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. 21−cv−11303−SDK−DRG Hon. Shalina D. Kumar Magistrate Judge David R. Grand

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

Constitution

Rules

Statutes

Other

ISSUES PRESENTED

I. Whether the allegations and all reasonable inferences drawn from those allegations would lead a reasonable court to conclude that Plaintiffs' Supplemented 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 this Court has jurisdiction to decide Plaintiffs' Religious Land Use and Institutionalized Persons Act ("RLUIPA") claim when it is undisputed that Plaintiff Catholic Healthcare International, Inc. has standing to advance the claim.

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

IV. Whether Plaintiffs have standing to challenge the Sign Ordinance when Defendants expressly relied on this ordinance to order the removal of Plaintiffs' religious displays and the ordinance is unconstitutional on its face and as applied.

V. Whether Plaintiffs' claims are ripe where Plaintiffs have suffered and continue to suffer a cognizable injury as a direct result of Defendants' violation of their rights protected by the United States and Michigan Constitutions and RLUIPA.

VI. Whether Plaintiffs have stated a plausible claim for relief under RLUIPA.

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

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

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

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

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

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Bible Believers v. Wayne Cnty., 805 F.3d 228 (6th Cir. 2015)

Champion v. Sec'y of State, 281 Mich. App. 307, 761 N.W.2d 747 (2008)

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)

Grayned v. City of Rockford, 408 U.S. 104 (1972)

Healy v. James, 408 U.S. 169 (1972)

Int'l Outdoor, Inc. v. City of Troy, 974 F.3d 690 (6th Cir. 2020)

Fulton v. City of Phila., 141 S. Ct. 1868 (2021)

Jones v. City of Cincinnati, 521 F.3d 555 (6th Cir. 2008)

Livingston Christian Schs. v. Genoa Charter Twp., 858 F.3d 996 (6th Cir. 2017)

Mast v. Fillmore Cnty., 141 S. Ct. 2430 (2021)

Reed v. Town of Gilbert, 576 U.S. 155 (2015)

Rocky Mt. Christian Church v. Bd. of Cnty. Comm'rs, 613 F.3d 1229 (10th Cir. 2010)

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006)

Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014)

Tree of Life Christian Sch. v. City of Upper Arlington, 905 F.3d 357 (6th Cir. 2018)

42 U.S.C. § 2000cc

Fed. R. Civ. P. 12(b)

INTRODUCTION

Defendants' motion to dismiss is legally and procedurally defective. At times, it is frivolous. The motion misstates the facts and misapplies the law. It is scattered and largely incoherent. And it makes clear that, *inter alia*, Defendants "misapprehend RLUIPA's demands." *See Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2432 (2021). At the end of the day, Defendants' motion is a feckless attempt to defend the indefensible. The Court should promptly deny the motion.

STANDARD OF REVIEW

A. Rule 12(b)(1).

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction (standing) 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.[1] Consequently, the Court must accept as true all the allegations in the Supplemented First Amended Complaint regarding the issue of standing. *Id*. at 325.

[1] Defendants make a ripeness argument, alleging, contrary to the allegations in the Supplemented First Amended Complaint and based upon impermissible and irrelevant hearsay assertions, that Plaintiff Palazzolo is not facing an "actual or

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 Supplemented 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, 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

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imminent" injury based on a "solicitation from CHI to its donors, claiming that '$5 Million is needed' to construct the St. Pio Perpetual adoration Chapel" and because "CHI currently operates a 'Worldwide Perpetual Adoration Team' and 'some Padre Pio prayer groups.'" (Defs.' Br. at 28). Plaintiffs address this misguided argument in the ripeness section.

Plaintiffs' well-pleaded allegations and instead to supplant these allegations with matters outside of the pleadings. The Court should reject Defendants' invitation for error. Indeed, Defendants submitted along with their motion *hundreds* of pages of documents they describe as the "2021-05-03 Board Packet" (Ex. 1, ECF No. 59-2), "2021-12-13 Planning Commission Packet" (Ex. 4, ECF No. 59-5), and the "ZBA Packet" (Ex. 6, ECF No. 59-7), among others. 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 23). Defendants are wrong. The majority of the documents are not attached to nor relied upon in the Supplemented First Amended Complaint. Moreover, Defendants never ask this Court to take judicial notice of these documents (it would be improper for the Court to do so).

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) (emphasis added). "[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); *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 asserting "facts which are not subject to reasonable dispute," Defendants instead advance false and irrelevant hearsay (for example, Defendants repeatedly assert the false 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' Supplemented 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 Supplemented First Amended Complaint ("SFAC") easily satisfies this standard.

SUMMARY OF RELEVANT FACTS[2]

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 the Township ("CHI Property") as a prayer campus, are protected religious exercise, religious assembly, and religious expression. (SFAC ¶¶ 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

[2] The relevant facts are contained within the SFAC and not in the contradictory statement of facts set forth in Defendants' motion.

on the CHI Property for religious purposes. (SFAC ¶¶ 13, 14, 132, 134). As the head of CHI, Plaintiff Palazzolo *has the authority to direct and control the use of the CHI Property*. (SFAC ¶ 86, Ex. 1, ECF No. 55-2, PageID.2301 [signing and authorizing site plan review for use of CHI Property]).

CHI acquired 40 acres of property (CHI Property) located within the 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"). (SFAC ¶¶ 28-31, 44).

On October 9, 2020, the Township, through Defendant Sharon Stone, ordered Plaintiffs to remove the Stations of the Cross and the image of Our Lady of Grace, 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

[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. (SFAC ¶¶ 32, 43).

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 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. They are religious "signs." Consequently, Plaintiffs rejected the demand on constitutional grounds.[4] (SFAC ¶¶ 57-59).

[4] Neither wind nor rain nor any other factors caused any safety issues whatsoever for the displays. Time and experience refute any claim that the displays were unsafe (and Plaintiffs were/are willing to pay a $50 permit fee, make the displays permanent, and have an inspector inspect them for safety—but the Township rejects this reasonable approach, *see* SFAC ¶¶ 149, 151, 167). Moreover, the displays were not erected along any public right of way or thoroughfare. They could not be seen from the road; they were located in a wooded, isolated area. The displays did not undermine any of the Township's stated objectives for restricting signage. The displays were not "distracting to motorists and pedestrians." They did not "create[] a traffic hazard" nor did they "reduce[] the effectiveness of signs needed to direct and warn the public." They did not "overwhelm the senses, impair sightlines and vistas, create confusion, reduce desired uniform traffic flow, create potential for accidents, affect the tranquility of residential areas, impair aesthetics [or] degrade the quality of a community." As noted, the religious displays were not placed within the public street right-of-way—they were not even visible from the road—and thus created no visibility or public safety issues whatsoever. And they created no visual blight. (SFAC ¶¶ 116-22). In short, the Township had no legitimate interest (compelling or substantial) to order the removal of these religious displays from this wooded, 40-acre property.

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. 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. (SFAC ¶¶ 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. (SFAC ¶ 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. The modest

size of the chapel and the limited parking (39 spaces) will necessarily limit the number of people who visit the property on a regular basis. (SFAC ¶¶ 79, 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*. (SFAC ¶¶ 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." (SFAC ¶¶ 85-97). Nonetheless, the Township denied Plaintiffs' application, thereby causing irreparable harm. (SFAC ¶¶ 98-109). Defendants *falsely* 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 29). Because Defendants have made traffic the *central* issue, Plaintiffs will address this issue in greater detail.

As a matter of *objective* fact, 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. (SFAC ¶¶ 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 (and false) hearsay statements from residents and matters outside of the pleadings.

Defendants assert that "Requiring a church to obtain a special use permit, subject to standards defined in an ordinance, is not an unreasonable limitation upon religious assemblies, institutions, or structures" and "requiring a church to demonstrate compliance with traffic standards is not an unreasonable limitation." (Defs.' Br. At 49). But Plaintiffs *did* demonstrate compliance and yet were still denied, thereby demonstrating the unreasonableness (and unlawfulness) of Defendants' denial. Moreover, *complete denial is not the least restrictive means to*

address traffic concerns (assuming this is a compelling interest under the facts of this case, which it is not), 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*. (SFAC ¶¶ 81-84). Defendants' own 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* SFAC ¶ 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* SFAC ¶¶ 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* SFAC ¶ 86, Ex. 1, ECF No. 55-2, PageID.2313).[5] The 56 "trips" calculation—these are "directional trips"—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

[5] Per Plaintiffs' traffic impact assessment set forth in its application (*i.e.*, the traffic impact assessment required in the application—a traffic impact study is only required when the development expects to generate over 100 trips, which this development plainly will not):

> 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.
>
> 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.

(SFAC ¶ 86, Ex. 1, ECF No. 55-2, PageID.2313).

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 <u>not</u> generate 100 directional vehicle trips *in the peak hour for traffic*.[6] Note that 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, the evidence shows that Chilson Road accommodated over 5,000 vehicles a day prior to the construction of the Latson Road interchange. After the Latson Road interchange construction, traffic on

[6] As usual, Defendants improperly invite the Court to ignore the allegations, and they do so here by further misrepresenting facts. A traffic assessment (the "study" contained in the special land use application submitted by Plaintiffs) revealed, based *on the criteria established by the Zoning Ordinance*, that the project would generate far less than 100 directional trips during the peak hour of traffic for the site. Thus, no further traffic impact study was required *per the Zoning Ordinance* (demonstrating as a matter of undisputed fact that the Township's traffic argument is a pretext). And this is confirmed by the fact, as noted, that the Planning Commission did not require any further traffic "study," the Township's consultants did not require any further traffic "study," and the Road Commission did not require any further traffic "study." Traffic is not a legitimate basis for rejecting Plaintiffs' religious use of the land. Period.

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 and modest adoration chapel will come close to generating over 2,000 cars a day (or 100 directional trips during the peak hour of use). It is absurd to suggest (and contrary to the facts to argue).

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 citations

requiring the cars to move or it could have requested the County Sheriff to issue tickets requiring the cars to move (*i.e.*, less restrictive means are available).

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* SFAC ¶ 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* SFAC ¶¶ 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 (SFAC ¶¶ 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]

[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 52-44).

[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 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.").

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* SFAC ¶ 95, Ex. 4, ECF No. 55-5, PageID.2371). Defendants rejected these measures and denied the application. In short, Defendants' traffic argument is a sham.

Following the Township's unlawful rejection of Plaintiffs' Final Submission, the Township continued its assault on Plaintiffs' rights to religious exercise and free speech. On May 7, 2021, the Township, via a letter signed and issued by Defendant Stone, demanded that Plaintiffs remove the Stations of the Cross and the display of the image of Our Lady of Grace from the CHI Property by June 4, 2021, prompting the filing of this lawsuit on June 2, 2021. (SFAC ¶¶ 110, 134). As stated in the Township's letter, "After denial of the proposed project at 3280 Chilson Road, the signs/temporary signs *are in violation of the sign ordinance* and will need to be removed." In this letter, Defendant Stone also states that the display of the image of Our Lady of Grace is a "structure/grotto *sign* [that] does not have a permit and will also need to be removed." (SFAC ¶ 111) (emphasis added).

On Friday, September 17, 2021, just days before a scheduled religious assembly in celebration of St. Pio's Feast Day (September 23, 2021) that Plaintiffs had been planning for many months (and which the Township had known about for at least 6 months), the Township filed a "verified" complaint and *ex parte* TRO

request in the 44th Circuit Court for Livingston County, asking the county circuit court to order Plaintiffs "to remove a 12-foot-tall stone structure [the image of Our Lady of Grace], altar, and 14 stations of the cross housing structures that have been installed at the [CHI] Property" and to prevent Plaintiffs from holding religious worship on the property, claiming that a Livingston County (not Township) driveway permit (which Plaintiffs have never used, as discussed further below, and which expired on January 8, 2022) "forbids" this. (SFAC ¶ 131).

The Township's demands in the verified complaint are similar to those set forth in the May 7 letter, which prompted the filing of this lawsuit. (SFAC ¶ 134).

On September 20, 2021, the state court judge "rubberstamped" the *ex parte* TRO *prepared by the Township's counsel*, thereby forcing CHI to immediately remove the religious symbols and to immediately "cease all unlawful use and occupancy of the Property for organized gatherings," thus prohibiting religious worship and assembly. (SFAC ¶ 136).

In order to comply with the Township's demands, Plaintiffs removed the religious symbols from the CHI Property. This task was completed on Sunday, September 26, 2021. Plaintiffs have been unable to hold any "organized gatherings" as a result of the Township's actions, thereby halting religious exercise and worship on the property to this day. (SFAC ¶¶ 137, 138).

As noted, the Township's driveway claim (*i.e.*, no "organized gatherings" restriction) is false and yet another way in which the Township is attempting to enforce its Zoning Ordinance to restrict Plaintiffs' right to religious exercise on CHI's private property. This latest driveway ploy is all part of the same course of conduct that is at the heart of this lawsuit. (SFAC ¶ 139).

Despite filing an alleged "verified" complaint, a witness for the Township, Ms. Kelly VanMarter, testified under oath in the state court proceedings that the Township had no information that CHI had taken any action on the Livingston County Road Commission permit to actually construct a field driveway. And the reason why the Township had no such evidence or information is because none exists. CHI has taken no action on this permit. The Township's claim is frivolous. Ms. VanMarter testified, in relevant part, as follows: "Q: Do you have any information whatsoever that CHI has ever acted on that permit to construct a field driveway? A: No." (SFAC ¶¶ 140, 141).

Consequently, the permit, and thus its language prohibiting "organized gatherings," is meaningless and has no force or effect. Moreover, the permit expired by its own terms on January 8, 2022. Nonetheless, the Township continues to use this permit as a pretext to prevent Plaintiffs from using the CHI Property for religious worship. Indeed, the no "organized gatherings" restriction *was added to CHI's*

permit at the insistence of the Township so that the CHI Property could not be used for religious worship. (SFAC ¶¶ 142, 143).

The driveway entrance to the CHI property is the same entrance used since CHI first acquired the property in October 2020, and it was in use prior to that. The area to the front of the entrance and along the shoulder is large enough for a shuttle bus or van to safely pull off the road and unload people who want to enter the property on foot to pray and worship. There are no sight line or sight distance issues whatsoever. (SFAC ¶¶ 144, 145).

CHI applied for a field driveway permit because it wanted to add gravel to improve the current driveway/entrance. As noted, CHI never took any action on the permit. Moreover, there is nothing in the application indicating that by applying for a field driveway permit the applicant is agreeing to any restrictions on the use of the driveway. For example, the application does not say that a field driveway cannot be used for organized gatherings or any other types of gatherings. There is no Livingston County Road Commission rule or regulation that imposes limitations on the use of a field driveway, including prohibiting it from being used for organized gatherings. (SFAC ¶ 146).

The driveway to Fillmore Park, which is located in the Township, is a dirt driveway that is similar to the entrance to the CHI Property. Fillmore Park recently held a grand opening that was attended by many people. And the park has posted

trail signs throughout. In other words, this dirt driveway is often used for organized secular gatherings at this park, and the Township allows it. (SFAC ¶¶ 147, 148).

The hearing on CHI's motion to dissolve the TRO and the Township's motion for preliminary injunction commenced on September 28, 2021, but it was adjourned after nearly a full day of testimony from the Township's witness (Ms. VanMarter) to determine whether the matter could be resolved between the parties. During cross-examination, the Township's witnessed testified, *inter alia*, as follows:

> Q: So looking at the property that CHI has, if it had been a private residence you could put up 14 bird houses, $50 per, a picnic table for $50 permit, and a ten foot by 12-foot stone wall outside of the setbacks for $50, correct?
> A: That's correct.
> Q: And it wouldn't require the $2,875 application fee, correct?
> A: Single family residential is a permitted use so they do not need to pay that fee.

(SFAC ¶ 149). The Township's witness also confirmed, *inter alia*, that there is no burdensome special land use application process required prior to having 200 people at a home for a football party in the Township. Ms. VanMarter testified as follows: "Q: [T]here's no special land use application required prior to having 200 people at your home for a football party in Genoa Township, correct? A: Correct." (SFAC ¶ 150). In other words, unlike Plaintiffs' religious displays, which are structurally no different in size or scope, the secular "structures" identified above (bird houses, picnic tables, 12-foot stone wall) could be constructed on the property *next door* to the CHI Property for just a $50 permit per item and without the need to undergo the

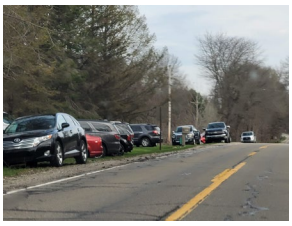
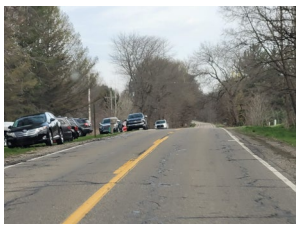
costly, burdensome, and subjective Planning Commission and Township Board approval process (the special land use application process), and 200 people could gather to watch football at the neighbor's property, but two people could not come to pray at the CHI Property.[9] (SFAC ¶ 151).

There are residences located near the CHI property, some of which have dirt/gravel driveways. Large secular events, such as graduation parties, football parties, and other organized gatherings, are permitted on these residential properties without requiring any special permits unless the assembly exceeds 1,000 attendees. Most often, the attendees to these secular events (whether the driveway is paved or dirt/gravel) park their vehicles on the grassy parts of the property. Many of these secular events have had far more people attend than will attend any of CHI's special events on its property, and these special events (St. Pio's Feast Day event and St. Pio's Birthday event) are the largest assemblies on the CHI property. For example, CHI had less than 200 people register for the September 23, 2021, event, and there are less than 50 people who will regularly enter the property within a given week. This is not a high traffic volume site. (SFAC ¶ 153).

[9] As stated by the Sixth Circuit, "While the United States Code contains a Religious Freedom and Restoration Act and a Religious Land Use and Institutionalized Persons Act, one will search in vain for a Freedom to Watch Football on a Sunday Afternoon Act." *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 540 (6th Cir. 2010).

Just days before CHI's September 23rd special event (which the Township halted via its state court filing and TRO), a "Family Fun Day" was held on September 18, 2021, on property located on Chilson Road approximately 1 mile from the CHI Property. There were approximately 100 people or more that attended this event. There is no improved surface parking for the number of vehicles at this event. The hosts of the "Family Fun Day" did not need any special land use approvals from the Township to hold this event, even though the impact of this event is far greater than the use of the CHI Property for religious worship. And the Township did not take any action to halt this "fun day" event. (SFAC ¶¶ 154, 155).

On April 30, 2022, the owner of the property located at 3275 Chilson Road, which is directly across the street from the CHI Property, was hosting a secular event. There were approximately 20 vehicles at the property, many of which were parked on the grass of the property and along Chilson Road. Pictures of these vehicles appear below (for perspective purposes, the last two pictures were taken from the CHI Property driveway):

Events such as these (*i.e.*, large events where numerous cars are parked on the grass and along the road) are permitted by the Township, and they are a routine

occurrence. Moreover, the owner of this property (3275 Chilson Road) is one of the neighbors who complained to the Township about CHI, and who objects to CHI's development and use of the CHI Property for religious worship. (SFAC ¶¶ 156-158).

During the holidays, the Township permits private residences to erect large displays on their property without requiring any special land use approvals, including a skeleton, which stood over 12 feet tall and which was erected in the Fall of 2021. Other holiday displays permitted by the Township in the Fall of 2021 without requiring the owner to obtain any special land use approvals included racy Halloween displays. (SFAC ¶¶ 159, 160).

The Township permits large "For Sale" signs on vacant land posted in the ground with three 4x4's. Many of these signs are larger than any Station of the Cross and are visible from the public right of way. A costly and burdensome application for special land use is not required for these displays. (SFAC ¶¶ 161, 162).

Picnic tables larger than the altar that was located on the CHI Property are displayed throughout the Township, including on Township property. An application for special land use is not required for these tables. (SFAC ¶ 163).

Unfortunately (but not surprising), there was no reasonable resolution to the demands the Township asserted in state court. The only option for CHI was to engage, once again, in the special land use approval process, which itself is no

guarantee as the Township Board retains the ability to deny the request on subjective grounds. That is, in order for CHI to obtain the "necessary permits, including land use permits and building permits for the structures" demanded by the Township in its civil enforcement action, CHI had to undergo, yet again, the burdensome, costly, and time-consuming special application for land use approval process. As a result, the parties stipulated to and submitted a proposed order to the state court judge, notifying the court of the following:

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

(SFAC ¶¶ 164, 165). *Per the stipulation*, on October 15, 2021, CHI submitted the costly (in excess of $8,000) special land use application and associated documents, seeking approval for the construction of the prayer campus (the religious symbols at issue and a driveway/parking area to address the "field" driveway permit issue) ("Prayer Campus Submission"). The fee alone for the application was $2,875 (which is not a nominal amount—permits for similar sized items on residential property would only cost $50 and would not require Planning Commission and Township Board approval). And to complete the onerous application process, CHI had to hire an engineering firm with the requisite expertise to prepare and submit the

site plan and environmental impact statement, to respond to the Township's experts and consultants, and to interface with the Township's experts and consultants. The *actual* cost for the Prayer Campus Submission was in excess of $8,500, and it was only this low because the engineers were able to use much of the same work from the original submissions. Consequently, CHI has now expended nearly $40,000 in just application and engineering fees in an effort to use its property for religious expression and worship. (SFAC ¶¶ 166-168).

Despite incurring the additional burdens, costs, and delays associated with submitting this modified special land use application (Prayer Campus Submission), *which the Township demanded*,[10] during a hearing on or about December 13, 2021, the Planning Commission shockingly refused to consider the submission, citing the Township Board's previous denial of CHI's special land use application (the Final Submission) on May 3, 2021, thereby causing further burdens, costs, delay, and uncertainty and forcing CHI to file an administrative appeal to the Zoning Board of Appeals (ZBA), which only added to the costs, delay, and uncertainty as the ZBA did not hear this appeal until February 15, 2022. (SFAC ¶ 169)

[10] As part of the Prayer Campus Submission and in response to the review letters submitted by the Township's consultants, Plaintiffs submitted a letter requesting answers from the Township as to its application and enforcement of the Zoning Ordinance so that Plaintiffs could better understand how the Township was applying the ordinance to Plaintiffs' proposed use of the CHI Property. The Township's bad faith toward CHI was on full display when it refused to answer the questions posed in the CHI letter. (SFAC ¶¶ 170, 171).

As noted, Plaintiffs appealed the Planning Commission's decision to the ZBA (a requirement to make the decision final). On February 15, 2022, the ZBA denied Plaintiffs' appeal, affirming the Planning Commission's refusal to hear and approve the Prayer Campus Submission, thereby making the decision final. (SFAC ¶ 173)

By denying the Prayer Campus Submission and through its state court enforcement action, the Township is prohibiting Plaintiffs religious displays. Yet, pursuant to Article 11 of the Township's Zoning Ordinance, "[g]ardens and landscaping are permitted in *all* yards" and "[m]anufactured landscape features and minor structures may be permitted in all yards subject to" certain location and size restrictions. All of Plaintiffs' religious displays satisfy these *location and size restrictions*, yet they are still prohibited. (SFAC ¶ 174). To this day, the Township is unlawfully preventing Plaintiffs from using the CHI Property for religious exercise, expression, and worship. (SFAC ¶ 176).

ARGUMENT

I. Defendants' Standing Arguments Are Without Merit.

Like many of their legal arguments, Defendants' standing arguments are scattershot and largely incoherent. First, Defendants claim that Plaintiff Palazzolo lacks standing to bring a RLUIPA claim. (Defs.' Br. at 24). Second, Defendants then broadly argue that all Plaintiffs "lack Article III standing," but they don't specify for which claims. (*Id*. at 25-26). However, in the following "Application"

section, Defendants claim that "Plaintiffs lack standing to assert a *facial* challenge to the ordinance," broadly referencing Plaintiffs' "Free Exercise and Free Speech" claims. (Defs.' Br. at 26-27 [emphasis added]). Apparently, Defendants acknowledge that Plaintiffs have standing to bring an as-applied challenge to the "ordinance"—so arguing that these same Plaintiffs don't have standing to challenge an ordinance on its face under the facts of this case is odd in the extreme. Finally, Defendants make a bizarre claim that Plaintiff Palazzolo lacks standing (to challenge what, is unclear), claiming (based on hearsay contained in documents that would be inappropriate for this Court to consider) that he is not facing an "actual or imminent" injury based on a "solicitation from CHI to its donors, claiming that '$5 Million is needed' to construct the St. Pio Perpetual adoration Chapel" and because "CHI currently operates a 'Worldwide Perpetual Adoration Team' and 'some Padre Pio prayer groups.'" (Defs.' Br. at 28). This last argument is particularly a head-scratcher. We will address each argument below.

A. Plaintiff Palazzolo Has Standing to Advance the RLUIPA Claim.

As an initial matter, Defendants do not argue that CHI lacks standing to advance the RLUIPA claim. Consequently, "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 the RLUIPA claim regardless of Plaintiff Palazzolo's standing. Consequently, addressing Plaintiff Palazzolo's standing to assert this claim is largely a fruitless exercise, but we will since Defendants have raised it.

"Standing to assert a claim or defense under [RLUIPA] shall be governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000cc-2. As set forth below, Plaintiff Palazzolo satisfies these "general rules." Moreover, RLUIPA confers standing not only on those persons with an "ownership" interest in the land (as Defendants suggest). It confers standing if the person has "other property interest in the regulated land." 42 U.S.C. §2000cc-5(5). Property interests include, *inter alia*, the right to direct and control the use of the property, which Plaintiff Palazzolo has in this case (SFAC ¶ 86, Ex. 1, ECF No. 55-2, PageID.2301 [signing and authorizing site plan review for use of CHI Property]). *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights to possess, use and dispose of it.") (internal quotations and citation omitted); *see also 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."). Nonetheless, as noted above, because CHI plainly has standing to advance the RLUIPA claim, Defendants' argument is meaningless. This Court has jurisdiction to decide this claim.

B. Plaintiffs Have Standing under Article III to Advance All Claims.

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).

While the necessary injury-in-fact to confer standing is not susceptible to precise definition, it must be "distinct and palpable," *Warth*, 422 U.S. at 501, and

not merely "abstract," "conjectural," or "hypothetical," *Allen*, 468 U.S. at 751; *cf. Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 104 (1983); *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). Put another way, the injury must be both "concrete and particularized," meaning "that the injury must affect the plaintiff in a *personal* and *individual* way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added). Plaintiffs easily satisfy this standard.

Not only have Defendants deprived Plaintiffs (plural) of their rights to free exercise of religion, religious worship, and religious expression when the Township denied the construction of the St. Pio Chapel and prayer campus on May 3, 2021 (causing injury to Plaintiff Palazzolo and his organization [CHI], and harm to Plaintiff Palazzolo's property interest to control and direct the use of the CHI Property), Defendants have subsequently enforced the Township's zoning ordinance (1) to remove all religious symbols from the CHI Property—symbols that are used by Plaintiffs for purposes of religious expression, prayer, and worship—and (2) to prohibit Plaintiffs from using the CHI Property for religious worship ("organized gatherings"). Plaintiffs are currently harmed, and they need not wait for *additional* future harm to occur to seek relief from this Court. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions.").

In sum, Plaintiffs have suffered injury by way of the loss of their rights protected by RLUIPA and the United States and Michigan Constitutions. *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). And Plaintiffs have suffered economic harm and damages (*e.g.*, loss of donations and paying unnecessary costs and fees) as a direct result of the Township's actions. *Linton v. Commissioner of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992) ("An economic injury which is traceable to the challenged action satisfies the requirements of Article III."); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (acknowledging that regulations injuring a plaintiff's "economic interests" create the necessary injury-in-fact to confer standing).

In the final analysis, Plaintiffs have suffered a personal injury fairly traceable to Defendants' allegedly unlawful conduct and likely to be redressed by the requested relief. Standing is easily established.

Defendants also argue that Plaintiffs lack standing to advance a facial (but not an as applied) challenge to the sign ordinance, citing *Midwest Media Property, LLC v. Symmes Township*, 503 F.3d 456 (6th Cir. 2007)—a case in which the plaintiff

could not allege an injury traceable to the off-premises advertising ban when the signs at issue violated the size and height regulations. *Midwest* is not this case.

To begin, the Sign Ordinance is plainly at issue in this case. Following Defendants' unlawful denial on May 3, 2021, of Plaintiffs' special application for land use, Defendants sent a letter to Plaintiffs on May 7, 2021, stating, "After denial of the proposed project at 3280 Chilson Road, the signs/temporary signs are in violation of the ***sign ordinance*** and will need to be removed." (SFAC ¶ 111). Furthermore, unlike Plaintiffs' religious "signs," which are structurally no different in *size or scope*, bird houses, 12-foot stone walls, 12-foot skeletons, and many other signs and "structures"[11] could be constructed on the property *next door* to the CHI Property for just a $50 permit per item and without the need to undergo the costly, burdensome, and subjective Planning Commission and Township Board approval process (the special land use application process). (SFAC ¶ 149). Because Plaintiffs' religious displays are being used for religious purposes, the Township is imposing upon Plaintiffs' the costly and burdensome special application for land use approval process (and denying the display of these religious symbols as a result).

[11] Defendants play fast and loose with the term "structure." Under the Zoning Ordinance, a "sign" is a "structure." Zoning Ordinance § 25.02. Moreover, pursuant to Article 11 of the Township's Zoning Ordinance, "[g]ardens and landscaping are permitted in all yards" and "[m]anufactured landscape features and minor structures may be permitted in all yards subject to" certain location and size restrictions. All of Plaintiffs' religious displays satisfy these location and size restrictions, yet they are still prohibited. (SFAC ¶¶ 174, 175).

Accordingly, and as argued further in this brief, the Zoning Ordinance, including the Sign Ordinance, makes content-based distinctions, it treats Plaintiffs' religious symbols on less than equal terms to *similar* secular symbols/structures (similar in size and scope), and it substantially burdens Plaintiffs' religious exercise, all in violation of the United States and Michigan Constitutions and RLUIPA. As argued further in this response, the Sign Ordinance operates as an unconstitutional prior restraint on Plaintiffs' speech, and it is an unconstitutional content-based restriction on Plaintiffs' speech. Plaintiffs are directly harmed by the Zoning Ordinance and thus have standing to advance their claims, including their facial challenge to the Sign Ordinance.

II. Plaintiffs' Claims Are Ripe.

Ripeness requirements are properly relaxed in the First Amendment context (*i.e.*, this case). *See Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002) (noting that the ripeness requirements are relaxed in the First Amendment context); *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*, 380 U.S. at 486 ("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 ripeness doctrine prevents courts from "entangling themselves in abstract disagreements" through premature adjudications. *Grace Cmty. Church v. Lenox Twp.*, 544 F.3d 609, 615 (6th Cir. 2008) (citation omitted). Per the Sixth Circuit:

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

Warshak v. United States, 532 F.3d 521, 525 (6th Cir. 2008) (citations omitted); *see, e.g., Grace Cmty. Church*, 544 F.3d at 614-18 (finding case not ripe where the record was incomplete as the parties' positions were ill defined, noting that the contention that "the parties' positions had been defined and an impasse reached . . . is belied by the record"). In the land use context, courts will often consider a "finality" requirement. As stated by the Supreme Court:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position *on the issue that inflicts an actual, concrete injury*; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193 (1985) (emphasis added).[12]

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

In *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533 (6th Cir. 2010) ("*Miles Christi*"), for example, the Sixth Circuit found that the case was not ripe for review as there were unresolved questions as to *how* the regulations would apply to Miles Christi's five-bedroom house located within the township. As the court noted, a "definitive statement from . . . the entity charged with interpreting Northville's zoning ordinances . . . about *which* ordinances apply to Miles Christi and about *whether Miles Christi must submit a site plan* under the ordinances" would assist the court with resolving the dispute. *Id*. at 539 (emphasis added). Per the court, "As things now stand, 'we have no idea.'" *Id*. The court further noted that there would be no hardship to Miles Christi if the court stayed its hand because "Miles Christi may potentially resolve the issue (at less expense) by appealing to the zoning board,[13] . . . a route that does *not* require Miles Christi to cancel any bible studies, masses or other religious activities and a route that does *not* require it to pay for an engineering study. . . ." *Id*. at 540 (emphasis added). Moreover, an appeal to the zoning board would stay all enforcement action. *Id*. at 542.

Miles Christi provides a good comparison. In this case, there is no question as to *how* the Township is enforcing its Zoning Ordinance. There is no question that

[13] Under the Northville Zoning Ordinance, the zoning board is "empowered . . . to participate in the . . . decision making process from the outset." *Miles Christi*, 629 F.3d at 541. The same is not true under the Genoa Township Zoning Ordinance, as the Township Board has plenary and final authority over special land use decisions and not the ZBA. (Muise Decl., Ex. D [Z.O. §§ 19.02.04(f) & 19.04] at Ex. 1).

Plaintiffs ***must*** submit to the onerous and subjective special land use application process—a costly process which requires a special land use application, site plan, and environmental impact study as well as approvals by the Planning Commission and the Township Board—to display any of the religious symbols at issue or to engage in outdoor religious worship on the CHI property. Plaintiffs have already completed that process ***twice*** (a process which included the very religious symbols at issue), and they were twice denied.[14] There is no simple appeal to a zoning board that would have permitted Plaintiffs to continue with their expressive religious activity, as in *Miles Christi*. Indeed, the Township has now forced the removal of the religious symbols and halted the outdoor religious worship.

Additionally, ripeness is found where the plaintiff is challenging the statutory scheme that is imposing a burden on his rights protected by the First Amendment, as in this case. *See Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir. 2010) (finding a challenge to the sponsorship or collaboration requirement, which imposed a burden on the right to free speech, was ripe for review even though the plaintiffs did not first seek collaboration with any individual official who could have sponsored the free speech activity and thus allowed the activity to occur); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 399-400 (6th Cir. 2001)

[14] It is beyond frivolous at this point for Defendants to continue to assert that the claims are not ripe because "Plaintiffs failed to apply for a permit." (Defs.' Br. at 30).

(finding a challenge to a permitting scheme ripe, rejecting the claim "that the entertainers [were] not under any threat with regard to the Ordinance because the entertainers [had] not yet sought a permit" under the Ordinance, and acknowledging that a party not yet affected by the actual enforcement of an ordinance is allowed to challenge actions under the First Amendment to ensure that the ordinance does not chill the exercise of free speech, a constitutionally protected right).

Here, Plaintiffs are *currently* harmed by the Zoning Ordinance. They have had to pay exorbitant fees as a result of being forced to comply with the unconstitutional and discriminatory demands of the ordinance, and whether Plaintiffs can engage in their right to religious exercise on their private property is entirely dependent upon the subjective judgment of the Planning Commission and Township Board. Thus, Plaintiffs are *currently* subject to and injured by the Zoning Ordinance, having been denied the right to engage in religious expression and worship on the CHI property as a result of the ordinance. *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"). In short, ripeness requires that the "injury in fact be certainly impending." *Id*. at 280 (citation omitted). Here, not only is the injury "certainly impending," it has actually occurred.

Accordingly, not only have Plaintiffs (including Plaintiff Palazzolo) been harmed economically by having to undergo a burdensome permitting process and pay exorbitant fees (a process and fees that secular owners of property in the very same neighborhood are not required to undergo or pay for similar secular displays/construction or activity), Plaintiffs have lost their First Amendment freedoms, causing immediate and irreparable harm. *Elrod*, 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The issues are ripe.

Indeed, it is beyond frivolous at this point for Defendants to continue to assert that the claims are not ripe because "Plaintiffs failed to apply for a permit." (Defs.' Br. at 30). And it is beyond frivolous (it is sanctionable) for Defendants to assert, "Contrary to Plaintiffs' supplemented allegations,[15] the Planning Commission and ZBA did not reach a 'final decision,' because Plaintiffs' manufactured an application, they knew or should have known could not be considered by the Planning Commission, and then filed a meritless appeal." (Defs.' Br. at 31). This

[15] This is a motion to dismiss for failure to state a claim. The allegations are the facts. (*See supra*). But Defendants' assertion is frivolous beyond this obvious point, as noted in the text above.

false and frivolous assertion is repeated in Defendants' brief as follows: "Instead of applying for use of the Property as a park, Plaintiffs – through negligence or by design - reapplied for the use the Township Board denied." (*Id.*). The Township's unlawful gamesmanship is clearly on full display. Plaintiffs submitted the special land use application for the prayer campus precisely how the parties discussed and *per the stipulation they submitted to the court in the state proceedings*. (SFAC ¶ 165). Plaintiffs have, through great cost and expense, been trying to get the necessary permits and land use approvals, but the Township continues to say "no" at every turn. To argue that Plaintiffs' claims are not ripe (and to do so by making material misrepresentations to this Court) is reprehensible.

III. Recent Supreme Court Decisions Compel Denial of Defendants' Motion.

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*."[16] *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

[16] *Fulton* provides the controlling law on the meaning of "general applicability" in the free exercise context. Defendants' failure to cite this case is inexcusable.

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. 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 other words, the petitioner was not forced to directly violate her religious beliefs by any regulation (indeed, this case was not a direct challenge to the employer who

fired her for exercising her religion). Rather, her religious beliefs were substantially burdened by the indirect denial of an unemployment benefit.

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 (emphasis added). 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.[17] 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."

[17] 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.

IV. 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).[18]

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

[18] 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* SFAC ¶ 133).

burdens 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 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 securely kept and

adored.[19] Without the St. Pio Chapel, Plaintiffs are unable to carry out a core function of their religious activities. (*See* SFAC ¶¶ 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. A violation of the Zoning Ordinance subjects a person 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

[19] 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 51-53). Defendants' assertion is patently false (and misapprehends the law).

Plaintiffs' religious exercise caused by the Township's decision to *prohibit* the 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 court, "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." *Id.* 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, Plaintiffs are *banned* from using their property for religious activities, and without the chapel, Plaintiffs are unable to carry out a core function of these activities due to the lack of a Tabernacle, thus establishing a substantial burden.

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. (SFAC ¶¶ 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(s), 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*, the loss of donations, and significant expenses. The cost of hiring an engineering firm to prepare the documents (and to make the many modifications) required by the Township for the special land use applications cost CHI in excess of $40,000. (SFAC ¶ 168). And

Plaintiffs have no 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. (SFAC ¶ 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. Pursuant to the stipulation of the parties, Plaintiffs submitted a second special application for land use for the prayer campus (at great expense). This too was

denied by the Township. These denials each placed a substantial burden on Plaintiffs' religious exercise, thereby triggering 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 (such as social gatherings in excess of 200 people). 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 [SFAC ¶ 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 arrange police services during special events to help control traffic,

and if cars were illegally parked, the Township or the police could ticket the violators. Completely 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. (SFAC ¶¶ 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. (SFAC ¶ 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. (SFAC ¶¶ 34-36). However, Plaintiffs' prayer campus 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. (SFAC ¶¶ 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. (SFAC ¶¶ 73, 74). Even "[a]ccessory roadside stands and commercial cider mills" are permitted. (*See* SFAC ¶ 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 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)). And 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 (an application that 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. (SFAC ¶¶ 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). 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 set forth above, the Township has "unreasonably limited" and, in fact, deprived Plaintiffs of the reasonable opportunity to practice their religion in the Township in violation of RLUIPA. The Township's "implementation of the land use regulation was unreasonably restrictive in this case."

E. Conclusion.

As set forth above, there are *multiple* bases for denying Defendants' motion to dismiss Plaintiffs' RLUIPA claim.

V. 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.[20] 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.

A. The Ordinance Is a Content-Based, Prior Restraint on Speech.

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. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term 'prior restraint' is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.") (internal quotations and citation omitted); *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 698 (6th Cir. 2020) ("The original City of Troy Sign Ordinance *imposed a prior restraint* because the right to display a sign that did not come within an exception as a flag or as a 'temporary sign' *depended on obtaining either a permit from the Troy Zoning Administrator or a variance from the Troy Building Code Board of Appeals*.") (emphasis added). As stated by the Supreme Court, "[*a*]*ny system* of prior restraints of expression comes to this Court

[20] Contrary to Defendants' assertion, Plaintiffs' "'free expression' claims" are not "brought based upon denial to construct buildings or barriers." (Defs.' Br. at 68).

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 (SFAC ¶¶ 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."). And the Township's Zoning Ordinance [Article 11] permits "manufactured landscape features and minor structures" that are larger than Plaintiffs' outdoor religious displays. (SFAC ¶¶ 174, 175, Ex. 13, ECF No. 55-14, PageID.2473).

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* SFAC ¶¶ 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* SFAC ¶¶ 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. (SFAC ¶¶ 110-11). 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.4), 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.

Moreover, 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). "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id*. at 495. 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. Moreover, Defendants' total ban on Plaintiffs' religious displays is not narrowly tailored to achieve any legitimate interest. Consequently, Defendants' actions violate Plaintiffs' rights protected by the Free Speech Clause.

B. The Restriction on "Organized Gatherings" Is Vague, Overbroad, and Prohibits Constitutionally Protected Activity.

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court outlined the rationale for the void-for-vagueness doctrine, stating, in relevant part that "***where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms***. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Id*. at 108-09 (internal punctuation and quotations omitted) (emphasis added); *see Cox v. La.,* 379 U.S. 536, 551-52 (1965) (holding that the challenged breach of the peace statute was unconstitutionally vague in its *overly broad scope* because Louisiana defined "breach of the peace" in a manner that violated the First Amendment).

The no "organized gatherings" restriction, which is being enforced by the Township, is unconstitutionally vague because it permits arbitrary, discriminatory, and subjective enforcement. What is an "*organized*" (as opposed to an "unorganized") gathering? How big does the gathering have to be for it to be "organized"? If two people agree to meet on the CHI Property at the same time,

then apparently the "gathering" is unlawful because it was "organized"(?). But if fifty people randomly show up on the property, this "gathering" is permissible (?). If two cars use the driveway for an "organized" gathering, it is unlawful (?). But if ten cars randomly use the driveway, it is apparently permissible (?). This vagueness and overbreadth are especially problematic here because people "gather" on the CHI Property for prayer and worship, which are protected by the First Amendment. As stated by the Supreme Court, "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). As a result of this restriction, Plaintiffs have ceased using the property for all religious assembly and worship. *Grayned*, 408 U.S. at 109 ("Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.").

And what legitimate government interest is promoted by this restriction, particularly when this driveway has been in use for many years without any issues, it had been used for more than a year for gatherings without any issues, and the Township permits other dirt driveways to be used for very large gatherings? As noted, under the Township's Zoning Ordinance, a neighbor with a dirt driveway can have 200 people gather at his house for a football game, but two people cannot agree to meet on the CHI property to pray a Rosary. The Fillmore Park driveway is dirt; yet, large gatherings are permitted on this property. All of this further illustrates the

unlawful overbreadth of the restriction. In *Coates v. Cincinnati*, 402 U.S. 611 (1971), the Court held an ordinance "unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct. . ." *id*. at 614, which is precisely this case. *See also Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574–76 (1987) (striking down as overbroad a regulation prohibiting all "First Amendment activities" at the airport because "no conceivable governmental interest would justify such an absolute prohibition of speech"). Here, the challenged restriction authorizes the punishment of constitutionally protected conduct (religious assembly) in violation of the First and Fourteenth Amendments.

VI. 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 they 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. And "[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, in fact, the Township is prohibiting these displays by not allowing the permits), and all without a compelling reason for doing so. Moreover, the fact that Defendants prohibit Plaintiffs' prayer campus "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.

VII. 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).

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 prohibiting "organized"

gatherings and imposing costly and unreasonable burdens for Plaintiffs' religious 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*).

VIII. 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).

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 Fourteenth Amendment.

IX. 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"). Defendants do not confront this case law. Nonetheless, for the reasons argued further above, Defendants have restricted Plaintiffs' free exercise of religion *and* religious expression, and these restrictions cannot survive strict scrutiny under the free exercise provisions of the United States and Michigan Constitutions.

CONCLUSION

The Court should deny Defendants' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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