No. 21-2987

United States Court of Appeals for the Sixth Circuit

CATHOLIC HEALTHCARE INTERNATIONAL, INCORPORATED; JERE PALAZZOLO,

Plaintiffs-Appellants,

v.

GENOA CHARTER TOWNSHIP, MI; SHARON STONE, IN HER OFFICIAL CAPACITY AS ORDINANCE OFFICER, GENOA CHARTER TOWNSHIP,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE JUDITH E. LEVY

Civil Case No. 5:21-cv-11303

APPELLANTS' PETITION FOR REHEARING

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REASONS FOR GRANTING THE PETITION

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants ("Appellants") hereby petition for panel rehearing of the Court's *per curiam* opinion issued on November 12, 2021. *See* Fed. R. App. P. 40.

In this case, Appellants are appealing the district court's denial of their motion for a preliminary injunction, where the district court denied Appellants' request not only on the basis of the *Younger* abstention doctrine but also based on the lower court's conclusion that Appellants' claims were not ripe and that Appellants were not likely to succeed on the merits. (Tr. of Hr'g at 36-40 [setting forth basis for denial of the preliminary injunction], R.29).[1]

Appellants also moved this Court for an injunction pending appeal as this case involves the deprivation of Appellants' First Amendment rights to religious expression and worship on their private property, and it is well established that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally

[1] To be sure, the district court's decision on the issues presented was scant and void of any substantive analysis. And this was the case even though the court issued two orders on the matter. (Order Denying TRO, R.28, PageID. 1449-50; Order Denying Prelim. Inj., R.30, PageID. 1495-96). Consequently, Appellants are seeking a just and proper resolution of the issues with this Court, which will undoubtedly provide the proper attention and legal analysis to the important constitutional issues presented.

admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*).

In its opinion, the Court acknowledged the urgency of the matter, stating, "As the parties have presented their merits arguments in their briefing and *time is of the essence*, we consider CHI's appeal here." (*Per Curiam* Op. at 2, Doc. 21-2 [emphasis added]). This Court's dispositive judgment on all the issues on appeal is all the more imperative given the lower court's rather thin and erroneous rulings from the bench. Unfortunately, this Court only addressed the *Younger* abstention issue in its opinion and thus overlooked the ripeness and likelihood of success issues, which alone could serve as separate and independent bases for the district court to continue to deny Appellants' request for a preliminary injunction (and thus the continuation of irreparable harm) upon remand. *See* Fed. R. App. P. 40 ("The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . .").

This Court's remand, as it stands now with its narrow focus on just *one* aspect of the *Younger* abstention argument and its avoidance of the other *two* bases for the district court's denial of the preliminary injunction, will only prolong matters in the district court,[2] and it will likely have zero effect on whether the injunction should

[2] Appellants filed their original complaint on June 2, 2021 (R.1), and served Defendants on June 8, 2021 (R.10, Summons Returned Executed). Defendants answered the complaint on June 29, 2021. (R.12, Answer). The court set a

issue as the district court will presumably rely on its other two bases (ripeness and likelihood of success) for denying the preliminary injunction should it ultimately agree with Circuit Judge Thapar that "*Younger* abstention does not apply." (*Per Curiam* Op. at 6 [J. Thapar, concurring]). This will necessarily force Appellants back to this Court, having to reargue the same issues yet again and causing further delay and irreparable harm.

Given the nature of these proceedings and the ongoing irreparable harm, this Court's *per curiam* opinion, which overlooked crucial and dispositive issues, and subsequent remand will necessarily cause delay and thus prejudice Appellants as time is of the essence, and justice delayed is justice denied. *See generally Barcume v. City of Flint*, 132 F. Supp. 2d 549, 557 (E.D. Mich. 2001) ("Ever since King John of England submitted to the rule of law articulated in the Magna Carta in 1215, the general principle that 'justice delayed is justice denied' has been fundamental to our legal system and the legal systems from which ours descended.").

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scheduling conference for July 28, 2021. (R.13, Notice to Appear). On July 14, 2021, Appellants filed an amended complaint (R.14, First Am. Compl.), and on July 21, 2021, the parties filed a joint discovery plan. (R.15, Discovery Plan). On July 26, 2021, Defendants filed a "Motion for Judgment on the Pleadings." (R.17, Defs.' Mot.). The next day, the district court canceled the scheduling conference (Text-Only Notice of Jul. 27, 2021), and set a hearing on Defendants' motion for November 4, 2021, (R.18, Notice of Hearing). On October 18, 2021, the district court reset the hearing on Defendants' motion for *February 24, 2022*. (R.34, Am. Notice of in Person Hr'g). In other words, we are many months away from moving from the pleadings stage to resolving the substantive issues on their merits.

Appellants respectfully ask this Court to grant this petition and, in light of the controlling case law, respectfully request the following. First, the Court should rule that *Younger* abstention does not apply, and it should so rule not only for the reasons articulated by Circuit Judge Thapar in his concurring opinion, but also for the reasons argued by Appellants in their filings with this Court. Second, for the reasons stated in Appellants' filings, the Court should rule that Appellants' claims are ripe for review. And third, for the reasons stated in Appellants' filings, the Court should conclude that Appellants are likely to succeed on the merits of their claims (the determinative factor in this First Amendment case) and issue the requested injunction. *See 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)) ("When 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.'"); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor.").

I. This Court Should Resolve the *Younger* Abstention Issue Now.

As Circuit Judge Thapar's concurrence makes amply clear, this Court is well equipped to resolve the issue of "whether this case involves a civil-enforcement action that is 'akin to a criminal prosecution' and thus eligible for *Younger* abstention" in the

first instance. (*See Per Curiam* Op. at 2). The correct answer to this issue is that "*Younger* abstention does not apply." (*Id*. at 6). A remand is unnecessary. This Court has a copy of the verified complaint filed in the state court. (Muise Decl. ¶ 2, Ex. A [Verified Compl.,], R.23-2, PageID. 1162-78). In this pleading, the Township seeks injunctive relief and not penalties. (*Id*. at PageID. 1177). On its face, "[t]he purpose of Genoa's civil-enforcement action is to force Catholic Healthcare to comply with the township's zoning ordinance—not to punish it for a past failure to comply." (*See Per Curiam* Op. at 5 [Thapar, J., concurring]). There are no criminal violations or criminal penalties involved in the Township's civil lawsuit. It is not an action to sanction Catholic Healthcare for some wrongful act. *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 79 (2013) ("Such enforcement actions [*i.e*., civil enforcement actions where *Younger* abstention applies] are characteristically initiated to sanction the federal plaintiff, *i.e.,* the party challenging the state action, for some wrongful act."). In sum, "there is no criminal-law analogue here. The township's civil-enforcement action is just that—a civil suit to enforce a zoning ordinance." (*Per Curiam* Op. at 6 [Thapar, J., concurring]). This Court should decide this issue now, and it should decide it in Appellants' favor. The district court will add nothing to this analysis.

Moreover, regardless of whether the state court civil enforcement action falls within the *Younger* abstention doctrine per the analysis outlined in the Court's *per curiam* opinion, the district court was wrong as a matter of undisputed fact and law

when it concluded that the Township filed first. This Court did not address this dispositive factor.

As this Circuit's precedent makes plain, "[t]he first condition for the application of *Younger* abstention is that the state proceeding must be pending *on the day the plaintiff sues in federal court*—the so-called 'day-of-filing' rule." *Nimer v. Litchfield Twp. Bd. of Trs.*, 707 F.3d 699, 701 (6th Cir. 2013) (emphasis added). Appellants' federal action was filed on *June 2, 2021*. The state court action was filed months later, on *September 17, 2021*. Thus, the state proceeding was not pending *on the day Catholic Healthcare filed in federal court*.

As the Township *admits* in its state court filing, "there is another pending civil action *arising out of the transaction or occurrence alleged in the complaint*, in the United States District Court for the Eastern District of Michigan, under the name *Catholic Healthcare International, Inc. v. Genoa Township*, Case No. 21-cv-11303." (Muise Decl., Ex. A ["Verified Complaint"] [emphasis added], Ex. 1, R.23-2, PageID. 1162). This federal lawsuit indeed "arises out of the [same] transaction or occurrence" as the later-filed state court action. Contrary to the district court's demonstrably false conclusion, this federal action is not focused solely upon the denial of Catholic Healthcare's special application for land use (*i.e.,* the Township's unlawful denial of Catholic Healthcare's application to build the modest St. Pio Chapel and prayer campus). Central to this federal case is the unlawful enforcement

of the Township's Zoning Ordinance to prevent Appellants from engaging in religious exercise and worship on Catholic Healthcare's private property located within the Township. As expressly stated in the First Amended Complaint (which was filed on July 14, 2021), the federal lawsuit seeks

> to enjoin the enforcement of the Township Zoning Ordinance as applied to Plaintiffs so as to allow Plaintiffs to construct and develop the St. Pio Chapel and prayer campus as set forth in this First Amended Complaint, *and to further enjoin Defendants, their employees, agents, and successors in office from* ***enforcing or endeavoring*** *to enforce the Township Zoning Ordinance, including the Sign Ordinance, so as to restrict Plaintiffs' religious exercise and religious expression* as set forth in this First Amended Complaint . . .

(First Am. Compl., Prayer for Relief, ¶ D, R.14, PageID. 236 [emphasis added]). Indeed, this federal lawsuit was filed on June 2, 2021 because the Township sent a letter to Catholic Healthcare on May 7, 2021, demanding that it remove the religious symbols at issue by June 4, 2021. In other words, Catholic Healthcare filed this federal lawsuit preemptively, attacking the constitutionality of the Zoning Ordinance, facially and as applied, before any enforcement action could occur. *See also Exec. Arts Studio, Inc. v. City of Grand Rapids*, 391 F.3d 783, 792 (6th Cir. 2004) (rejecting *Younger* abstention argument and noting, with importance, 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 zoning law, *preemptively filing in federal court* attacking the

constitutionality of the Ordinance before any enforcement action could occur") (emphasis added).

Thus, *Younger* abstention does not apply as a matter of undisputed fact and law for at least two reasons, as set forth above. *See also Exec. Arts Studio, Inc.*, 391 F.3d at 792-93 (concluding that a state court order which held that the plaintiff was a public nuisance under Michigan law and would have to either cease operations or remove all the material which caused it to fall into the ambit of the ordinance did not preclude the district court from granting summary judgment in the plaintiff's favor, finding that the zoning ordinance at issue was unconstitutional as applied as a matter of federal law).

In the final analysis, the application of the *Younger* abstention doctrine is an issue this Court reviews *de novo* (*Per Curiam* Op. at 2 ["[W]e look at issues of law (like Younger abstention) de novo."], Doc. 21-2), and it is an issue that this Court should resolve now as "time is of the essence," (*id.*).

II. The Court Should Resolve the Ripeness and Likelihood of Success Issues Now.

To avoid needless repetition (and in light of the word limitation), Appellants will not repeat here, in full, the arguments presented in their opening brief on the ripeness and likelihood of success issues. (*See* Appellants' Br. at 31-42 [addressing ripeness and likelihood of success issues], Doc. 19). Suffice to say, there is no dispute that this case involves fundamental rights protected by the First Amendment: the right to religious worship and the right to religious expression through worship and the

display of religious symbols. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("Religious worship" is a "form[] of speech and association protected by the First Amendment."); *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)).

Due to the fact that Appellants are currently subject to an unlawful zoning ordinance (which includes a sign ordinance) that is being used to suppress their First Amendment rights, the case is plainly ripe for review. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (holding challenge ripe given that a contrary finding "may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity"); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights.").

The Township's Zoning Ordinance, as applied to Appellants' religious expression, operates as an unconstitutional prior restraint. *See Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 698 (6th Cir. 2020) (holding that the "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"); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."). And the Zoning Ordinance (which includes the Sign Ordinance) is an unconstitutional, content-based restriction on speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (stating that "[c]ontent-based laws . . . are presumptively unconstitutional"); *Int'l Outdoor, Inc.*, 974 F.3d at707-08 (holding that the "Sign Ordinance imposed a content-based restriction by exempting certain types of messages from the permitting requirements").

For related reasons, the Township's Zoning Ordinance, facially and as applied to restrict Appellants' religious worship, violates the Free Exercise Clause. *See Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 255-56 (6th Cir. 2015) (*en banc*) (stating that "[t]he 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" and that "[f]ree exercise claims are often considered in tandem with free speech claims and may rely entirely on the same set of facts").

Appellants want to assemble on the Catholic Healthcare property for the purpose of prayer and religious worship. The Township is imposing upon Appellants costly and unreasonable burdens for their displays because they are used for religious worship, and the Township is prohibiting Appellants from using the property for

religious worship (an "organized gathering"), all without a compelling reason. The fact that the Township prohibits Appellants religious conduct "while permitting [other] secular conduct that undermines the government's asserted interests in a similar way"—such as permitting birdhouses, picnic tables, and stone walls that are similar in size and scope to Appellants' religious symbols and permitting secular events on private property with dirt driveways in numbers that far exceed the number of people who will engage in religious worship on Catholic Healthcare's property without the need to undergo a burdensome and costly permit and approval process (a process that permits the Township to deny the application based on subjective factors)—is fatal for the Township. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021) ("A law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542-47 (1993) (invalidating city ordinances on free exercise grounds and concluding that the ordinances fail to prohibit nonreligious conduct that endangers the same governmental interests in a similar or greater degree than the religious conduct).

In sum, the challenged official action is not generally applicable, and it fails strict scrutiny. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) ("[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.'") (internal citation omitted); *Fulton*, 141 S. Ct. at 1881 (stating that under strict scrutiny, "so long as the government can achieve its interests in a manner that does not burden religion, it must do so"); *see also id*. ("The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS."). Thus, 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 Appellants under the circumstances of this case—circumstances where secular exemptions abound. The Court can and should answer this question in the negative and issue the requested injunction (or remand the case for the lower court to do so).

CONCLUSION

Appellants request that the Court grant this petition and remand with instructions that the district court immediately enter the requested injunction to allow the display of the religious symbols on Catholic Healthcare's property and to permit Appellants to use the private property for outdoor religious worship. This injunction is necessary to mitigate the ongoing and irreparable harm caused by the deprivation of Appellants' fundamental right to religious worship.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a) and Fed. R. App. P. 40, the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 3,116 words, excluding those sections identified in Fed. R. App. P. 32(f).

AMERICAN FREEDOM LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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