiff, Case Number: 21-31255-CZ

v

CATHOLIC HEALTHCARE INTERNATIONAL, INC.,

Defendant.

_____/

ORDER TO SHOW CAUSE ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANT'S EMERGENCY MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

BEFORE THE HONORABLE L. SUZANNE GEDDIS, CIRCUIT JUDGE

Howell, Michigan – Tuesday, September 28, 2021

APPEARANCES:

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(248) 733-3680

For the Plaintiff: MR. T. JOSEPH SEWARD, P35095
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For the Defendant: MR. ROBERT MUISE, P62849
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3000 Green Road, Unit 131098
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(734) 635-3756

TRANSCRIBED BY: KATHERINE WENZEL, CER 5839
Certified Electronic Recorder
(517) 285-5378

TABLE OF CONTENTS

screen section of the ordinance.
Q What would it require to build a 12 foot high, ten foot wide stone wall on your private residence?
A I would have to get a permit and depending on where it was at, that size may not be allowed.
Q Well how about in the CE district, would that size be allowed?
A Only inside the building envelope.
Q What's a building envelope?
A So outside of the setbacks.
Q So you could build a ten foot by 12 foot stone wall in CE if it was outside of the setbacks, correct?
A After you got a permit, yes.
Q And, and what would be the, the cost of a permit for that?
A Fifty dollars.
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.
Q And, and even with that $2,875 application fee, they would still have to pay for those individual permits, correct?