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. 5:21−cv−11303−JEL−DRG Hon. Judith E. Levy Magistrate Judge David R. Grand

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION

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Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Catholic Healthcare International, Inc. ("CHI") and Jere Palazzolo (collectively referred to as "Plaintiffs"), by and through undersigned counsel, hereby move this Court for an emergency Temporary Restraining Order ("TRO") and preliminary injunction to immediately enjoin the enforcement of the Genoa Charter Township Zoning Ordinance as applied to Plaintiffs' religious displays and assemblies on the CHI Property.[1] Emergency relief is necessary because Defendants are seeking to immediately remove all of the religious displays on the CHI Property and to prevent all religious gatherings on this property, specifically including the modest religious gathering scheduled for **Thursday, September 23, 2021**.

At approximately 6:28 p.m. on Friday, September 17, 2021, Defendants' counsel, David Buress, sent Plaintiffs' counsel an email with several attachments, including a "Verified Complaint" and proposed *ex parte* TRO request, that, according to Defendants' counsel, were filed in the 44th Circuit Court for Livingston County that same day. (Muise Decl. ¶ 2, Ex. A, Ex. 1). In these papers, Defendants are asking the county circuit court to order Plaintiffs "to remove a 12-foot-tall stone

[1] Plaintiffs filed this action on June 2, 2021. (Compl., Doc. No. 1). They filed a First Amended Complaint on July 14, 2021. (First Am. Compl., Doc. No. 14 ["FAC"]). A central issue of this ongoing litigation is the constitutionality of the Township's Zoning Ordinance, which includes its Sign Ordinance, facially and as applied to restrict Plaintiffs' religious exercise and religious expression on the CHI Property. (*See, e.g., id.* at ¶¶ 141-59; Prayer for Relief, ¶ D).

structure [the image of Santa Maria delle Grazie], altar, and 14 stations of the cross housing structures that have been installed at the [CHI] Property." (*Id*. ¶ 2). Defendants are further seeking to prevent Plaintiffs from holding religious worship on their property by requesting that the circuit court prohibit CHI "from shuttling attendees onto the Property," alleging, *inter alia*, that a Livingston County (not Township) permit (which Plaintiffs have never employed) "forbids" this. (*Id*. ¶ 3). This is a bad faith collateral attack that smacks of forum shopping to avoid the ongoing federal litigation before this Court. Indeed, it is an undisguised frontal attack on religious freedom.

As this Court knows from prior filings (and as set forth more fully in the accompanying declarations), these religious symbols have been on display on the CHI Property since September 2020, and Plaintiffs and others have been gathering on this property for religious worship at least since then. When the Township denied Plaintiffs' request for special land use to construct a modest adoration chapel (St. Pio Chapel) and to fully develop the proposed prayer campus on the CHI Property, Plaintiffs filed this lawsuit. At issue in this current action is the constitutionality of the Township's Zoning Ordinance, which includes its Sign Ordinance, facially and as applied to restrict Plaintiffs' religious expression. Additionally, a central claim of this lawsuit is that the Township's denial of Plaintiffs' special land use application to construct the modest St. Pio Chapel violated the Religious Land Use and

Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. ("RLUIPA"). (FAC ¶¶ 130-39). Plaintiffs have a substantial likelihood of succeeding on their claims. (*See* Pls.' Resp. in Opp'n to Defs.' Mot. to Dismiss [Doc. No. 20]).

Through Plaintiffs' application process, the Township knew many months ago about the proposed (and modest) religious event scheduled for September 23, 2021, on the CHI Property. Indeed, this special (and yearly) event was discussed in Plaintiffs' application submitted to the Township on or about February 16, 2021. (*See* Palazzolo Decl., ¶ 57 [Ex. 2, Doc. No. 14-3, Pg. ID 276]). Yet, in what can only be described as an extraordinary act of bad faith, Defendants filed an *ex parte* request in state court to stop this event and to remove the religious displays, and they notified Plaintiffs' counsel of this filing after COB on the Friday less than a week before the event. In its circuit court filing, Defendants correctly stated that "there is another pending civil action arising out of the transaction or occurrence alleged in the complaint, in the United States District Court for the Eastern District of Michigan, under the name *Catholic Healthcare International, Inc. v. Genoa Township*, Case No. 21-cv-11303." However, Defendants further stated that this federal case "does not prevent [the Township] from enforcing its ordinances [which Plaintiffs demonstrate here are unconstitutional facially and as applied] in this court." (*See* Muise Decl., Ex. A ["Verified Complaint"], Ex. 1). Thus, to halt this current and direct assault on Plaintiffs' First Amendment freedoms and to prevent

irreparable harm caused by Defendants' actions, the requested injunction is appropriate and necessary. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*); *Bonnell v. Lorenzo,* 241 F.3d 800, 809 (6th Cir. 2001) ("[W]hen reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.").

Up to this point, Defendants have only threatened to take unconstitutional action such as this. They have never taken the next extraordinary step of actually halting Plaintiffs' religious expression and exercise beyond unlawfully denying Plaintiffs' special land use application. Consequently, until now, preliminary injunctive relief was not necessary. But the battleground has changed substantially. And Defendants apparently concede that a request for injunctive relief in this Court was and is a distinct possibility, stating in their "Verified Complaint" that "CHI did not request an injunction from the United States District Court, nor has the District Court issued any kind of order that would prohibit Genoa Township from enforcing

its zoning ordinance." (Muise Decl., Ex. A, "Verified Complaint" ¶ 49, Ex. 1). With all due respect, it is now time for that order from this Court.

Pursuant to E.D. Mich. LR 7.1, on September 18, 2021, at approximately 11:35 a.m., Plaintiffs' counsel, Robert J. Muise, sent an email to Defendants' counsel, T. Joseph Seward and David D. Buress, requesting concurrence in the relief sought by this motion. Given the exigency of the matter, Plaintiffs' counsel requested a response by noon on September 19, 2021. Based on a requested read receipt notice, Attorney Seward read the email at 12:42 p.m. on Saturday, September 18, 2021. (Muise Decl., ¶ 3, Ex. B, Ex. 1). As of the filing of this motion, Defendants' counsel has not responded to Plaintiffs' request. However, in light of the ongoing litigation in this Court and Defendants' newly filed collateral attack in a county circuit court, it is quite apparent that Defendants oppose this motion. Moreover, Defendants' counsel will immediately receive a copy, and thus notice, of this motion upon its filing via ECF.

For the reasons set forth in the accompanying brief, Plaintiffs have demonstrated a likelihood of success on their First Amendment claims, that they will suffer irreparable harm absent the requested injunction, that granting the injunction will not cause substantial harm to others, and that granting the injunction is in the public interest.

Accordingly, Plaintiffs request that the Court immediately issue the requested TRO to permit the September 23, 2021, religious assembly with CHI's religious symbols (altar, Stations of the Cross, and image of Santa Maria delle Grazie), and then set an expedited schedule for briefing on the preliminary injunction. Time is of the essence.

Respectfully submitted,

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PLAINTIFFS' BRIEF IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION

ISSUE PRESENTED

Whether the enforcement of the Genoa Township Zoning Ordinance, which includes its Sign Ordinance, facially and as applied to restrict Plaintiffs' expressive religious activity on CHI's private property deprives Plaintiffs of their rights protected by the First Amendment and RLUIPA, thereby causing irreparable harm and warranting the requested injunctive relief.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

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

Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001)

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

Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474 (6th Cir. 1995)

Elrod v. Burns, 427 U.S. 347 (1976)

G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071 (6th Cir. 1994)

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)

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

Newsome v. Norris, 888 F.2d 371 (6th Cir. 1989)

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

42 U.S.C. § 2000cc *et seq*

Fed. R. Civ. P. 65

INTRODUCTION

In an extraordinary move, the Township is asking the Livingston County Circuit Court to issue an *ex parte* order requiring Plaintiffs to cleanse the CHI Property of religious symbols (the small altar, Stations of the Cross, and the image of Santa Maria delle Grazie) and prohibiting Plaintiffs from engaging in religious worship and assembly on CHI's private property, including prohibiting a special event scheduled for this Thursday, September 23, 2021—an event the Township has been aware of since at least last February. The basis for Defendants' request is the application and enforcement of the Township's Zoning Ordinance. This Court should immediately enjoin this unlawful assault on Plaintiffs' religious expression, thereby preserving the *status quo*, preventing irreparable harm to Plaintiffs, and permitting Plaintiffs to engage in their peaceful religious worship and assembly at the CHI Property on September 23, 2021, and through the course of this litigation.

STATEMENT OF FACTS

Plaintiff Catholic Healthcare International, Inc. ("CHI") is a nonprofit corporation that is formally recognized as a private association of the faithful by the Catholic Diocese of Lansing, Michigan. The activities and work of CHI, including its proposed development and use of its property located within Genoa Township (CHI Property) as a prayer campus, are religious exercise, religious assembly, and religious expression. (Palazzolo Decl. ¶¶ 2-4, 6-8, Ex. 2).

Plaintiff Jere Palazzolo is the Chairman, President, and Director of CHI. He engages in religious exercise, religious assembly, and religious expression through the activities and work of CHI. This includes praying, worshiping, and assembling on the CHI Property for religious purposes. As the head of CHI, Plaintiff Palazzolo has the authority to direct and control the use of the CHI Property. (Palazzolo Decl. ¶¶ 1, 5, 10, Ex. 2).

CHI acquired 40 acres of property (CHI Property) located within Genoa Township from the Catholic Diocese of Lansing. The diocese originally acquired the property with the reasonable expectation of building a church on it since places of religious worship are allowed on this property by the Zoning Ordinance.[2] 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"). (Palazzolo Decl. ¶¶ 9, 11-14, 16-27, Ex. 2).

The current entrance to the CHI Property is the same entrance that has been used by CHI since it acquired the property in October 2020, and it was the entrance

[2] 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. (Palazzolo Decl. ¶ 15, Ex. 2).

used prior to that. CHI applied for a permit with the Livingston County Road Commission to make some changes or modifications to this entrance. However, CHI has not taken any action on this permit. That is, CHI has not constructed a field driveway. The entrance, which the Township has been aware of since well before CHI owned the property, has not changed nor has it been modified. Indeed, Township officials have used this entrance to enter the property to conduct inspections and have never complained. (Palazzolo Decl. ¶ 90, Ex. 2; O'Reilly Decl. ¶ 31, Ex. 3).

The Stations of the Cross, the image of Santa Maria delle Grazie, and a small altar have been displayed on the property since September 2020, and they are used for prayer and worship. Neither wind nor rain nor any other factors have caused any safety issues whatsoever since the displays were erected. Time and experience refute any claim that the displays are unsafe. Moreover, the displays are not erected along any public right of way or thoroughfare. They cannot be seen from the road; they are located in a wooded, isolated area. (Palazzolo Decl. ¶¶ 27, 78, Ex. 2; O'Reilly Decl. ¶¶ 14-15, Ex.3).

The displays do not undermine any of the Township's stated objectives for restricting signage. The displays are not "distracting to motorists and pedestrians." They do not "create[] a traffic hazard" nor do they "reduce[] the effectiveness of signs needed to direct and warn the public." They do not "overwhelm the senses,

impair sightlines and vistas, create confusion, reduce desired uniform traffic flow, create potential for accidents, affect the tranquility of residential areas, impair aesthetics [or] degrade the quality of a community." (*See* Muise Decl., Ex. C [Sign Standards], Ex. 1). As noted, the religious displays are not placed within the public street right-of-way—they are not even visible from the road—and thus create no visibility or public safety issues whatsoever. And they create no visual blight. (Palazzolo Decl. ¶¶ 81-84, Ex. 2).

In fact, the property is so wooded that the trees and their overhanging branches surrounding the image of Santa Maria delle Grazie create a "grotto" effect. Of course, there is no natural or manmade cave on the CHI Property. An actual "grotto" is a small cave or an artificial recess or structure made to resemble a natural cave, and they ("grottoes") are often used as part of a Catholic shrine. In fact, the word "grotto" has become used almost exclusively to refer to Catholic shrines built into a rock formation. Consequently, the natural area created by the trees surrounding the image is often referred to as a "grotto" by CHI and Plaintiff Palazzolo. (Palazzolo Decl. ¶ 25, Ex. 2).

On or about October 9, 2020, the Township, through Defendant Sharon Stone, ordered Plaintiffs to remove the Stations of the Cross and the image of Santa Maria delle Grazie, claiming that by displaying these religious symbols and using them for religious worship, Plaintiffs have now converted the secluded, wooded area where

they are displayed into a "church or temple" under § 25.02 of the Zoning Ordinance, which defines "church or temple" as "any structure *wherein* persons regularly assemble for religious activity." To comply with Defendants' (unlawful) demand, Plaintiffs would have to undertake an extensive, costly (in excess of $20,000), and burdensome zoning process. Defendants' determination was factually inaccurate. There is no "structure" on the CHI Property "wherein" regular religious assemblies take place. Nor are any of these religious symbols "accessory structures" requiring Township approval. Consequently, Plaintiffs rejected the demand on the factual inaccuracies and constitutional grounds. (Palazzolo Decl. ¶¶ 29-32, Ex. 2).

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 proposed 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. (Palazzolo Decl. ¶¶ 43, 44, Ex. 2).

The proposed 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. (Palazzolo Decl. ¶ 45, Ex. 2).

The proposed 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. (Palazzolo Decl. ¶ 46, Ex. 2).

The modest size of the chapel and the limited parking (39 spaces) will necessarily limit the number of people who visit the religious property on a regular basis. (Palazzolo Decl. ¶ 47, Ex. 2).

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. (Palazzolo Decl. ¶¶ 35-40, Ex. 2).

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. 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. Defendants' engineering consultants did not require a traffic impact study. The Livingston County Road Commission did not require a traffic impact study. And the Planning Commission did not require a traffic impact study. (Palazzolo Decl. ¶¶ 48-53, Ex. 2).

As the evidence shows, Chilson Road accommodated over 5,000 vehicles a day prior to the Latson Road interchange being constructed. After the Latson Road interchange construction, traffic on Chilson Road decreased significantly to approximately 2,500 vehicles a day. Thus, Chilson Road is able to adequately accommodate the proposed development. (O'Reilly Decl. ¶¶ 26-27, Ex. 3).

Plaintiffs' application 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." (Palazzolo Decl. ¶¶ 59-60, Ex. 2). Nonetheless, the Township unlawfully denied Plaintiffs' application.[3] (Palazzolo Decl. ¶¶ 61-67, Ex. 2).

As noted in Plaintiffs' application, there are only *two* events 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. To accommodate this, Plaintiffs proposed using the greenspace on their property for overflow parking. (*See* Palazzolo Decl., ¶ 57 [Ex. 2, Doc. No. 14-3, Pg. ID 276]). 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 (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, 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.[4] Plaintiffs'

[3] 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.

[4] *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."). (Muise Decl. ¶ 5, Ex. D, Ex. 1).

religious assembly scheduled for September 23, 2021, will have far less people attending. (*See* O'Reilly Decl., ¶¶ 20-24, Ex. 3).

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." (Palazzolo Decl., ¶ 57 [Ex. 2, Doc. No. 14-3, Pg. ID 276]). Defendants rejected these measures and denied the application. Indeed, they are again rejecting this least restrictive alternative, which will mitigate any traffic concerns.

Following the Township's unlawful denial of Plaintiffs' special land use application, the Township, via a letter, demanded once again that Plaintiffs remove the Stations of the Cross and the display of the image of Santa Maria delle Grazie from the CHI Property. In other words, Defendants demanded that Plaintiffs cleanse the CHI Property of anything religious. In this letter, the Township, through Defendant Stone, stated, *inter alia*, that the display of the image of Santa Maria delle Grazie is a "structure/grotto sign [that] does not have a permit and will also need to be removed." Defendants consider this image to be an "accessory structure," requiring special land use approval (a costly and burdensome process that Plaintiffs had just completed, resulting in the Township denying the application). (Palazzolo Decl. ¶¶ 72-76, Ex. 2).

In their filings in the Livingston County Circuit Court, the Township affirms

its position that the wooded area of the CHI Property (the "grotto") "is considered a 'church or temple' because a grotto is typically a structure that is erected where people worship." (Muise Decl., Ex. A ["Verified Complaint" ¶ 24] Ex. 1). Therefore, according to the Township, the small altar, the Stations of the Cross, and the image of Santa Maria delle Grazie are "accessory structure[s] because they are usually incidental to a church." (*Id*.). But of course, the wooded area, which the Township asserts is a "church or temple" because it is a place where people worship, is not *physically a structure* that is a "church or temple." Thus, per the Township, these religious displays are now "accessory structures without a principal structure." (*Id*., ¶ 70). And the Township advances this argument after it unlawfully denied Plaintiffs' request to construct the modest "principal structure" (the St. Pio Chapel)—a denial that is a central aspect of Plaintiffs' challenge in this lawsuit.[5] The Township thus further asserts that Plaintiffs' "proposed use of the Property for an organized gathering on September 23, 2021, is a violation of the Genoa Township Zoning Ordinance." (*Id*., ¶ 79). Consequently, the Township is seeking the immediate removal of the small altar, Stations of the Cross, and the image of Santa

[5] Thus, per the Township, the "necessary permits, including land use permits and building permits for the structures" (Muise Decl., Ex. A ["Verified Complaint" ¶ A], Ex. 1) necessarily require the approval of Plaintiffs' special land use application to construct the St. Pio Chapel, which, of course, the Township unlawfully denied. Thus, because of this denial, the Township is seeking to cleanse the CHI Property of any religious symbols, and it is seeking to prevent Plaintiffs from using the CHI Property for religious worship.

Maria delle Grazie, and it is seeking to prevent Plaintiffs from using the CHI Property for religious worship. And more specifically, it is seeking to prevent the religious gathering scheduled for September 23, 2021. (*See Id*.). An immediate order from this Court halting Defendants' attack on Plaintiffs' fundamental right to religious worship is necessary, and it is warranted.

ARGUMENT

I. Standard for Issuing a TRO/Preliminary Injunction.

"The standard for issuing a temporary restraining order is logically the same as for a preliminary injunction with emphasis, however, on irreparable harm given that the purpose of a temporary restraining order is to maintain the status quo." *Reid v. Hood*, No. 1:10CV2842, 2011 U.S. Dist. LEXIS 7631, at *4-5 (N.D. Ohio Jan. 26, 2011) (citing *Motor Vehicle Bd. of Cal. v. Orrin W. Fox, et al*., 434 U.S. 1345, 1347 n. 2 (1977)).

The standard for issuing a preliminary injunction is well established:

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

Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (same). Typically, the reviewing court will balance these factors, and no single factor will necessarily be

determinative of whether or not to grant the injunction. *Connection Distributing Co.*, 154 F.3d at 288. However, because this case deals with a violation of Plaintiffs' First Amendment rights, the crucial and often dispositive factor is whether Plaintiffs are likely to prevail on the merits. *Id*.

II. Plaintiffs Satisfy the Standards for Granting the Requested Injunctive Relief.

A. Plaintiffs' Likelihood of Success on the Merits.

1. Freedom of Speech Claim.

"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. *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. Defendants seek to restrict Plaintiffs' right to freedom of

speech through the enforcement of its Zoning Ordinance, including its Sign Ordinance, which is part of the zoning regulation.

The Township's enforcement of its Zoning Ordinance to restrict Plaintiffs' right to freedom of speech triggers First Amendment protection. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). Moreover, the *ordinance operates as a prior restraint on speech* as it requires Plaintiffs to obtain a permit before being allowed to engage in their religious expression. *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 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);[6] "Signs required by law"; and "Flags of any country, state, municipality, university, college or school." (Muise Decl., Ex. C [Sign Standards, § 16.02.20], Ex. 1]). 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." (*Id*. § 16.03.02); *see also City of Ladue v. Gilleo,* 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place.").

Moreover, because Plaintiffs' "signs" are for the purpose of religious worship, Defendants are imposing upon Plaintiffs the additional burden of having to go through an extensive, costly (in excess of $20,000), and burdensome zoning process—treating the displays as a "church or temple" or an "accessory structure." 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* O'Reilly Decl. ¶¶ 5-6, Ex. 3), Plaintiffs' religious displays have now converted the wooded area of the CHI Property into a "church or temple," thereby requiring special

[6] Under this exemption, Plaintiffs could assemble and disassemble the religious displays every 75 days. Why isn't the St. Pio Feast Day Celebration a recognized holiday, thus permitting Plaintiffs' displays under this exemption? (*See* O'Reilly Decl. ¶ 24, Ex. 3). This further illustrates the fact that the ordinance is content based and unconstitutional.

and costly approvals. Defendants reaffirmed this position following the denial of Plaintiffs' application for special land use, and they continue to assert this position in their latest circuit court filing.

In the final analysis, 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). It cannot satisfy strict scrutiny. *See infra*.

As noted previously, Plaintiffs' religious displays satisfy all of the "interests" asserted by the Township for regulating signage. Thus, Defendants do not have a compelling interest in ordering the removal of these symbols from the CHI Property or imposing additional costs and burdens for displaying them. And even if the Zoning Ordinance and its application to Plaintiffs' speech were content neutral, the restrictions "still must be narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). And "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, *not simply that the chosen route is easier*." *Id.* at 495 (emphasis added). 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. Defendants' actions violate Plaintiffs' rights protected by the Free Speech Clause.

2. Free Exercise Claim.[7]

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

[7] Plaintiffs' right to free exercise of religion in the land use context is also protected by federal statutory law. 42 U.S.C. § 2000cc *et seq*. Under RLUIPA, "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . unless the government 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). Here, the Township is implementing its Zoning Ordinance to deny Plaintiffs the right to use the CHI Property for religious purposes, thereby placing a substantial burden on Plaintiffs' religious exercise. This burden is not in furtherance of a compelling governmental interest nor the least restrictive means of furthering that governmental interest. *See also Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2431 (2021) (Gorsuch, J., concurring) ("*Fulton* makes clear that the County and courts below misapprehended RLUIPA's demands."); (*see also* Pls.' Resp. in Opp'n to Defs.' Mot. to Dismiss at 19-39 [Doc. No. 20]).

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 violate the Free Exercise Clause.

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

Plaintiffs want to assemble on the CHI Property for the purpose of prayer and religious worship. Defendants are imposing upon Plaintiffs costly and unreasonable burdens for their displays used for religious worship (and because they are used for religious worship) without a compelling reason for doing so. Moreover, the fact that Defendants prohibit Plaintiffs' religious park "while permitting [a] secular [park and other secular] conduct that undermines the government's asserted interests in a

similar way" is fatal for Defendants. The challenged official action is not generally applicable, and it fails 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."). Thus, the question is not whether the Township has a compelling interest in enforcing its Zoning Ordinance generally, but whether it has such an interest in enforcing it against Plaintiffs under the circumstances of this case—circumstances where secular exemptions abound.

For example, many people within the Township have patio tables or picnic tables that are the same size or larger than the small altar that is located on the CHI Property. There is no permit requirement to have these patio or picnic tables on private property. Birdhouses larger than the Stations of the Cross are permitted in

the Township without the need for a permit. At times, more people will attend a graduation party, a football party, or other permitted secular events in the Township, including such events held on property zoned CE, than will visit the CHI Property during the September 23, 2021 special event. Many large-scale events are held at private residences located near the CHI Property. For example, on September 18, 2021, a "Family Fun Day" was held on property located near the CHI Property. There were approximately 100 people or more that attended this event, and there were numerous picnic tables. The Township did not require any special permits for this event, which was held on private property. In fact, secular events with up to 1,000 people 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. (O'Reilly Decl. ¶¶ 8, 19-23, Ex. 3).

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. It is supported by more than 200 parking spaces. (O'Reilly Decl. ¶ 4, Ex. 3). 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. (Muise Decl., Ex. E [Zoning Ordinance, § 3.03], Ex. 1). However, Plaintiffs' religious "park" was denied by the Township, and because it was denied, the Township is now seeking to remove all of the religious symbols from the CHI Property (because, according to the Township, they are "being maintained on the Property without an accompanying principal structure"), and the Township is seeking to prevent the property from being used for religious gatherings and worship. As stated by 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' restrictions do not satisfy the most demanding test known to constitutional law.

B. Irreparable Harm to Plaintiffs.

Plaintiffs will be irreparably harmed without the TRO/preliminary injunction. Defendants' restrictions on Plaintiffs' expressive religious activity deprive Plaintiffs of their fundamental rights protected by the First Amendment. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Connection Distributing Co.*, 154 F.3d at 288. And this injury is sufficient to justify the requested injunctive relief. *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*); *Bonnell v. Lorenzo,* 241 F.3d 800, 809 (6th Cir. 2001) ("[W]hen reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.").

C. Harm to Others.

In this case, the likelihood of harm to Plaintiffs is substantial because Plaintiffs intend only to exercise their right to religious worship on their private property, and the deprivation of this right, even for minimal periods, constitutes irreparable injury. *See supra*.

On the other hand, if Defendants are restrained from unlawfully enforcing their Zoning Ordinance, they will suffer no harm because the exercise of constitutionally protected rights can never harm any of Defendants' or others' legitimate interests. *See Connection Distributing Co.*, 154 F. 3d at 288.

Moreover, as noted previously, there has been no harm caused by the display of Plaintiffs' religious symbols, which have been displayed on the CHI Property

without incident since September 2020, nor has there been any harm caused by Plaintiffs' peaceful religious assemblies. Indeed, Defendants have complained about "60-80 cars" parked along Chilson Road during one event, but when Plaintiffs seek to avoid any such (false) claims in the future by shuttling people to the property, Defendants now assert that Plaintiffs' are not permitted to do that either.

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. . . ." *Connection Distribution Co.*, 154 F.3d at 288. For if Plaintiffs show that their constitutional rights have been violated (which they have shown here), then the harm to others is inconsequential.

D. The Public Interest.

The impact of the TRO/preliminary injunction on the public interest turns in large part on whether Defendants violated Plaintiffs' rights protected by the First Amendment. As the Sixth Circuit noted, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

As set forth above, the enforcement of the Township's Zoning Ordinance to restrict Plaintiffs' religious expression on the CHI Property violates the First Amendment. It is in the public interest to issue the TRO/preliminary injunction.

CONCLUSION

Plaintiffs request that the Court immediately issue the requested injunction to allow the display of the religious symbols on the CHI Property—symbols which have been displayed without any harm whatsoever since September 2020—and to permit the September 23, 2021, religious assembly. This injunction is necessary to avoid irreparable harm by allowing Plaintiffs to continue to use the CHI Property to exercise their fundamental right to religious worship.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

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