

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CATHOLIC HEALTHCARE
INTERNATIONAL, INC. and
JERE PALAZZOLO,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Case No. 21-2987

**APPELLANTS' REPLY IN SUPPORT OF MOTION
FOR INJUNCTION PENDING APPEAL**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. The Court Has Jurisdiction to Issue the Injunction in this Case	5
II. The <i>Younger</i> Abstention Doctrine Does Not Apply	6
III. Plaintiffs Are Likely to Succeed on the Merits	9
CONCLUSION	10
CERTIFICATE OF COMPLIANCE.....	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

Cases	Page
<i>ACLU v. Ashcroft</i> , 322 F.3d 240 (3d Cir. 2003).....	4
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	9-10
<i>England v. La. Bd. of Med. Exam’rs</i> , 375 U.S. 411 (1964).....	5, 7
<i>Exec. Arts Studio, Inc. v. City of Grand Rapids</i> , 391 F.3d 783 (6th Cir. 2004)	5, 6, 7, 8
<i>Fulton v. City of Phila.</i> , 141 S. Ct. 1868 (2021).....	9
<i>Gordon v. Holder</i> , 721 F.3d 638 (D.C. Cir. 2013).....	4
<i>Int’l Outdoor, Inc. v. City of Troy</i> , 974 F.3d 690 (6th Cir. 2020)	9
<i>Mitchum v. Foster</i> , 407 U.S. 225 (1972).....	5-6
<i>Nimer v. Litchfield Twp. Bd. of Trs.</i> , 707 F.3d 699 (6th Cir. 2013)	7
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015).....	9
<i>Salih v. Plaintiff’s Liaison Counsel (In re Nat’l Prescription Opiate Litig.)</i> , No. 21-3460, 2021 U.S. App. LEXIS 25122 (6th Cir. Aug. 20, 2021).....	5
 Constitution	
U.S. Const. Art. VI, cl. 2.....	4

Statutes

28 U.S.C. § 22835
42 U.S.C. § 2000cc2

INTRODUCTION

The Township's attack on Plaintiffs' fundamental right to religious freedom is breathtaking. Indeed, it is shocking. In their opposition, Defendants offer this Court a tendentious (and false) view of the facts and law,¹ and they inexplicably fail to address controlling precedent on the substantive issues presented. Defendants' arguments should be summarily rejected, and the requested injunction should issue.

As stated by this Court, "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989). Defendants' opposition to Plaintiffs' motion is a feckless attempt to justify the clear infringement upon Plaintiffs' First Amendment rights.

As the undisputed facts demonstrate, Plaintiffs have been using Catholic Healthcare International Inc.'s ("CHI") rural, 40-acre property located in Genoa Township, Michigan ("Township") for the display of religious symbols and to engage in *outdoor* religious worship since September 2020. Plaintiffs properly

¹ In their introduction, Defendants state that "CHI has filed this motion on an alleged 'emergency' basis despite CHI's agreements in the State court to continuation of the 44th Circuit Court's Temporary Restraining Order, pending negotiations." (Defs.' Resp. at 1). What Defendants fail to note is that the outcome of the "negotiations" is that the Township is forcing CHI to undergo a costly and burdensome special land use application process which will take many months to complete with no guarantees of succeeding and which CHI is doing *under protest and with a reservation of its rights*. (See Muise Decl., Ex. A [Proposed Consent Order/Stipulation], attached to this reply as Exhibit 1).

rejected the Township’s earlier efforts, beginning in October 2020, to censor their speech and to condition their right to peacefully exercise their religion upon completion of an onerous, costly, and burdensome zoning process that subjected their fundamental rights *to the prior approval* of the Township.² This is the very definition of a prior restraint, *see infra*—an issue the Township ignores because it cannot carry the heavy burden to justify it. In short, the Township does not have a compelling interest for halting this peaceful, outdoor, religious exercise on CHI’s rural, 40-acre property.

Bear in mind, Plaintiffs are not requesting an emergency injunction to construct a church or any other similar building—this injunction request is to simply restore Plaintiffs’ rights to display the modest religious symbols at issue and to hold *outdoor* religious worship on the CHI property while this federal litigation proceeds. The denial of Plaintiffs’ request to construct the modest St. Pio adoration chapel is a central focus of Plaintiffs’ RLUIPA (42 U.S.C. § 2000cc) challenge in this case, and that issue will be decided at a later date.

²This is not simply a process of applying for a \$50 permit to erect a birdhouse (some of which are larger than the Stations of the Cross) or to put out a picnic table (most of which are larger than the altar), or to erect a stone wall (which could be the size of the display of the image of Our Lady of Grace mural wall)—all of which are permitted on private residential property without the need for a costly special land use application (the filing fee alone is \$2,875), site plan and associated documents, Planning Commission approval, and Township Board approval. (*See Palazzolo Decl.* ¶¶ 6-7, Ex. A, at Ex. 2 filed in support of the motion).

As noted in Plaintiffs’ motion, CHI previously submitted a costly (\$27,000) special application for land use in order to construct a modest (95 seat) adoration chapel (St. Pio Chapel) and to fully develop the prayer campus on its property.³ On May 3, 2021, the Township denied the application. Shortly following this denial, the Township again ordered the removal of the temporary religious displays by *June 4, 2021*, prompting Plaintiffs to file this federal civil rights lawsuit on *June 2, 2021*.

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 knew about for just as long), the Township filed its verified complaint and *ex parte* TRO request in the 44th Circuit Court for Livingston County, asking the local state court to order CHI “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 their property,

³ The Township makes the absurd and false claim that this costly submission was Plaintiffs’ effort to seek “forgiveness.” (Defs.’ Resp. at 13). To the contrary, CHI’s special land use application was for the purpose of actually *building* a “church or temple”—the modest St. Pio adoration chapel—an application that the Township *denied* last May in direct violation of RLUIPA and other law. And now, after this unlawful denial, the Township has stripped the property of all religious symbols and is barring its use for *outdoor* religious worship. Additionally, CHI’s counsel’s cross-examination of the Township’s witness during the state court hearing was not for the purpose of settlement (Defs.’ Resp. at 8); it was to starkly demonstrate the discriminatory manner in which the Township enforces its Zoning Ordinance (*see* Palazzolo Decl., Ex. A [Hr’g Tr. excerpt], at Ex. 2 to motion).

claiming that a Livingston County (not Township) permit (which Plaintiffs have never used) “forbids” this. This was nothing short of a bad faith collateral attack that smacks of forum shopping to avoid the ongoing federal litigation. Unfortunately, the district court below denied Plaintiffs’ emergency request to halt this unconstitutional application of the Township’s Zoning Ordinance, and the state court granted the *ex parte* TRO, forcing Plaintiffs to remove the religious symbols and to cease all outdoor worship. To remedy this ongoing irreparable harm, Plaintiffs filed this motion, urging the Court to immediately restore Plaintiffs’ fundamental right to religious freedom.

An order from this Court immediately enjoining the Township’s *unconstitutional enforcement of its Zoning Ordinance* in this case is entirely appropriate. Federal law—and not the Township’s Zoning Ordinance—is the supreme law of the land. U.S. Const. Art. VI, cl. 2 (“This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”). The Township has no legitimate interest in the unlawful enforcement of its Zoning Ordinance. *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003) (“[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.”); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (“[E]nforcement of an unconstitutional law is always contrary to the public interest.”). And Plaintiffs have properly reserved their right to advance their federal claims in federal court

pursuant to *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 421-22 (1964). There is nothing that bars this Court from granting the injunction and halting the Township's egregious assault on the First Amendment through its unlawful enforcement of its Zoning Ordinance. Nothing. The Court has the duty to exercise its jurisdiction and uphold the Constitution by granting the requested injunction. *Exec. Arts Studio, Inc. v. City of Grand Rapids*, 391 F.3d 783, 791 (6th Cir. 2004) ("There is no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.") (internal quotations and citations omitted).

I. The Court Has Jurisdiction to Issue the Injunction in this Case.⁴

This motion is a request to enjoin an unconstitutional zoning ordinance, facially and as applied to restrict Plaintiffs' fundamental right to religious freedom, in order to halt great, immediate, and irreparable harm. This is not a request for an injunction to stay proceedings in a state court.⁵ But even then, 28 U.S.C. § 2283 would not bar an injunction in this § 1983 case. *See Mitchum v. Foster*, 407 U.S.

⁴ Defendants claim in a footnote that "CHI appears to cite to *In re: Notional Opiate Products Litigation*," noting that they could not find this case. (Defs.' Resp. at 15 n.1). The case cited by Plaintiffs is *Salih v. Plaintiff's Liaison Counsel (In re Nat'l Prescription Opiate Litig.)*, No. 21-3460, 2021 U.S. App. LEXIS 25122 (6th Cir. Aug. 20, 2021), and it was cited for the proposition that the standard for issuing an injunction pending appeal is the same standard for issuing a preliminary injunction. This is not a disputed issue.

⁵ When this case was filed, there was no currently pending state court proceeding. *See infra*.

225, 242-43 (1972) (“[T]his Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person’s constitutional rights. . . . For these reasons we conclude that, under the criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the ‘expressly authorized’ exception of that law.”).

The reasons why an injunction is appropriate in this case are set forth more fully in Plaintiffs’ arguments as to why the *Younger* abstention doctrine does not apply.

II. The *Younger* Abstention Doctrine Does Not Apply.

“The *Younger* abstention doctrine counsels a federal court to refrain from adjudicating a matter that is properly before it in deference to *ongoing state criminal proceedings*.” *Exec. Arts Studio, Inc.*, 391 F.3d at 791 (citation omitted) (emphasis added). While this doctrine has been extended to certain classes of civil cases, “it remains the rule that only *exceptional* circumstances justify a federal court’s refusal to decide a case in deference to the states.” *Id.* (internal quotations and citation omitted) (emphasis added). This case contains no such “exceptional circumstances.”

Indeed, Defendants cannot even meet the “first condition” for applying this doctrine. “The first condition for the application of *Younger* abstention is that the state proceeding must be pending *on the day the plaintiff sues in federal court*—the

so-called ‘day-of-filing’ rule.” *Nimer v. Litchfield Twp. Bd. of Trs.*, 707 F.3d 699, 701 (6th Cir. 2013) (emphasis added). Plaintiffs’ federal action was filed on *June 2, 2021*. The state court action was filed months later, on *September 17, 2021*.⁶ Abstention is improper.

In *Executive Arts Studio*, in which this Court held that the *Younger* abstention doctrine did not apply, the Court made the following relevant observation:

Here, Executive Arts perceived the possibility of the prospective future enforcement of the zoning law against itself once the state court had declared Executive Arts to be a regulated use under the City’s zoning law, *preemptively filing in federal court* attacking the constitutionality of the Ordinance before any enforcement action could occur.

Id. at 792 (emphasis added).⁷ The same is true in this case. Anticipating that the Township might seek enforcement action against Plaintiffs for their religious displays and outdoor worship, Plaintiffs preemptively filed this federal lawsuit attacking the constitutionality of the Zoning Ordinance facially and as applied to Plaintiffs’ religious exercise and expression. *Executive Arts Studio* is controlling.

⁶ Following the unlawful denial of Plaintiffs’ special land use application, the Township sent a letter to CHI on May 7, 2021, demanding, once again, the removal of the religious symbols by June 4, 2021. This unlawful demand prompted Plaintiffs to file this federal action on June 2, 2021. (Compl., R-1). And this unlawful demand, which is at issue here, is a central claim in this federal litigation. (See First Amended Compl. ¶¶ 110-113; Prayer for Relief, ¶ D, R-14, which was filed on July 14, 2021). Defendants’ assertion to the contrary is *false*.

⁷ Similar to the plaintiff in *Executive Arts Studio, Inc.*, Plaintiffs have reserved the “right to raise and litigate any federal claims in federal court pursuant to *England v. Louisiana Board of Medical Examiners . . .*” *Exec. Arts Studio, Inc.*, 391 F.3d at 788.

Executive Arts filed its federal lawsuit on March 29, 2001. On May 3, 2001, the ZBA denied its variance request. Executive Arts appealed the decision with the Kent County Circuit Court on May 22, 2001. And on October 11, 2001, the Kent County Circuit Court issued an opinion finding, *inter alia*, that Executive Arts (also referred to as “Velvet Touch” in the case) “was a public nuisance under Michigan law and would have to either cease operations or remove all the material which caused it to fall into the ambit of the ordinance.” *Id.* at 789 (emphasis added). This state court order did not preclude the district court from granting summary judgment in Executive Arts’ favor, finding that the zoning ordinance at issue was unconstitutional as applied as a matter of federal law. This Court affirmed the lower court ruling and concluded as follows:

In this case, the substantive content to which the Supreme Court referred, an allegedly unconstitutional zoning ordinance, is directly at issue. Therefore, while “it is true, of course, that the federal court’s disposition of [this] case may well affect, or for practical purposes, preempt, a future - - or . . . even a pending - - state-court action . . . there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts.” [*New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 373 (1989)]. The City has simply not explained how the district court’s acceptance of jurisdiction over the constitutional issues contained within *the amended* complaint would have interfered, except as a collateral by-product, with any ongoing state judicial proceedings. Therefore, the City has not shown this court why the exceptional abstention doctrine of *Younger* should be applied.

Exec. Arts Studio, Inc., 391 F.3d at 792-93 (emphasis added).

In conclusion, there is no basis for this Court to abstain in this case. The Court has jurisdiction to conclude that the Zoning Ordinance is unconstitutional facially and/or as applied to restrict Plaintiffs' religious activity as a matter of federal law and to then issue the requested injunction in furtherance of the Court's jurisdiction to hear and decide this case.

III. Plaintiffs Are Likely to Succeed on the Merits.

Inexplicably, Defendants cite to no case law nor do they even attempt to distinguish the controlling case law cited by Plaintiffs demonstrating that the Zoning Ordinance, facially and as applied to Plaintiffs' religious expression, **(1)** is an unconstitutional prior restraint, *see Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 698 (6th Cir. 2020) (holding that the "Troy Sign Ordinance imposed a prior restraint"); **(2)** is an unconstitutional content-based restriction on Plaintiffs' speech, *see id.* at 707-08 (holding that the ordinance was content based); *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015) (same); and **(3)** is not a neutral and generally applicable law in violation of Plaintiffs' right to free exercise of religion, *see Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021) ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."). The Township makes no effort to satisfy its burden under strict scrutiny. And the reason is obvious: it cannot satisfy the "most demanding test known to constitutional law." *City of Boerne v. Flores*,

521 U.S. 507, 534 (1997). In fact, Defendants have waived any such arguments by failing to advance them in their response.

CONCLUSION

The Court should *immediately* issue the injunction, thereby returning CHI's private property to the *status quo ante* and permitting the return of the religious displays and worship, as required by the First Amendment.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise

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Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 27(d), the foregoing is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 2,596 words, excluding those accompanying documents identified in Fed. R. App. P. 27(a)(2)(B).

AMERICAN FREEDOM LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise

Robert J. Muise, Esq.

EXHIBIT 1

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CATHOLIC HEALTHCARE
INTERNATIONAL, INC. and
JERE PALAZZOLO,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Case No. 21-2987

DECLARATION OF ROBERT J. MUISE

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

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

2. I have personal knowledge of the filings made in the case of *Genoa Charter Township v. Catholic Healthcare International, Inc.*, in the 44th Circuit Court for Livingston County, Michigan (Case No. 21-31255-CZ). I am representing Catholic Healthcare International, Inc. (“CHI”) in this state court case.

3. Attached to this declaration as Exhibit A is a true and correct copy of a stipulated Consent Order that was signed by the parties and submitted to the 44th

Circuit Court for Livingston County on October 12, 2021. As set forth in this stipulation: “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. As noted, [CHI] reserves all rights, claims, and defenses, specifically including those set forth in the current federal litigation in *Catholic Healthcare International v. Genoa Township*, Case No. 5:21-cv-11303-JEL-DRG, which includes the reserved right to construct the St. Pio adoration chapel on [CHI’s] property should [CHI] ultimately prevail in the federal litigation.”

4. The approval process for a special land use application set forth above is costly, the process will take many months, and there is no guarantee that the Genoa Township Board will ultimately approve the application.

5. Attached to this declaration as Exhibit B is a true and correct copy of an email from Attorney T. Joseph Seward, counsel for Genoa Township, authorizing CHI’s counsel to sign the “stip and order,” which is attached here as Exhibit A, on his behalf.

6. Attached to this declaration as Exhibit C is a true and correct copy of

an email from the 44th Circuit Court Clerk's Office confirming receipt/filing of the Consent Order attached here as Exhibit A. As of this filing, the circuit court judge has yet to sign the Consent Order. Nonetheless, the parties stipulated to its content, and this Court can take judicial notice of this filing pursuant to Rule 201 of the Federal Rules of Evidence.

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

Executed on the 18th day of October 2021.

/s/ Robert J. Muise
Robert J. Muise

EXHIBIT A

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

GENOA CHARTER TOWNSHIP

Plaintiffs,

Case No. 21-31255-CZ

v.

Hon. L. Suzanne Geddis

**CATHOLIC HEALTHCARE
INTERNATIONAL, INC.**

Defendant.

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CONSENT ORDER FOR ADJOURNMENT AND CONTINUATION OF TRO

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the ___ day of _____, 2021

THIS MATTER HAVING come before the Court upon the hearing on the Court's Order to Show Cause why preliminary injunction shall not issue and Defendant's Motion to Dissolve TRO, and upon the consent and stipulation of the parties, and the Court being otherwise duly advised in the premises:

IT IS HEREBY ORDERED:

- A. The hearing upon the Order to Show Cause and Defendant's Motion to Dissolve the TRO scheduled for and commenced on Tuesday, September 28, 2021, was adjourned to permit the parties to discuss a possible resolution of this case;
- B. The parties were ordered to advise the Court no later than Tuesday, October 12, 2021, whether a resolution to this case has been reached;
- C. The parties hereby advise the Court that Defendant 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 Defendant'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. As noted, Defendant reserves all rights, claims, and defenses, specifically including those set forth in the current federal litigation in *Catholic Healthcare International v. Genoa Township*, Case No. 5:21-cv-11303-JEL-DRG, which includes the reserved right to construct the St. Pio adoration chapel on Defendant's property should Defendant ultimately prevail in the federal litigation.
- D. The parties further advise that Defendant has filed a motion for an injunction pending appeal in the U.S. Court of Appeals for the Sixth Circuit, challenging the constitutionality of Genoa Township's enforcement of its zoning ordinance against Defendant under federal law, including the U.S. Constitution. The Sixth Circuit has expedited the briefing on Defendant's motion.

E. The Court's *ex-parte* Temporary Restraining Order issued September 20, 2021 @ 3:55 P.M., SHALL REMAIN IN EFFECT until further order of the Court or upon order from the Sixth Circuit.

IT IS SO ORDERED.

THIS IS NOT A FINAL ORDER AND DOES NOT RESOLVE THE LAST PENDING CLAIM OR CLOSE THE CASE

Hon. L. Suzanne Geddis
Circuit Court Judge

Date: _____

I stipulate to entry of the above order:

/s/ T. Joseph Seward w/permission 

SEWARD HENDERSON PLLC
T. Joseph Seward (P35095)
David D. Burress (P77525)
Attorneys for Plaintiff

/s/ 

AMERICAN FREEDOM LAW CENTER
Robert J. Muise (P62849)
Attorneys for Defendant

EXHIBIT B

From: [Joe Seward](#)
To: [Robert Muise - AFLC](#); [David Burress](#)
Cc: [David Burress](#); dyerushalmi@americanfreedomlawcenter.org; "Kate Oliveri"; [Edward Tucker](#)
Subject: RE: Genoa Township v CHI - For Settlement Purposes
Date: Tuesday, October 12, 2021 10:50:08 AM
Attachments: [image001.png](#)

Rob go ahead and sign my name to the stip and order. As to getting you on the November meeting, that is out of my control.



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EXHIBIT C

From: [WC Clerks](#)
To: [Robert Muise - AFLC](#)
Subject: RE: [EXT] Genoa Twp v. CHI, Case No. 21-31255-CZ - Consent Order for Adjournment and Continuation of TRO
Date: Tuesday, October 12, 2021 11:56:55 AM

Received, thank you !

Thank you,

44th Circuit Court Clerk's Office
204 S. Highlander Way, Suite 4
Howell, MI 48843
517-546-9816
Fax 517-548-4219

From: Robert Muise - AFLC <rmuise@americanfreedomlawcenter.org>
Sent: Tuesday, October 12, 2021 11:56 AM
To: Celeste Brooks <CBrooks@livgov.com>; WC Clerks <wclerks@livgov.com>
Cc: 'David Burress' <dburress@sewardhenderson.com>; koliveri@americanfreedomlawcenter.org;
'Joe Seward' <jseward@sewardhenderson.com>
Subject: [EXT] Genoa Twp v. CHI, Case No. 21-31255-CZ - Consent Order for Adjournment and Continuation of TRO

"The e-mail below is from an external source. Please do not open attachments or click links from an unknown or suspicious origin."

Attached please find a proposed consent order for submission to the court. Thank you.

Robert J. Muise*

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