UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

CATHOLIC HEALTHCARE INTERNATIONAL, INC. and JERE PALAZZOLO, Plaintiffs, v. GENOA CHARTER TOWNSHIP, and SHARON STONE, Ordinance Officer for Genoa Charter Township, Defendants.	No. 2:21−cv−11303−JEL−DRG Hon. Judith E. Levy Magistrate Judge David R. Grand

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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ISSUES PRESENTED

I. Whether the allegations and all reasonable inferences drawn from those allegations would lead a reasonable court to conclude that Plaintiffs' First Amended Complaint is sufficient to raise a right to relief above the speculative level and to state claims to relief that are plausible on their face.

II. Whether Plaintiff Palazzolo has standing when he has alleged a personal injury fairly traceable to Defendants' allegedly unlawful conduct and likely to be redressed by the requested relief.

III. Whether Plaintiffs have stated a plausible claim for relief under the Religious Land Use and Institutionalized Persons Act.

IV. Whether Plaintiffs have stated a plausible claim for relief under the Free Speech Clause of the First Amendment.

V. Whether Plaintiffs have stated a plausible claim for relief under the Free Exercise Clause of the First Amendment.

VI. Whether Plaintiffs have stated a plausible right to association claim arising under the First Amendment.

VII. Whether Plaintiffs have stated a plausible equal protection claim arising under the Fourteenth Amendment.

VIII. Whether Plaintiffs have stated a plausible free exercise claim arising under the Michigan Constitution.

IX. Whether Defendant Stone enjoys qualified immunity when she has been sued for declaratory and injunctive relief only.

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INTRODUCTION

Defendants seek to dismiss this lawsuit *at the pleading stage*. Their motion is procedurally and factually defective. At times, it is frivolous. The Court should swiftly deny Defendants' motion so that this case may promptly proceed to the merits. The delay caused by Defendants' ill-conceived motion is only adding to the irreparable harm that Plaintiffs are currently suffering due to the loss of their fundamental rights. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (same).

STANDARD OF REVIEW

We begin by discussing the appropriate standard of review as this will properly frame the Court's task when resolving Defendants' motion.[1]

[1] Defendants erroneously describe their motion as a motion for judgment on the pleadings under Rule 12(c). A Rule 12(c) motion, however, is brought "[a]fter the pleadings are closed." Fed. R. Civ. P. 12(c). The pleadings are not closed because Defendants have yet to file an answer to the First Amended Complaint. *See* Fed. R. Civ. P. 15(a)(3). Consequently, Plaintiffs will treat Defendants' motion as if it were brought under Rule 12(b). *See Seastrom v. Jennett*, No. 1:19-cv-637, 2021 U.S. Dist. LEXIS 66374, at *1 n.1 (W.D. Mich. Mar. 10, 2021) ("Although Defendant . . . brings his motion pursuant to Federal Rule of Civil Procedure 12(c)—the rule that applies to judgment on the pleadings—his motion is properly considered a motion to dismiss for failure to state a claim under Rule 12(b)(6) because he has not filed an answer.")(citing *Bray El v. City of Euclid*, No. 1:16CV2160, 2017 U.S. Dist. LEXIS 98375 (N.D. Ohio June 26, 2017)(treating the defendant's motion pursuant to Rule 12(c) as a motion to dismiss under Rule 12(b)(6) because "defendant did not file an Answer to the Amended Complaint")). The standards are similar.

A. Rule 12(b)(1).

Defendants challenge Plaintiff Palazzolo's standing to bring this action. A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may take the form of a facial challenge, which tests the sufficiency of the pleading, or a factual challenge, which contests the factual basis for jurisdiction. *See Am. Freedom Law Ctr., Inc. v. Nessel*, No. 1:19-cv-153, 2020 U.S. Dist. LEXIS 60622, at *9 (W.D. Mich. Jan. 15, 2020); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). Defendants have advanced a facial attack as they do not present any relevant or admissible evidence to contest the factual basis for jurisdiction.[2] Consequently, the Court must accept as true all the allegations in the First Amended Complaint regarding the issue of standing. *Id*. at 325.

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[2] Defendants make a ripeness argument, alleging, contrary to the allegations in the First Amended Complaint and based upon impermissible and irrelevant hearsay assertions, "that CHI needed to raise $5 Million for construction of the St. Pio chapel, and its fundraising efforts are still ongoing"; therefore, the harm caused by Defendants' actions is not "actual or imminent." (Defs.' Br. at 18). The argument is without merit. Indeed, Plaintiffs are *currently* harmed by Defendants' adverse decisions and are *currently* subject to the Zoning Ordinance and its penalties. The case is ripe. *See, e.g., NRA of Am. v. Magaw*, 132 F.3d 272, 290 (6th Cir. 1997) (finding challenge ripe and stating that "[w]hen a statute creates substantial economic burdens and compliance is coerced by the threat of enforcement, it is not necessary to determine whether a plaintiff subject to the regulation has sufficiently alleged an intention to refuse to comply; it is sufficient for the plaintiff to demonstrate the statute's direct and immediate impact on his business and to establish that compliance with the regulation imposed will cause significant economic harm"); *see also Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002) (relaxing ripeness requirements in the First Amendment context).

B. Rule 12(b)(6).

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege facts sufficient to state a claim for relief that is "plausible on its face" and, when accepted as true, are sufficient to "raise a right to relief above the speculative level." *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017) (citation omitted). "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007)). When reviewing Defendants' motion under Rule 12(b)(6), the Court must construe the First Amended Complaint *in the light most favorable to Plaintiffs*, *accept its factual allegations as true*, and *draw all reasonable inferences in Plaintiffs' favor*. *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008).

For a Rule 12(b)(6) motion to dismiss (or a Rule 12(c) motion for judgment on the pleadings), the standard is clear: "all well-pleaded material allegations of the pleadings of the opposing party *must be taken as true*." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007) (emphasis added). Despite this clear standard, Defendants repeatedly ask the Court to reject Plaintiffs' well-pleaded material allegations and instead to supplant these allegations with matters outside of the pleadings. The Court should reject Defendants' invitation for error. Indeed,

Defendants submit along with their motion *hundreds* of pages of documents they describe as the "2021-05-03 Board Packet" (Ex. 1, Doc. No. 17-2), "2021-02-08 Planning Commission Packet" (Ex. 2, Doc. No. 17-3), and the "2021-03-08 Planning Commission Packet" (Ex. 3, Doc. No. 17-4). Defendants claim that these documents *and the information contained within them* (including all of the hearsay statements) are "public records" and should, therefore, be considered by the Court. (Defs.' Br. at 16). Defendants are wrong. The majority of the documents are not attached to nor relied upon in the First Amended Complaint. Moreover, Defendants never ask this Court to take judicial notice of these documents.

While public records can sometimes be used by a court to decide a motion to dismiss, "a court may only take judicial notice of a public record whose existence or contents prove facts whose accuracy cannot reasonably be questioned." *Passa v. City of Columbus*, 123 F. App'x 694, 697 (6th Cir. 2005). "[I]n order to preserve a party's right to a fair hearing, a court, on a motion to dismiss, must only take judicial notice of facts which are not subject to reasonable dispute." *Id.* This standard is satisfied only where the facts are "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *City of Monroe Emples. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 655 n.1 (6th Cir. 2005) (internal quotation marks omitted). Thus, not all public records are appropriate to

consider on a Rule 12(b)(6) motion. *See Ney v. Lenawee Med. Care Facility*, No. 19-13217, 2020 U.S. Dist. LEXIS 73668, at *6 (E.D. Mich. Apr. 27, 2020) (holding that not all public records can be considered on a Rule 12(b)(6) motion); *McDowell v. Town of Sophia*, No. 5:12-cv-01340, 2012 U.S. Dist. LEXIS 123557, at *11 (S.D. W. Va. Aug. 30, 2012) (holding that, while documents that are essentially the defendant's version of the facts "may be 'public records' subject to a FOIA, [] it would be absurd to conclude the Court should take judicial notice of the substance of such public records for the purpose of addressing a 12(b)(6) motion").

Rather than "facts which are not subject to reasonable dispute," Defendants instead advance false and irrelevant hearsay (for example, Defendants repeatedly and falsely claim that 60 to 80 cars were parked along Chilson Road during a CHI event), which is inappropriate. Moreover, as stated by the Sixth Circuit:

> Where a plaintiff attaches to the complaint a document containing unilateral statements made by a defendant, where a conflict exists between those statements and the plaintiff's allegations in the complaint, and where the attached document does not itself form the basis for the allegations, Rule 10(c) does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading simply because the documents were attached to the complaint to support an alleged fact.

Jones, 521 F.3d at 561 (internal quotations and citation omitted).

In sum, the Court's task for purposes of resolving Defendants' motion is to determine whether the allegations in Plaintiffs' First Amended Complaint, taken as true, and drawing all reasonable inferences from those allegations in Plaintiffs'

favor, would lead a reasonable court to conclude that the complaint sufficiently raises a right to relief above the speculative level and states claims to relief that are plausible on their face. The First Amended Complaint (FAC) satisfies this standard.

SUMMARY OF RELEVANT FACTS

Plaintiff Catholic Healthcare International, Inc. ("CHI") is a nonprofit corporation that is formally recognized as a private association of the faithful by the Catholic Diocese of Lansing, Michigan. The activities and work of CHI, including its proposed development and use of its property located within Genoa Township (CHI Property) as a prayer campus, are religious exercise, religious assembly, and religious expression protected by the United States and Michigan Constitutions and federal statutory law. (FAC ¶¶ 10, 11, 24-31).

Plaintiff Jere Palazzolo is the Chairman, President, and Director of CHI. He engages in religious exercise, religious assembly, and religious expression through the activities and work of CHI. This includes praying, worshiping, and assembling on the CHI Property for religious purposes. (FAC ¶¶ 13, 14, 132, 134). As the head of CHI, Plaintiff Palazzolo has the authority to direct and control the use of the CHI Property. (*See, e.g.,* FAC ¶ 86, Ex. 1, Doc. No. 14-2, Pg. ID 241 [signing and authorizing site plan review for use of CHI Property]).

CHI acquired 40 acres of property (CHI Property) located within Genoa Township from the Catholic Diocese of Lansing. The diocese originally acquired

the property with the reasonable expectation of building a church on it since places of religious worship are allowed on this property by the Zoning Ordinance.[3] When CHI acquired the property, it too had a reasonable expectation of developing it into a prayer campus, which would include an adoration chapel (St. Pio Chapel), prayer trails, a small outdoor altar, and the display of religious images, icons, and symbols, including Stations of the Cross, religious statues, and the display of the image of Santa Maria delle Grazie ("Our Lady of Grace").[4] (FAC ¶¶ 28-31, 44).

On or about October 9, 2020, the Township, through Defendant Sharon Stone, ordered Plaintiffs to remove the Stations of the Cross and the image of Santa Maria delle Grazie, claiming that by displaying these religious symbols and using them for religious worship, Plaintiffs have now converted the secluded, wooded area where they are 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 Defendants' (unlawful) demand, Plaintiffs would have to undertake an extensive, costly (in excess of $20,000), and burdensome zoning process. Defendants' determination was factually inaccurate

[3] The property is zoned Country Estate (CE), and "[c]hurches, temples and similar places of worship" are allowed by the Zoning Ordinance on property zoned CE after special land use approval by the Township. (FAC ¶¶ 32, 43).

[4] The Stations of the Cross and the image of Santa Maria delle Grazie have been displayed on the property since September 2020, and are used for prayer and worship. (*See* FAC ¶¶ 44-55).

and demonstrates the arbitrary, discriminatory, irrational, and unreasonable manner in which they apply the Zoning Ordinance to Plaintiffs. There is no "structure" on the CHI Property "wherein" regular religious assemblies take place. Nor are any of these religious symbols "accessory structures" requiring Township approval. Consequently, Plaintiffs rejected the demand on constitutional grounds.[5] (FAC ¶¶ 57-59). Defendants never recanted their ongoing demand/threat. Indeed, they raised it again on May 7, 2021. (FAC ¶¶ 61, 110-17). To this day, Plaintiffs are subject to cease-and-desist orders, civil infractions, and fines as a result. (*See* Zoning Ordinance § 21.04 [setting forth penalties]).

The CHI Property is compatible with and suitable for the development of a place of religious worship, specifically including the construction and development of the proposed St. Pio Chapel and prayer campus. The development of the St. Pio

[5] Neither wind nor rain nor any other factors have caused any safety issues whatsoever since the displays were erected. Time and experience refute any claim that the displays are unsafe. Moreover, the displays are not erected along any public right of way or thoroughfare. They cannot be seen from the road; they are located in a wooded, isolated area. The displays do not undermine any of the Township's stated objectives for restricting signage. The displays are not "distracting to motorists and pedestrians." They do not "create[] a traffic hazard" nor do they "reduce[] the effectiveness of signs needed to direct and warn the public." They do 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." As noted, the religious displays are not placed within the public street right-of-way—they are not even visible from the road—and thus create no visibility or public safety issues whatsoever. And they create no visual blight. (FAC ¶¶ 116-22).

Chapel and prayer campus is harmonious and consistent with adjacent land uses. It is harmonious and consistent with maintaining the peaceful, rural nature of the property. The adoration chapel will be a modest, 95 seat, 6,090 square foot chapel/church with an associated 39-space parking lot, site lighting, and building lighting. (FAC ¶¶ 62, 76, 77).

The St. Pio Chapel will be a place where people can come to pray, attend Mass, and adore Jesus Christ in the Eucharist. The prayer campus is not a high-volume site. It is a place where people can walk the trails and pray. One trail, for example, will allow visitors to pray the Stations of the Cross. The proposed development will retain the rural atmosphere of the area, and it will promote the quality of life. (FAC ¶ 78).

The St. Pio Chapel will be approximately 600 feet off of Chilson Road. Plaintiffs are preserving most of the property to allow for trails on the property and to allow people to find peace in the natural surroundings. Plaintiffs are only building on approximately 5 acres (out of 40), and this development is largely in the open area of the site, thereby maintaining the rural character of the property. (FAC ¶ 79).

The modest size of the chapel and the limited parking (39 spaces) will necessarily limit the number of people who visit the religious property on a regular basis, and Plaintiffs, like other property owners in the Township, will abide by the relevant laws when hosting events on the CHI Property. (FAC ¶ 80).

The St. Pio Chapel will contain a tabernacle, which is a liturgical furnishing used to house the Eucharist (the Body of Christ) outside of Mass. A tabernacle provides a safe location where the Eucharist can be kept for the adoration of the faithful and for later use. Canon Law requires a tabernacle to be in a secure location, such as the St. Pio Chapel, because it helps prevent the profanation of the Eucharist. Without the St. Pio Chapel, there could be no tabernacle on the CHI Property. And without the tabernacle, the Eucharist could not be kept on the property. Thus, the St. Pio Chapel is the central and critical element of Plaintiffs' proposed development. *Without the St. Pio Chapel, Plaintiffs are unable to carry out a core function of their religious activities*. (FAC ¶¶ 63-68).

In order to develop the prayer campus and construct the St. Pio Chapel, Plaintiffs submitted an application for special land use. The application met all of the Zoning Ordinance requirements. It was ultimately approved by the Township Planning Commission. Plaintiffs went "above and beyond and addressed all of the concerns of the Planning Commission and the consultants." (FAC ¶¶ 85-97). Nonetheless, the Township denied Plaintiffs' application, thereby causing irreparable harm. (FAC ¶¶ 98-109). Defendants assert in their motion that the application "was ultimately denied because Plaintiffs failed to consider the actual amount of traffic that would be generated." (Defs.' Br. at 35). Because Defendants have made traffic the *central* issue, Plaintiffs will address this issue in greater detail.

To begin, a traffic study was not required for the development of the CHI Property as the proposed use of the property did not meet the threshold traffic generated to require such a study. The negligible traffic caused by the proposed St. Pio Chapel and prayer campus will have little to no overall impact, and Chilson Road has been shown to handle much larger traffic volumes in the past. (FAC ¶¶ 80-84).

As noted, the *crux* of Defendants' argument as to why the Township denied Plaintiffs' application is based upon an alleged (and demonstrably false) traffic concern. And to support this illegitimate argument, Defendants rely upon matters that are improper for the Court to consider—matters which include inadmissible hearsay statements from residents and matters outside of the pleadings. (*See supra*).

Defendants assert that "requiring a church to demonstrate compliance with traffic standard[s] is not unreasonable." (Defs.' Br. 32). But Plaintiffs *did* demonstrate compliance and yet were still denied, thereby demonstrating the unreasonableness (and unlawfulness) of Defendants' absolute denial. Moreover, complete denial is not the least restrictive means to address traffic concerns, as discussed later in this response.

Defendants' arguments demonstrate that they either (1) misapprehend how traffic impact is determined under the Township's own zoning requirements or (2) seek to intentionally obfuscate the matter to convince the Court that this is/was a legitimate basis for the denial. Either way, Defendants' arguments fail.

As noted, a traffic impact study was not required *as a matter of fact*. (FAC ¶¶ 81-84). Defendants' engineering consultants did not require a traffic impact study. The Livingston County Road Commission did not require a traffic impact study. The Planning Commission did not require a traffic impact study. (*See* FAC ¶ 93, Ex. 3 [Planning Comm'n Minutes]). And if the Township Board required a traffic impact study, it could have tabled the matter until one was conducted. But it didn't do that. Rather, it simply denied Plaintiffs' application. (*See* FAC ¶¶ 97-102, Ex. 5 [Twp. Bd. Minutes]). Nonetheless, under the facts of this case, if the Township Board imposed this unnecessary and costly requirement upon Plaintiffs, it would be treating Plaintiffs disparately compared to other similarly situated individuals.

At the end of the day, Defendants are playing fast and loose with the facts. Plaintiffs' engineering consultants used the Institute of Transportation Engineers (ITE) Trip Generation Manual to determine the appropriate number of "trips" that the proposed project would generate. This manual is commonly used within the Township for such purposes, and the Township even references it in its application for special land use approval as a legitimate source for determining traffic impact. (*See* FAC ¶ 86, Ex. 1, Doc. No. 14-2, Pg. ID 253).[6] The 56 "trips" calculation—

[6] Per Plaintiffs' responses to the Township's application:

> I. Impact on traffic and pedestrians: A description of the traffic volumes to be generated based on national reference documents, such as the most recent edition of the *Institute of Transportation Engineers Trip Generation Manual*, other published studies or actual counts of similar uses in Michigan.

these are "directional trips," as commonly understood by anyone with a basic knowledge of zoning—determined by Plaintiffs' engineering consultants was based upon the ITE manual's data for places of religious worship. The most accurate and best fit for this evaluation was the Sunday use data point. This makes sense since the peak traffic day for places of religious worship is Sunday. Contrary to Defendants' argument, using the Sunday *data point* does not mean that Plaintiffs' consultants ignored the other days of the week. Rather, it means that they used the *peak day for traffic* for places of religious worship to determine the impact of the proposed development. As Defendants tacitly admit (and as Defendants' consultants, the Planning Commission, and the Road Commission plainly acknowledged), a traffic impact study was not required because the development will not generate 100 directional vehicle trips *in the peak hour for traffic*. Note that

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> The Institute of Transportation Engineers Trip Generation Manual 10th Edition Volume 2 Part 2 was used to calculate the number of trips generated by the proposed church. The scenario on sheet 187 using gross floor area and the peak hour on a Sunday produced 56 trips. The traffic counts section on Livingston County Road Commission's website was used to analyze Chilson Road annual average daily traffic. The most recent data shows Chilson Road has an AADT of 2,500 between E Coon Lake Road and Beck Road. Chilson Road did experience an annual growth of -26% in 2014 due to the I-96 ramp on Latson Road being constructed. Chilson Road had an AADT of 4,505 prior to the construction of the ramp. The increased traffic caused by the proposed church will have little overall impact, and Chilson Road has been shown to handle much larger AADT volumes in the past. It is important to note that the anticipated mass times for this site generally do not line up with peak hour traffic times.

(FAC ¶ 86, Ex. 1, Doc. No. 14-2, Pg. ID 253).

the traffic impact requirement is based upon the *peak hour* of traffic generated by the site (the actual method for calculating traffic impact) and not a full day's count of traffic for the site. Nonetheless, as the evidence shows, Chilson Road accommodated over 5,000 vehicles a day prior to the Latson Road interchange being constructed. After the Latson Road interchange construction, traffic on Chilson Road decreased significantly to approximately 2,500 vehicles a day. Thus, Chilson Road is able to adequately accommodate the proposed development. There is no basis to assert that Plaintiffs' prayer campus with its modest adoration chapel will come close to generating over 2,000 cars a day (or 100 directional vehicle trips during the peak hour of use). It is absurd to even suggest.

Defendants' repeated reference to a private citizen's complaint that at one time 60 to 80 cars were parked along Chilson Road during an event hosted by Plaintiffs is wrong for numerous reasons. First, it is improper for this Court to even consider the documents containing this allegation for purposes of resolving Defendants' motion. (*See supra*). Second, the statement is hearsay and thus inadmissible regardless of the Rule 12(b) standard. *See* Fed. R. Evid. 802. And third, the statement is false. Actually, it is absurd and unreliable on its face. First, there is a significant difference between 60 and 80 cars, calling into question the veracity of the statement and the declarant's ability to recall events accurately. And second, it is absurd to deny Plaintiffs the ability to build a proper parking lot on the

CHI Property and then complain that people are not parking on the property but on the street. Moreover, there is no suggestion that the police were called or that a safety problem was in fact caused by cars parking along the side of this rural road. And if the cars were illegally parked, then the Township could have issued tickets (certainly a least restrictive means of furthering its interest in traffic safety).

As noted in Plaintiffs' application, there are only *two* events[7] all year that Plaintiffs intend to hold on the CHI Property that may require an increase in parking above and beyond the 39 permitted parking spaces. (*See* FAC ¶ 96). To accommodate this, Plaintiffs proposed using the greenspace on their property for overflow parking. (*Id.*). Defendants denied this request even though (1) Defendants permit 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 (*see* FAC ¶¶ 73-74, 96), (2) Defendants 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 (FAC ¶¶ 34-36), and (3) the Township's own "Assembly Ordinance" permits assemblies up to 1,000 people, and once that threshold is met, the host could apply for a special permit.[8]

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[7] Defendants once again are playing fast and loose with the facts by falsely insinuating that these two isolated and planned events are the normal use for the property. (*See, e.g.,* Defs.' Br. at 25, 28).

[8] *See* https://www.genoa.org/government/ordinances/ordinance-assembly ("An ordinance to license, regulate and control, in the interest of the public health, safety

Finally, Plaintiffs 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." (*See* FAC ¶ 95, Ex. 4, Doc. No. 14-5, Pg. ID 311 ["Should excessive interest in an event warrant, staged/multiple receptions may occur to accommodate these additional people. It would be anticipated that on special event days, people will be shuttled into the site as necessary once parking accommodations on-site are full."]). Defendants rejected these measures and denied the application.

In sum, traffic impact was not a legitimate basis for denying Plaintiffs their fundamental rights to religious exercise, speech, and assembly. Defendants' argument is a sham.

Following the Township's denial of Plaintiffs' special land use application, the Township, via a letter signed and issued by Defendant Stone, demanded once again that Plaintiffs remove the Stations of the Cross and the display of the image of Santa Maria delle Grazie from the CHI Property. In other words, Defendants demanded that Plaintiffs cleanse the CHI Property of anything religious. In this letter, Defendant Stone states, *inter alia*, that the display of the image of Santa Maria

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."). The Court could properly take judicial notice of this ordinance. *See* Fed. R. Evid. 201.

delle Grazie is a "structure/grotto sign [that] does not have a permit and will also need to be removed." Defendants consider this image to be an "accessory structure," requiring special land use approval. (FAC ¶¶ 110-26). This lawsuit followed.

ARGUMENT

I. Plaintiff Palazzolo Has Standing.

Defendants argue that Plaintiff Palazzolo lacks standing. Borrowing from this Court's standing decision in a different context, "[t]his argument is frivolous." *Guertin v. Mich.*, No. 16-cv-12412, 2017 U.S. Dist. LEXIS 85544, at *33 (E.D. Mich. June 5, 2017) (Levy, J.) (rejecting the defendants' argument that the plaintiffs lack standing in a Flint water crisis case).

As an initial matter, Defendants do not argue that CHI lacks standing. And "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding it sufficient that at least one plaintiff had standing to invoke the Court's jurisdiction to hear and decide the case); *ACLU v. NSA*, 493 F.3d 644, 652 (6th Cir. 2007) ("[F]or purposes of the asserted declaratory judgment . . . it is only necessary that one plaintiff has standing."). Thus, the Court has jurisdiction to hear and decide this case regardless of Plaintiff Palazzolo's standing. Nonetheless, his standing is easily established.

Article III of the Constitution confines federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. To give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2341 (2014). "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To invoke the Court's jurisdiction, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Not only have Defendants deprived Plaintiff Palazzolo of his rights to free exercise of religion, religious worship, and religious expression by denying the construction of the St. Pio Chapel (causing injury to him and his organization and harm to his property interest to control and direct the use of the CHI Property), Defendants have on multiple occasions threatened to enforce the Township's zoning ordinance to remove all religious symbols from the CHI Property—symbols that are used by Plaintiff Palazzolo for purposes of prayer and worship. Plaintiff Palazzolo is currently subject to cease-and-desist orders, civil infractions, and fines. (Zoning

Ordinance § 21.04). He need not wait for *additional* future harm to occur to seek relief from this Court. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The *threat of sanctions* may deter . . . almost as potently as the actual application of sanctions.") (emphasis added); *see also Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *DiLaura v. Ann Arbor Charter Twp.*, 30 F. App'x 501, 507 (6th Cir. 2002) ("All of the Plaintiffs [which includes individuals] have standing to challenge the zoning ordinance under RLUIPA; religious *use* of land is the core concept protected by that statute."); 42 U.S.C. § 2000cc-2 (providing that "[s]tanding to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution").

Plaintiff Palazzolo has suffered a personal injury fairly traceable to Defendants' allegedly unlawful conduct and likely to be redressed by the requested relief. His standing is established.

II. Recent Supreme Court Decisions Demonstrate that the Right to Religious Freedom Protected by the First Amendment and Codified in RLUIPA Is Fundamental and a Violation of this Right Triggers Strict Scrutiny.

Recent Supreme Court decisions affirm the strong protection afforded religious organizations (CHI) and people of faith (Plaintiff Palazzolo) under the First

Amendment. These decisions provide the proper lens by which this Court should view the claims advanced by Plaintiffs, including Plaintiffs' RLUIPA claim.

In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Court held that Philadelphia's refusal to contract with Catholic Social Services for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment. As the Court noted, "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* at 1871 (internal quotations and punctuation omitted). The Court further noted that "[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*." *Id*. at 1877 (emphasis added). When such a law burdens religious exercise, it must survive strict scrutiny. *See id*. at 1879-82.

The Court affirmed that "[a] government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests. . . . . Put another way, *so long as the government can achieve its interests in a manner that does not burden religion, it must do so*." *Id*. at 1881 (internal citation omitted). The Court clarified that "[t]he 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*." *Id*. (emphasis added).

In his concurring opinion, Justice Alito noted that "[i]n enacting . . . the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803 (codified at 42 U. S. C. §2000cc *et seq.*), Congress tried to restore the constitutional rule in place before [*Employment Division v. Smith*, 494 U.S. 872 (1990)] was handed down." *Fulton*, 141 S. Ct. at 1889 (Alito, J., concurring); *see also Cutter v. Wilkinson*, 544 U.S. 709, 714-16 (2005) (acknowledging that RLUIPA was enacted in response to *Smith*). In *Smith*, the Court held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment. *Smith*, 494 U.S. at 879-80. The case was considered a repudiation of the standard set forth in cases like *Sherbert* and *Thomas*, prompting Congress to enact RLUIPA, as noted above. Accordingly, a court's RLUIPA analysis should be guided by decisions such as *Sherbert v. Verner*, 374 U. S. 398 (1963), and *Thomas v. Review Board of Indiana Employment Security Division,* 450 U.S. 707 (1981), which are pre-*Smith* decisions. *See Fulton*, 141 S. Ct. at 1883-86 (Alito, J., concurring).

In *Sherbert*, a Seventh-day Adventist was fired because she would not work on Saturdays. She was subsequently unable to find a job that would allow her to keep the Sabbath as her faith required, so she applied for unemployment benefits.

Sherbert, 374 U.S. at 399-400. The State denied her application under a law prohibiting eligibility to claimants who had "failed, without good cause . . . to accept available suitable work." *Id.* at 401. That denial infringed her free exercise rights.

In *Thomas*, the Court concluded that a State could not withhold unemployment benefits from a Jehovah's Witness who quit his job because he refused to do work that he viewed as contributing to the production of military weapons. In so holding, the Court reaffirmed that "[a] regulation *neutral on its face* may, *in its application*, nonetheless offend the constitutional requirement for governmental neutrality *if it unduly burdens the free exercise of religion*." *Thomas*, 450 U.S. at 717 (internal quotations and citation omitted) (emphasis added); *see also id.* at 716 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."). The Court held that "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id*. at 717-18. In other words, even an indirect burden (*i.e.*, the denial of a *benefit*) on the exercise of religion triggers strict scrutiny.

And if it wasn't clear from *Fulton* that the rights protected by the Free Exercise Clause applied in the land use context, *Mast v. Fillmore County*, 141 S. Ct. 2430 (2021), removed any doubt. In *Mast*, the Court granted certiorari, vacated the

adverse land use decision against the Amish petitioners, and remanded the case for further consideration in light of *Fulton.*

As stated by Justice Gorsuch in his concurring opinion:

> *Fulton* makes clear that the County and courts below misapprehended RLUIPA's demands. That statute requires the application of "strict scrutiny." Under that form of review, the government bears the burden of proving both that its regulations serve a "compelling" governmental interest—and that its regulations are "narrowly tailored."

Id. at 2432 (Gorsuch, J., concurring). *Mast* does not involve the government denying a religious organization the right to build *a place of religious worship*—which plainly burdens the right to religious exercise.[9] Rather, the *Mast* "dispute is about plumbing, specifically the disposal of gray water—water used in dishwashing, laundry, and the like." *Id*. at 2431. The Amish "do not have running water in their homes, at least as most would understand it. Water arrives through a single line and is either pumped by hand or delivered by gravity from an external cistern." *Id*. The County adopted an ordinance that required the Amish to have a modern septic system to dispose of the gray water. "Responding to this development, the Swartzentruber Amish submitted a letter explaining that their religion forbids the use of such technology and 'asking in the name of our Lord to be exempt' from the new rule."

[9] RLUIPA expressly provides that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5.

Id. The County rejected the request. *Id*. The Amish filed suit under RLUIPA and lost below, resulting in the petition to the Supreme Court. As noted, the Court granted the petition, vacated the adverse decision, and remanded for further consideration in light of *Fulton*. By doing so, the Court sent a clear message: "RLUIPA prohibits governments from infringing sincerely held religious beliefs and practices except as a last resort." *Id.* at 2433 (Gorsuch, J., concurring).

With this background, we turn now to the specific claims advanced here.

III. Plaintiffs Have Stated a "Plausible Claim" under RLUIPA.

A. Substantial Burden Provision.

RLUIPA provides the following:

> (1) General Rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, 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).[10]

Thus, if the Township's implementation of its land use regulations to deny Plaintiffs' proposed use of the CHI Property for religious purposes substantially

[10] The "substantial burden" provision applies in this case as the Township "has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2)(C); (*see* FAC ¶ 133).

burdened Plaintiffs' religious exercise, then the burden shifts to the Township to satisfy strict scrutiny. Here, the Township substantially burdened Plaintiffs' religious exercise and that burden was not in furtherance of a compelling governmental interest nor the least restrictive means of furthering that governmental interest. This is a quintessential case of a RLUIPA violation.

1. Plaintiffs' Religious Exercise.

RLUIPA defines religious exercise as follows:

> (7) Religious exercise.
> (A) In general. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.
> (B) Rule. The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

42 U.S.C. § 2000cc-5(7). RLUIPA "applies to an exercise of religion regardless of whether it is 'compelled.'" *Holt v. Hobbs*, 574 U.S. 352, 362 (2015).

Plaintiffs' proposed use of the CHI Property as a prayer campus with prayer trails, including a prayer trail with the Stations of the Cross, for prayer, meditation, and worship, and the proposed use of the St. Pio Chapel for Mass, prayer, worship, and Eucharistic adoration is "religious exercise" protected by RLUIPA. Moreover, the chapel is a central and *necessary* component of the proposed development because it will house the Tabernacle where the Eucharist will be housed and

adored.[11] Without the St. Pio Chapel, Plaintiffs are unable to carry out a core function of their religious activities. (*See* FAC ¶¶ 63-68). Plaintiffs easily satisfy the "religious exercise" component of RLUIPA.

2. Substantial Burden.

"RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise . . . , not whether the RLUIPA claimant is able to engage in other forms of religious exercise." *Holt*, 574 U.S. at 361-62. The Court's substantial-burden analysis involves a straightforward, two-part inquiry: (1) identify the religious exercise at issue, and (2) determine whether the government has placed a substantial burden on that exercise. *See id.* at 362.

Based on *Sherbert* and *Thomas*, it is apparent that the Township's *direct* prohibition of Plaintiffs' religious exercise (particularly as defined by RLUIPA) constitutes a substantial burden. If Plaintiffs violated the Zoning Ordinance, they are subject to cease-and-desist orders, civil infractions, and fines. (*See* Zoning Ordinance § 21.04 [setting forth penalties]). Thus, if the *indirect* burden on religious exercise caused by the government's decision not to permit unemployment *benefits* in *Sherbert* and *Thomas* was impermissible, then the Township's *direct* burden on Plaintiffs' religious exercise caused by the Township's decision to *prohibit* the

[11] Remarkably, Defendants assert that Plaintiffs have not made any allegations that Defendants' actions have interfered with a "fundamental tenet" of Plaintiffs' Catholic faith. (Defs.' Br. at 38). Defendants' assertion is patently false.

exercise subject to penalty must be considered substantial. *See also Mast*, 141 S. Ct. at 2431 (Gorsuch, J., concurring) ("*Fulton* makes clear that the County and courts below misapprehended RLUIPA's demands.").

And while the Sixth Circuit did not have the benefit of *Fulton* (or *Mast*) when it decided *Livingston Christian Schools v. Genoa Charter Township*, 858 F.3d 996 (6th Cir. 2017), the factors it outlines for determining a "substantial burden" under RLUIPA clearly demonstrate that Plaintiffs have satisfied that element here.

As noted by the Sixth Circuit, "land-use regulations can prohibit a plaintiff from engaging in desired religious behaviors, causing some courts to define a substantial burden as something that places significant pressure on an institutional plaintiff to modify its behavior." *Livingston Christian Schs.*, 858 F.3d at 1004. In successful cases, "the plaintiffs had demonstrated that they were *unable to carry out some core function of their religious activities* due to the inadequacy of their current facilities." *Id.* at 1006 (emphasis added). Here, without the St. Pio Chapel, Plaintiffs are unable to carry out some core function of their religious activities due to the lack of a Tabernacle, thus establishing a "substantial burden" under this factor.

Another "factor" considered by the Sixth Circuit "is whether the religious institution has *a feasible alternative location* from which it can carry on its mission." *Livingston Christian Schs.*, 858 F.3d at 1004 (emphasis added). Plaintiffs do not have any alternative locations for the construction and development of the St. Pio

Chapel and prayer campus. In other words, there is no feasible alternative location from which Plaintiffs can carry on their religious mission. (FAC ¶¶ 70, 106). Consequently, the Township's rejection prohibits Plaintiffs from engaging in their desired religious behaviors, thereby causing a substantial burden under this factor.

The Sixth Circuit also considered "[w]hether the religious institution will suffer substantial delay, uncertainty, and expense due to the imposition of the regulation . . . ." *Livingston Christian Schs.*, 858 F.3d at 1004 (internal quotation marks omitted); *see also Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) ("When [a religious organization] has no ready alternatives, or where the alternatives require substantial 'delay, uncertainty, and expense,' a complete denial of the [religious organization's] application might be indicative of a substantial burden."). Here, as a direct and proximate result of Defendants' denial of Plaintiffs' application, Plaintiffs have suffered and will continue to suffer substantial delay, uncertainty, and expense. The delay in the construction of the St. Pio Chapel and prayer campus has resulted in the loss of Plaintiffs' First Amendment rights, thereby causing irreparable harm, *see supra*, and the loss of donations. The cost of hiring an engineering firm to prepare the documents (and the many modifications to the Original Submittal) required by the Township for the special land use application cost CHI in excess of $27,000. (FAC ¶ 128). And Plaintiffs have no ready alternatives. (*See supra*). They do not own other properties close to

the CHI Property that would permit them to carry out their religious activities. CHI, a nonprofit organization, does not have the funds to purchase new property and to go through, yet again, the extensive and costly process of getting their proposed development approved by the Township and ultimately completed. (FAC ¶ 70). Plaintiffs satisfy this factor.

Finally, the Sixth Circuit also considers whether "an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes." *Livingston Christian Schs.*, 858 F.3d at 1004. As noted by the Fourth Circuit, "[w]hen a religious organization buys property reasonably expecting to build a church, governmental action impeding the building of that church may impose a substantial burden. . . . This is so even though other suitable properties might be available, because the 'delay, uncertainty, and expense' of selling the current property and finding a new one are themselves burdensome." *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 557-58 (4th Cir. 2013); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) ("What is true is that . . . once the organization has bought property reasonably expecting to obtain a permit, the denial of the permit may inflict a hardship on it."). Here, CHI acquired the property from the Catholic Diocese of Lansing with the expectation of building its prayer campus and modest chapel as this use is an allowed use under the Zoning Ordinance. Plaintiffs satisfy this factor.

Finally, as noted by the Fourth Circuit, "RLUIPA's substantial burden provision says nothing about targeting. Rather, it simply forbids government from imposing a substantial burden on religious exercise unless the Government demonstrates that it has used the least restrictive means of furthering a compelling governmental interest; that is, unless the governmental action satisfies strict scrutiny." *Bethel World Outreach Ministries*, 706 F.3d at 556-57. In other words, to make out a substantial burden claim, Plaintiffs need not prove religious animus on the part of Defendants. *See id*. at 557 ("Requiring a religious institution to show that it has been targeted on the basis of religion in order to succeed on a substantial burden claim would render the nondiscrimination provision superfluous."); *accord Livingston Christian Schs.*, 858 F.3d at 1005.

In sum, Plaintiffs submitted an application for special land use approval pursuant to the Zoning Ordinance. The application was reviewed and approved by the Township's consultants. The application was reviewed and approved by the Township's Planning Commission. Yet, the Township Board denied the application. This denial placed a substantial burden on Plaintiffs' religious exercise, thereby requiring the Township to satisfy strict scrutiny.

3. Strict Scrutiny.

Defendants' substantial burden on Plaintiffs' religious exercise cannot withstand strict scrutiny. Strict scrutiny is the "most demanding test known to

constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *see also 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). 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 (emphasis added); *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."). Moreover, per the Supreme Court, "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 Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotations and citation omitted).

Defendants tell us in their motion that the Township's denial was based on traffic concerns. In other words, traffic is the governmental "interest" at issue. (*See supra*). However, Defendants cannot satisfy the compelling interest standard because (1) the facts demonstrate that traffic is not an issue for Plaintiffs' modest development, (2) Chilson Road has been shown to handle far more traffic than Plaintiffs' development will ever generate, (3) Defendants permit other uses for this

land (such as a public park with 200 parking spaces) that will generate far more traffic than Plaintiffs' proposed use, and (4) Defendants permit other uses of neighboring land for large events that will far exceed the traffic generated by Plaintiffs' proposed use. In sum, Defendants' "interest" is not only *not* compelling, it is a sham.

Similarly, Defendants cannot meet the "least restrictive means" requirement. As noted, the CHI Property has a very large greenspace that could be used for overflow parking when necessary. The Township could permit the "curb drop" (as in the Original Submission [FAC ¶ 96]) to assist with any additional parking needs, or the Township could simply approve a larger parking lot, like the 200-space parking lot it has at its own public park a few miles away from the CHI Property. The Township could also permit Plaintiffs to provide a shuttle service or "staged/multiple receptions" to alleviate any overflow parking/traffic issues. The Township could provide police services during special events to help control traffic, and if cars were illegally parked, the Township could ticket the violators. In sum, denying Plaintiffs' application is not the least restrictive means available to the Township. Defendants cannot satisfy strict scrutiny.

B. Equal Terms Provision.

Under the "Equal terms" provision, RLUIPA provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious

assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. §2000cc(b)(1). "[A] prima facie case under RLUIPA's equal terms provision requires proof that (1) the plaintiff [is] a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the [plaintiff] on less than equal terms, [compared] with (4) a nonreligious assembly or institution." *Tree of Life Christian Sch. v. City of Upper Arlington*, 905 F.3d 357, 367 (6th Cir. 2018) (internal quotations and citation omitted). Elements (1) and (2) are not at issue.

With regard to the comparison required by elements (3) and (4), per the Sixth Circuit, "the phrase 'legitimate zoning criteria' best captures the idea that the comparison required by RLUIPA's equal terms provision is to be conducted with regard to the legitimate zoning criteria set forth in the municipal ordinance in question." *Id.* at 369. "There is no need, however, for the religious institution to show that there exists a secular comparator that performs the same functions." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007). Moreover, the "Equal Terms provision operates on a strict liability standard; strict scrutiny does not come into play." *Id*. at 269. Thus, once a prima facie case is established under the Equal Terms provision, liability attaches.

The CHI Property is compatible with and suitable for the development of a place of religious worship, specifically including the construction and development of the proposed St. Pio Chapel and prayer campus. The development of the St. Pio

Chapel and prayer campus is harmonious and consistent with adjacent land uses. It is harmonious and consistent with maintaining the peaceful, rural nature of the property. (FAC ¶¶ 52, 77-79). In sum, it advances the "legitimate zoning criteria" of the Township for property zoned CE. Additionally, under the Zoning Ordinance, the Township permits "[p]ublicly owned parks, parkways, scenic and recreational areas, and other public open spaces" and "[p]rivate non-commercial parks, nature preserves and recreational areas owned and maintained by a home-owners association" on property zoned CE. (FAC ¶ 34). In fact, the Township operates a park just 3 miles east of the CHI Property. This park is on a parcel of land that is smaller (38 acres) than the CHI Property (40 acres). It includes two playgrounds, a water misting feature, a sled hill, a .66-mile walking path, two regulation sized athletic fields, a swing set for all ages, picnic tables, and a pavilion with accessible heated bathrooms and warming area. And it is supported by more than 200 parking spaces. Consequently, this very park with its *200 plus parking spaces*—whether constructed by the Township or as a "private non-commercial park . . . owned and maintained by a home-owners association"—could be constructed *on the CHI Property* without requiring any special land use approval as it is a permitted use under the Zoning Ordinance. (FAC ¶¶ 34-36). However, Plaintiffs' religious "park" was denied by the Township, which now asserts that the denial was all about traffic (apparently, 60 to 80 cars). However, if Plaintiffs were permitted to have a parking

lot with 200 parking spaces as part of its *religious* "park," even the Township's bogus traffic concerns would be eliminated. And there are other secular and non-secular comparators, such as the Fillmore County Park with its reading trails, the permitted "Sculpture & Poetry Walk" on private property, and two *protestant* churches located within 3 miles from the CHI Property that further demonstrate the Township's violation of the Equal Terms provision. (FAC ¶¶ 37, 38, 75). Indeed, there are numerous other events and comparators that will generate significantly more traffic than Plaintiffs' proposed development, including graduation parties, football parties, and other secular events with up to 1,000 people which have been held at residences located near the CHI Property without any complaints from neighbors or the Township and without the Township requiring any permits or other official approvals for the events. (FAC ¶¶ 73, 74). Even "[a]ccessory roadside stands and commercial cider mills" are permitted. (*See* FAC ¶ 41; *see also id*. at ¶¶ 39, 40, 42).

In sum, Plaintiffs have stated a plausible claim for relief under the Equal Terms provision of RLUIPA.

C. Nondiscrimination Provision.

"RLUIPA . . . contains a separate prohibition on discrimination in the implementation of land-use regulations, which does not require that the regulation impose a substantial burden." *Livingston Christian Schs.*, 858 F.3d at 1005. Under

the "Nondiscrimination" provision, RLUIPA provides that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). In applying this nondiscrimination provision, courts have looked to equal protection precedent. *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 198 (2d Cir. 2014) (citing *Bethel*, 706 F.3d at 559). Under that precedent, a plaintiff must demonstrate that the government decision was motivated at least in part by discriminatory intent, which is evaluated using the "sensitive inquiry" established in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977).

One factor which this inquiry recognizes as potentially probative of the decisionmaker's intent is the "specific sequence of events leading up to the challenged decision." *Id.* at 267. Departures from normal procedures can suggest that the decision was based on unlawful motives, as can "[s]ubstantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Id.* (citing *Dailey v. City of Lawton*, 425 F.2d 1037, 1040 (10th Cir. 1970) (finding racial motivation where a city refused to rezone a plot despite present and former city planning directors' testimony that there was no reason not to rezone)). Particularly relevant to this case is the fact that a government decision influenced by community members' religious

bias is unlawful, even if the government decisionmakers display no bias themselves. *See City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 448 (1985); *Marks v. City of Chesapeake*, 883 F.2d 308, 311-13 (4th Cir. 1989). Such impermissible influence may be inferred where expressions of community bias are followed by irregularities in government decision making. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982).

As demonstrated above, there was no legitimate factual basis for the Township Board to deny Plaintiffs' application (indeed, it was approved by the Planning Commission and the Township's own consultants), and there were strong expressions of community bias that preceded this irregularity in government decision making.[12] (FAC ¶¶ 101, 103-04). Accordingly, Plaintiffs have stated a plausible claim for relief under the "Nondiscrimination" provision.

D. Unreasonable Limitations Provision.

RLUIPA also prohibits the Township from "unreasonably limit[ing] religious assemblies, institutions, or structures within [its] jurisdiction." 42 U.S.C. § 2000cc(b)(3).

[12] Discrimination against CHI because it is a religious organization can also be inferred by the fact that the Township could lose tax revenue generated by the CHI Property if it approved the development. Upon completion of the St. Pio Chapel and prayer campus, CHI will be eligible for a property tax exemption. Consequently, a factor motivating the Township's refusal to approve Plaintiffs' proposed development is the loss of tax revenue for the Township. (FAC ¶¶ 107-08).

In *Rocky Mt. Christian Church v. Board of County Commissioners*, 613 F.3d 1229 (10th Cir. 2010), the Tenth Circuit held that the district court properly instructed the jury as to the church's RLUIPA claim under the exclusions and limitations provision, stating that "[t]he district court's instruction properly required RMCC to establish that the County's 'regulation, as applied or implemented, has the effect of depriving both [RMCC] and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures, within Boulder County." *Id*. at 1238; *see also Alger Bible Baptist Church v. Twp. of Moffatt*, No. 13-13637, 2014 U.S. Dist. LEXIS 13945, at *27 (E.D. Mich. Feb. 5, 2014) (quoting and citing *Rocky Mt. Christian Church* with approval). The Tenth Circuit further stated that "[t]he jury was also properly instructed that it could 'find that the land use regulation . . . imposes unreasonable limits even though religious assemblies are not totally excluded from Boulder County.'" *Id*.

Accordingly, the Tenth Circuit held that "[b]ecause sufficient evidence existed for the jury's unreasonable limitations verdict, the district court did not err when it denied the County's motion for judgment as a matter of law." *Id*. at 1239. In reaching this conclusion, the Tenth Circuit observed that "[t]he jury could . . . conclude that the County's implementation of the land use regulation *was unreasonably restrictive in this case*." *Id*. (emphasis added).

As the facts and argument set forth above demonstrate, and as the facts of the First Amended Complaint and all reasonable inferences drawn from those facts in favor of Plaintiffs demonstrate, the Township, through the application or implementation of its Zoning Ordinance, has "unreasonably limited" and, in fact, deprived Plaintiffs of the reasonable opportunity to practice their religion in the Township in violation of RLUIPA. Indeed, the Township's "implementation of the land use regulation was unreasonably restrictive in this case." Accordingly, Plaintiffs have stated a plausible claim for relief under the Unreasonable Limitations provision.

E. Conclusion.

As set forth above, there are *multiple* bases for denying Defendants' motion to dismiss Plaintiffs' RLUIPA claim. In the final analysis, Plaintiffs have stated a plausible claim for relief under RLUIPA.

IV. Plaintiffs Have Stated a "Plausible Claim" under the Free Speech Clause.

"Religious worship" is a "form[] of speech and association protected by the First Amendment." *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). And so too is the display of religious symbols. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Respondents' religious display in Capitol Square was private expression. Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause

as secular private expression."); *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).

Plaintiffs' prayer, worship, religious assembly for purposes of prayer and worship, and the use of religious symbols are all forms of expression protected by the First Amendment.[13] Defendants seek to restrict Plaintiffs' right to freedom of speech through the enforcement of its Zoning Ordinance, including its Sign Ordinance, which is part of the zoning regulation.

The Township's enforcement of its Zoning Ordinance to restrict Plaintiffs' right to freedom of speech triggers First Amendment protection. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). Moreover, the *ordinance operates as a prior restraint on speech* as it requires Plaintiffs to obtain a permit before being allowed to engage in their religious expression.[14] *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*

[13] Contrary to Defendants' assertion, Plaintiffs' "'free expression' claims" are not "brought based upon denial to construct buildings or barriers." (Defs.' Br. at 47).
[14] Defendants argue that Plaintiffs "failed to show that the permit process . . . would be futile, and that resort to this Court is necessary." (Defs.' Br. at 33-34). Defendants are wrong. They plainly misapprehend the concept of a prior restraint and why it is so egregious under the First Amendment.

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). As stated by the Supreme Court, "[*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) (emphasis added). Defendants cannot overcome this heavy presumption in this case.

Moreover, the Zoning Ordinance, facially and as applied to punish Plaintiffs' religious expression, is content based, thereby triggering strict scrutiny. As stated by the Supreme Court, "[c]ontent-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), the Sixth Circuit 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" (an arbitrary number); "Signs required by law"; and "Flags of any country, state, municipality, university, college or school." Sign Ordinance § 16.02.20. By its own terms, the Township's Sign Ordinance exempts from its permit and fee requirement "Historical marker[s]," "Parking lot signs," "Street address signs," and "Temporary signs." Sign Ordinance § 16.03.02 (FAC ¶¶ 123-24); *see also City of Ladue v. Gilleo,* 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They 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 an extensive, costly (in excess of $20,000), and burdensome zoning

process—treating the displays as a "church or temple" or an "accessory structure." (*See* FAC ¶¶ 57, 111). That is, because religious worship is involved, as opposed to the secular acts of viewing sculptures and reading poetry or reading about "Leopold the Lion" (*see* FAC ¶¶ 37, 38), Plaintiffs' religious displays have now converted the wooded area of the CHI Property into a "church or temple," thereby requiring special and costly approvals. Defendants reaffirmed this position following the denial of Plaintiffs' application for special land use, (FAC ¶¶ 110-11), and they reassert this position in their motion (Defs.' Br. at 39-40). Thus, the ordinance is content based on its face and as applied. *See 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).

As noted previously (*see supra* n.5), 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). Here, Defendants do not have a "substantial interest" in ordering the removal of Plaintiffs'

religious displays or imposing additional costs and burdens for displaying them. Plaintiffs' religious displays satisfy all of the "interests" asserted by the Township. Consequently, Defendants' actions violate Plaintiffs' rights protected by the Free Speech Clause.

V. Plaintiffs Have Stated a "Plausible Claim" under the Free Exercise Clause.

"The principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Lukumi*, 508 U.S. at 523. In *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015), the *en banc* court stated:

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

Id. at 255-56. 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 demonstrating Defendants' violation of the Free Speech Clause, their actions similarly violated the Free Exercise Clause.

Nonetheless, "the relevant comparison for purposes of a Free Exercise challenge to a regulation is between its treatment of certain religious conduct and the analogous secular conduct that has a similar impact on the regulation's aims." *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 266; *see Church of Lukumi Babalu Aye*, 508 U.S. at 542-47 (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).

As recently stated by the Court in *Fulton*, "[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." *Fulton*, 141 S. Ct. at 1877. 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 Lukumi Babalu Aye*, 508 U.S. at 534.

Plaintiffs want to assemble on the CHI Property for the purpose of prayer and religious worship. Defendants are not only denying Plaintiffs' the right to construct a modest adoration chapel which is *essential* for Plaintiffs' religious exercise since it will house a Tabernacle, Defendants are imposing upon Plaintiffs costly and unreasonable burdens for their displays used for religious worship (and because they are used for religious worship), and all without a compelling reason for doing so. Moreover, the fact that Defendants prohibit Plaintiffs' religious park "while permitting [a] secular [park and other secular] conduct that undermines the government's asserted interests in a similar way" is fatal for Defendants. In sum, the challenged official action is not generally applicable, and it fails strict scrutiny in violation of the Free Exercise Clause.

VI. Plaintiffs Have Stated a "Plausible" Right to Association Claim.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). The Sixth Circuit echoed this fundamental understanding, stating, "Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (citing *NAACP v. Ala.*, 357 U.S. 449, 460 (1958)). "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

"The Constitution protects two distinct types of association: (1) freedom of expressive association, protected by the First Amendment, and (2) freedom of intimate association, a privacy interest derived from the Due Process Clause of the Fourteenth Amendment but also related to the First Amendment." *Anderson v. City of LaVergne*, 371 F.3d 879, 881 (6th Cir. 2004). As noted by the Sixth Circuit, the "Supreme Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, *and the exercise of religion*." *Id*. (emphasis added). "Of course, it is immaterial whether the beliefs sought to be advanced by association

pertain to political, economic, religious or cultural matters, and state action which *may have the effect of curtailing the freedom to associate* is subject to the closest scrutiny." *Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183, 197 (3d Cir. 1990) (internal quotations and citation omitted) (emphasis added). As recently stated by the Supreme Court:

> When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, because First Amendment freedoms need breathing space to survive.

Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021) (internal quotations and citation omitted).

As noted throughout this response, because Plaintiffs want to assemble on the CHI Property for religious worship, Defendants are not only denying Plaintiffs' the right to construct a modest chapel which is *essential* for that purpose, Defendants are imposing upon Plaintiffs costly and unreasonable burdens for their displays because they are used for religious worship, thereby curtailing the freedom to associate without a substantial or compelling reason for doing so. (*See supra*).

VII. Plaintiffs Have Stated a "Plausible" Equal Protection Claim.

When the government treats an individual disparately "as compared to similarly situated persons and that such disparate treatment . . . burdens a *fundamental right*, targets a suspect class, or has *no rational basis*," such treatment

violates the equal protection guarantee of the Fourteenth Amendment. *Bible Believers,* 805 F.3d at 256 (internal quotations and citation omitted) (emphasis added). "In determining whether individuals are 'similarly situated,' a court should not demand exact correlation, but should instead seek relevant similarity." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012) (internal quotation marks omitted). Such disparate treatment is "subject to strict scrutiny." *Bible Believers*, 805 F.3d at 256.

The rights to free exercise of religion and freedom of speech are "fundamental," *see supra; see also Bible Believers*, 805 F.3d at 256 ("Freedom of speech is a fundamental right."), and disparate treatment that burdens these rights violates the equal protection guarantee of the Fourteenth Amendment, *see id*. at 256-57; *see also Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) (concluding that a speech restriction violated the First Amendment *and* the Equal Protection Clause).

Here, as noted throughout this response, Defendants permit secular activity within the CE zoned areas of the Township (and in the same neighborhood as the CHI Property), including the development of secular parks, but have targeted Plaintiffs' religious activity for disparate treatment without satisfying strict scrutiny. Indeed, Defendants' treatment of Plaintiffs' religious symbols as a "church or temple" or "accessory structure" is not only discriminatory, it is arbitrary and

irrational, all in violation of the equal protection guarantee of the Fourteenth Amendment.

VIII. Plaintiffs Have Stated a "Plausible Claim" under the Michigan Constitution.

"The first sentence of article I, section 4 [of the Michigan Constitution] guarantees the free exercise of religion." *Alexander v. Bartlett*, 14 Mich. App. 177, 181, 165 N.W.2d 445, 448 (1968). "The Michigan Constitution is at least as protective of religious liberty as the United States Constitution." *People v. Dejonge*, 442 Mich. 266, 273 n.9, 501 N.W.2d 127, 131 (1993). As noted by the Michigan Court Appeals, courts "apply the compelling state interest test (strict scrutiny) to challenges under the free exercise language in Const. 1963, art. I, § 4, *regardless of whether the statute at issue is generally applicable and religion-neutral*." *Champion v. Sec'y of State*, 281 Mich. App. 307, 314, 761 N.W.2d 747, 753 (2008) (emphasis added); *see id*. at 314 n.5 (noting also that "under Michigan and federal constitutional analysis, strict scrutiny is applicable in hybrid cases, *i.e.*, cases in which a free exercise claim is made in conjunction with other constitutional protections such as freedom of speech"). For the reasons argued above, Defendants have restricted Plaintiffs' free exercise of religion *and* religious expression, and these restrictions cannot survive strict scrutiny. Thus, in addition to violating the U.S. Constitution, Defendants have also violated the Michigan Constitution.

IX. Defendant Stone's Qualified Immunity Argument Is Frivolous.

Defendant Stone argues that she has qualified immunity. The argument is frivolous. As stated explicitly in the First Amended Complaint, "Defendant Stone is sued for declaratory and injunctive relief only." (FAC ¶ 23; *see also* Prayer for Relief ["E) to award Plaintiffs nominal and compensatory damages *against the Township* for the harm caused by the Township . . . ." (emphasis added).]).[15] It is well established that qualified immunity does not shield a defendant from claims for declaratory and injunctive relief. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct"); *Pearson v. Callahan*, 555 U.S. 223, 242-43 (2009) (noting that the qualified immunity defense is not available in "cases against individuals where injunctive relief is sought instead of or addition to damages"); *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (describing qualified immunity as "immunity from suits for damages"); *Malam v. Adducci*, No. 20-10829, 2020 U.S. Dist. LEXIS 59407, at *36-37 (E.D. Mich. Apr. 5, 2020) (Levy, J.) ("Because Petitioner here seeks only declaratory and injunctive relief, qualified immunity does not apply."). The Court must reject Defendant Stone's argument. It has no merit.

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[15] During the meet and confer between counsel, Plaintiffs' counsel highlighted this very point for Defendants' counsel and confirmed that Plaintiffs were only seeking declaratory and injunctive relief against Defendant Stone. Yet, Defendants' counsel still proceeded with advancing the argument in their motion.

CONCLUSION

The Court should promptly deny Defendants' motion to dismiss.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

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