No. _____

In the Supreme Court of the United States

KAMAL ANWIYA YOUKHANNA; WAFA CATCHO; MAREY JABBO; DEBI RRASI; JEFFREY NORGROVE; MEGAN MCHUGH,

Petitioners,

v.

CITY OF STERLING HEIGHTS; MICHAEL C. TAYLOR, individually and in his official capacity as Mayor, City of Sterling Heights, Michigan,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a city council rule prohibiting private citizens from making disparaging comments about religion when speaking during the public comment period of a council meeting convened for the purpose of deciding whether to permit the construction of a mosque via a consent decree violate the First Amendment?

2. Can a city council enter into a consent decree in federal court that fails to comply with local and state zoning laws when the consent decree was not necessary to rectify the violation of federal law?

PARTIES TO THE PROCEEDING

Petitioners are Kamal Anwiya Youkhanna, Wafa Catcho, Marey Jabbo, Debi Rrasi, Jeffrey Norgrove, and Megan McHugh (collectively referred to as "Petitioners").

Respondents are the City of Sterling Heights, Michigan and Michael C. Taylor, individually and in his official capacity as Mayor, City of Sterling Heights, Michigan ("City") (collectively referred to as "Respondents").

STATEMENT OF RELATED PROCEEDINGS

Am. Islamic Cmty. Ctr., Inc. v. City of Sterling Heights, No. 1:16-cv-12920 (E.D. Mich. filed Aug. 10, 2016)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

RULE

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals appears at App. 1 and is reported at 934 F.3d 508. The opinion of the district court appears at App. 29 and is reported at 332 F. Supp. 3d 1058.

JURISDICTION

The opinion of the court of appeals affirming the judgment of the district court was entered on August 14, 2019. App. 1. A petition for rehearing en banc was denied on September 10, 2019. App. 53. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

A. AICC Zoning Application.

On July 8, 2015, the American Islamic Community Center ("AICC") submitted an Application for Planning Commission Approval (hereinafter "AICC application") for a Special Approval Land Use in which it requested permission to build a "Religious Community Center" in a largely Chaldean Christian neighborhood located on Fifteen Mile Road in the City. (R.67-3, Pg. ID 1637-38). The location for this structure is zoned R-60, which is

residential. (*Id*.). The proposed religious community center is approximately 28,000 square feet (R.67-4, Pg. ID 1649), with a dome and spires that exceed 60 feet in height. (R.67-5, Pg. ID 1657). It will be located on 4.3 acres. (R.67-4, Pg. ID 1649). While the building is 28,000 square feet, only 3,024 square feet is designated as "worship space." Consequently, only approximately one-eighth of the building is designated for religious worship. (*Id*., Pg. ID 1651; R.67-6, Pg. ID 1660-76).

The City's zoning regulations permit the construction of "[c]hurches, synagogues, mosques and places of group worship" in areas zoned residential. (ZO at § 3.02, R.67-7, Pg. ID 1679). "Such facilities may include *related* community centers."[1] (*Id*. at § 3.02A4 [emphasis added]). However, a community center, as a principal use, is not permitted in a residential area; it is permitted in the planned office district.[2] (R.67-4, Pg. ID 1646).

AICC is currently worshipping at a Madison Heights, Michigan location that advertises a broad range of activities beyond those presented during its application process. (R.67-8, Pg. ID 1702 [citing daily prayer, Friday prayer service and Ramadan services]). In fact, AICC was looking for new space for the purpose of offering "educational activities, youth activities, and

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[1] AICC has "approximately 100 members" (R.9-2, Pg ID 87), which begs the question: why build a 28,000 square-foot structure?

[2] While *factually* the building is more like a "community center" with a small worship space, for purposes of this petition, it will be referred to as a "mosque."

special events" that the existing space would not accommodate.[3] (R.9-4, Pg. ID 256).

B. Local and State Zoning Regulations.

For the City to approve a special approval land use, the proposed construction must comply with *all* of the "specific" and "general" standards under the Zoning Ordinance, (R.67-4, Pg. ID 1647), as well as the Michigan Zoning Enabling Act ("MZEA").

Section 3.02 of the Zoning Ordinance addresses special approval land uses, such as "[c]hurches, synagogues, mosques and places of group worship," which "may be permitted by the Planning Commission subject to the *general* standards of section 25.02 and the *specific* standards imposed for each use." (ZO at § 3.02 [emphasis added], R.67-7, Pg. ID 1679). The maximum height allowed for a building located within a residentially-zoned district is 30 feet. (*Id.* at § 3.04, Pg. ID 1688-90). However, a place of worship *may* exceed this height so long as it meets other requirements set forth in the Zoning Ordinance. (R.67-4, Pg. ID 1648 [noting that this is a *permissive* requirement]; ZO at § 3.02A1, R.67-7, Pg. ID 1679).

The "authority" for approving a special land use is set forth in § 25.01 of the Zoning Ordinance, which states, in relevant part, that the "Planning Commission shall have the power to approve or disapprove all special approval land uses, except that the City Council

[3] Per AICC, it "offers a variety of services to the local Muslim community." (R.27, Pg. ID 1076).

shall be the *approving authority*[4] with respect to special approval land uses which have been *approved* by the City Council . . . 4. As a development pursuant to a consent judgment approved by the City Council." (ZO at § 25.01, R.67-7, Pg. ID 1691). When considering "all applications for special approval land use except those *reviewed and approved by the City Council as provided in the preceding sentence*, the Planning Commission shall *review* each case individually as to its appropriateness and *consider*" the applicable standards. (*Id*. at § 25.01B, Pg. ID 1691). And "[w]hen the City Council is the reviewing authority with respect to a special approval land use, it . . . *shall consider the same standards as the Planning Commission*." (*Id*. at § 25.01C [emphasis added], Pg. ID 1692). Thus, when the City Council is approving a special approval land use development pursuant to a consent judgment, as in this case, it must ensure compliance with the same regulations considered by the Planning Commission (unless federal law requires otherwise).[5]

The "general standards" applicable to *all* special approval land uses are set forth in § 25.02. And each

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[4] In order to "approve" an application for special land use, the requested construction must comply with the zoning regulations. Thus, in order to "approve" the application, there must be a "review" to ensure such compliance. "Approval" necessarily presupposes a "review."

[5] The City's position revealed during discovery and accepted by the district court is that when a special approval land use is approved as part of a consent decree, the City Council is not required to consider nor comply with any of the standards for such use. (*See* R.67-5, Pg. ID 1645; *see also id*., Pg. ID 1643). The City is forced to take this position because the Consent Judgment at issue here does not comply with the required standards. *See infra*.

of these standards is *mandatory*. (*Id*. at § 25.02 [stating that the "proposed special approval land use *shall*" comply with the stated standard], R.67-7, Pg. ID 1692-93). Thus, while these standards are considered "general," they are *mandatory* ("shall") and they require facts to demonstrate compliance. (R.67-4, Pg. ID 1643; ZO § 25.03B1, R.67-7, Pg. ID 1694; Mich. Comp. Laws § 125.3502).

Section 25.03 sets forth the required "Procedures" that apply to special approval land uses. Subsection A, "*Public Hearing*," states, in relevant part, that "[i]f the City Council is the *reviewing authority* for a special approval land use under consideration that is proposed. . . [w]ithin or as part of a development proposed to be developed pursuant to a consent judgment (or amendment) *approved* by the City Council, the City Council *shall* investigate the circumstances of the case prior to approving or denying the request." (ZO at § 25.03A [emphasis added], R.67-7, Pg. ID 1693-94).

Under subsection B, the ordinance sets forth the required procedures for *approving* a special approval land use. Subsection B states, in relevant part, that "in instances where [the City Council] is the reviewing authority . . . . [if] the particular special approval land use(s) is *in compliance with the standards* [including § 25.02 and state statutes] it shall be approved. *The decision shall be incorporated in a statement of findings and conclusions which specifies the basis for the decision and any conditions imposed*." (*Id*. at § 25.03B1 [emphasis added], R.67-7, Pg. ID 1694).

Regardless of the Zoning Ordinance requirements, the MZEA separately mandates "a statement of findings and conclusions . . . which specifies the basis for the decision" for all special land use approvals. Mich. Comp. Laws § 125.3502.

Consequently, under both the Zoning Ordinance and the MZEA, when a special land use is approved, regardless of the entity that does the approving, a statement of findings and conclusions specifying the basis for the *approval* is required. This ensures the public that the entity responsible for approving the land use has in fact complied with the requisite standards. The City Council did not do this here when it reversed the unanimous decision of the Planning Commission, which specifically found that the mosque construction does not comply with the zoning standards. *See infra.*

C. Actions of the Planning Commission.

The Planning Commission held a hearing on August 13, 2015, to review AICC's application. No final decision was rendered. Rather, the Planning Commission voted to continue the matter to September 10, 2015, so that it could consider additional information it had requested from AICC and so that a full commission would be present to hear and decide the matter. (R.67-9, Pg. ID 1753-54). During the August 13, 2015, hearing, numerous citizens spoke in opposition to the AICC construction, citing traffic and safety as the primary concerns. (*See id.*, Pg. ID 1716-46).

Following the September 10, 2015 Planning Commission meeting, the Planning Commission voted *unanimously* to disapprove AICC's zoning application. Based on the *factual* record, the Planning Commission concluded that the proposed construction did not comply with the Zoning Ordinance. As stated in the Planning Commission Staff Report of September 10, 2015, AICC "was afforded an opportunity to consider and propose amendments to the architectural plans to address" the concerns raised by the Planning Commission. However, AICC failed to do so. (R.67-5, Pg. ID 1657-58 [noting no changes to ensure compatibility with the land uses in the vicinity in terms of the height, scale, and potential impact on the neighboring areas]). The Planning Commission ultimately concluded, based on the facts, that the proposed construction does not comply with the Zoning Ordinance, and it made the following specific findings:

- The location and height of the proposed building interferes with and discourages the appropriate development and use of adjacent land and buildings, with the height exceeding that of other structures in the immediate areas by more than 30' at some points of the proposed building . . . ;
- The square footage of the proposed building in comparison to the size of the parcel is excessive and not compatible with the established long-term development patterns in this R-60 zoning district . . . ;

- Given the approximately 20,500[6] square foot size of the proposed building and the allocation of floor space to ancillary uses, there is a likely shortage of off-street parking when the principal and ancillary uses of the building are combined, especially on busy prayer hall days. Section 23.02 B.1 of the Ordinance requires additional parking spaces for ancillary uses, which are not addressed in the architectural plans . . . ; and

- The scale and height of the proposed building on the site are not harmonious with the character of existing buildings in the vicinity of this R-60 zoning district . . . .

(R.67-5, Pg. ID 1657; R.67-10, Pg. ID 1758-59; R.67-11, Pg. ID 1769-70 [reviewing the hearing transcript where he, the former City planner, explains why the mosque does not, as a matter of fact, comply with the zoning ordinance and testifying that his explanation was true]).

During his testimony, Respondent Taylor confirmed that he "support[ed] the planning commission's decision in this case," that "the planning commission arrived at the right decision" and that this decision was "based on legitimate planning and zoning issues." (R.67-12, Pg. ID 1781-82). Per the testimony of Respondent Taylor:

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[6] When you include the basement, the square footage of the building is approximately 28,000 square feet. (R.67-4, Pg. ID 1649).

> Q. So as you sit here today, was it your understanding the planning commission properly applied the zoning ordinance to deny the special approval land use application of the AICC?
> A. That is my belief, yes.

(R.67-12, Pg. ID 1782).

Christopher McLeod, the City's designated Rule 30(b)(6) witness, testified that "the planning commission clearly outlined their rationale for denying the application. And their specific requirements in terms of their view, the specific requirements—general requirements of special land use were not met. So, from that standpoint, I agree with the planning commission's determination." (R.67-4, Pg. ID 1650).

D. Litigation Against the City.

As a result of the Planning Commission's denial of the AICC application, AICC sued the City in federal court. (R.9-2, Pg ID 84-138). The City denied all wrongdoing. (*Id.*, Pg ID 140-93).

E. City Council Meeting of February 21, 2017.

On February 21, 2017, a City Council meeting was held during which the City Council considered whether to enter into a consent decree that would resolve the pending litigation and approve AICC's request to build the mosque. Counsel for the City prepared only *one* Agenda Statement for the meeting, and the only "Suggested Action" provided was to *approve* the Consent Judgment. (R.67-13, Pg. ID 1788-89; R.67-4, Pg. ID 1652). Noticeably, no AICC supporters were

present at this meeting—confirming for Petitioners that the decision had already been made. (R.67-14, Pg. ID 1793-94).

During this meeting, Respondent Taylor, the Mayor and Chairman of the City Council,[7] imposed a restriction on speakers who wanted to address the Consent Judgment agenda item. More specifically, the Mayor warned the speakers prior to the public comment period on the mosque issue that he would not permit "any comments about anybody's religion. . . . And any comments regarding other religions or disagreements with religions will be called out of order." (R.67-12, Pg. ID 1776). Respondent Taylor testified that he was enforcing a City Council rule that prohibits public comments that "make attacks on people or institutions."[8] (*Id.*, Pg. ID 1776; *id.*, Pg. ID 1777 ["If somebody came up at any council meeting and started to talk about somebody else's religious beliefs or attacking them for their religious beliefs, they would be called out of order. I was just specifying it at this meeting."]).

The application and enforcement of this speech restriction was demonstrated throughout the meeting, particularly when Respondent Taylor interrupted a

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[7] As the chairperson, Respondent Taylor enforces the City Council's rules, and he is "responsible for giving people the floor, calling people out of order, ruling on points of order . . . [and he] generally [is] responsible for running the meetings." (R.67-12, Pg. ID 1775).

[8] Consequently, a City Council rule was the moving force behind the violation of Petitioners' constitutional rights. *See Monell v. N.Y. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978).

woman speaker, calling her out of order and stating, "You're out of order. You cannot say that you don't want them to build the mosque because you want to be safe. Do you understand? I've made that ruling already." (R.67-12, Pg. ID 1777-78; *see id.*, Pg. ID 1778 ["I believed that she was making an attack on the AICC."]; *id.*, ["It related to what was going on back home, and my understanding of what's going on back home—and back home I understood to be Iraq—is that Christians are being brutally persecuted by Islamic terrorists, and so I found that she was equating the AICC and the mosque with ISIS, and I viewed that as an attack on the AICC. That was not in order with our council rules."]). This prior restraint on the speakers at the City Council meeting restricted Petitioners' speech. *See, e.g.,* App. 20-22 (citing Petitioners' testimony as to the content of their intended comments, but incorrectly concluding that the comments were not "relevant" and were thus restricted in this public forum by the "relevance rule").

And while "religion" was off-limits for the citizen speakers, Respondent Taylor allowed council member Doug Skrzyniarz to lecture the citizens about "religious wars," "religious liberty," and the so-called "wall of separation between church and state," among others, prompting (not surprisingly) an adverse response from some in attendance. (R.67-12, Pg. ID 1779-80, 1783; R.67-14, Pg. ID 1795).

F. Consent Judgment.

To resolve the AICC litigation "without any admission of liability," AICC and the City entered into the Consent Judgment. (R.67-20, Pg. ID 1831). On

March 10, 2017, the district court approved the Consent Judgment without making any findings that there has been or will be an actual violation of federal law. (*See id.*).

The Consent Judgment approved AICC's request to build a mosque:

> *AICC is hereby granted special land use approval* to develop a 20,500 square foot mosque on the Property. The dome at the center of the mosque and the spires on each end of the building shall be no higher than fifty-three and one-half (53 ½) feet from the base of the building. The dome will have a totally decorative crescent on top that will be no taller than five (5) feet, and the spires will include a pole and crescent that is eight (8) feet higher than the top of the spire, as shown on the approved site plan. Details of the dome and crest are attached as Exhibit B. . . .

(R.67-20, Pg. ID 1832 [emphasis added]).

The Consent Judgment does not include the required "statement of findings and conclusions," which would set forth facts demonstrating that the construction complies with *all* of the zoning standards as mandated by the Zoning Ordinance and the MZEA. (*See id.*).

Per the Consent Judgment, the number of parking spaces "was determined based upon only the worship area in the building containing 3,205 square feet"—no ancillary uses were considered. (R.67-20, Pg. ID 1835). The Consent Judgment only requires AICC to make

"reasonable efforts" to provide off-site parking and to "monitor parking so that members and guests do not park on adjacent residential streets." (*Id.*). "[T]he City may institute residential permit parking on the neighboring residential streets to ensure compliance with this provision," but only so long as the City "appl[ies] a residential parking permit system in an area in the City found to be similarly-situated to the [mosque property]." (*Id.*, Pg. ID 1835-36). The Consent Judgment does not prohibit noisy outdoor activities, such as sports. (*See id.*). The Consent Judgment does not set forth facts explaining how this enormous structure satisfies the mandatory standards set forth in § 25.02. (*See id.*).

By its own terms, the Consent Judgment trumps local zoning regulations. (R.67-20, Pg. ID 1837 ["Except as modified by this Consent Judgment, AICC shall comply with all City codes . . . ."], Pg. ID 1838 ["To the extent that this Consent Judgment conflicts with any City Ordinance . . . , the terms of this Consent Judgment shall control."],).

G. Petitioners' "Good Faith Concerns" about the Mosque.

As Respondent Taylor testified:

> A. I heard from a number of Chaldean people that they were upset with the mosque being built on 15 Mile Road, yes.
> Q. And what was your understanding of their objections to the mosque being built on 15 Mile Road?

> A. Well, I can't speak for every Chaldean person, but the general theme I heard was that when they lived in Iraq, and they would have a Christian community in Iraq, that Muslims would build a mosque or try to get a foothold near their community as a way to antagonize them and as a way to let them know that Christians could not escape Muslims, and that Muslims would follow them wherever they went. And so when the Chaldean community that lives in Sterling Heights—I think lives throughout the city but it's concentrated in the 15 mile and Ryan area, and this mosque was proposed in fairly close proximity to 15 Mile and Ryan, and so the Chaldeans that I talked to, a number of them expressed to me that this seemed to be similar to what would happen to them back at home; and as we talked about earlier, a number of Chaldeans—probably most of them were trying to escape religious persecution in Iraq and saw this as antagonistic, the AICC deciding to put their mosque on 15 Mile Road, and so that's generally what I got from talking with Chaldeans in Sterling Heights.
>
> Q. Are you dismissive of those concerns or do you think they're real concerns that they have expressed to you?
>
> A. I'm not dismissive of those concerns and I believe they're *good faith concerns from the Chaldean people* who expressed them to me.

(R.67-12, Pg. ID 1774 [emphasis added]). It was similar "good faith concerns" that Petitioners wanted to express at the February 21, 2017, City Council

meeting, but were prevented from doing so by Respondent Taylor's enforcement of the challenged speech restriction, which the Sixth Circuit incorrectly upheld as a "relevance" restriction. *See, e.g.*, App. 19-22.

II. PROCEDURAL BACKGROUND.

Petitioners filed this action on March 13, 2017. Following the close of discovery, the parties filed cross-motions for summary judgment. *See* App. 29.

On August 1, 2018, the district court entered an opinion and order granting Respondents' motion for summary judgment and denying Petitioners' motion for summary judgment. App. 29-52.

Citing Sixth Circuit precedent, the district court described the applicable standard for Petitioners' First Amendment claim as follows: during a City Council meeting, the City "may apply restrictions to the time, place, and manner of speech so long as those restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications.'" App. 45 (quoting *Jobe v. City of Catlettsburg*, 409 F. 3d 261, 266 (6th Cir. 2005)).

Claiming to apply this standard, the district court concluded as follows:

> In this case, the purpose of the February 21, 2017 meeting was to discuss the approval of the Consent Judgment, thus *comments about Islam were irrelevant to the discussion* before the Council. Moreover, [Respondent] Taylor

> indicated at the outset that commentary regarding anyone's religion was not relevant to whether the Consent Judgment should be approved and the reason for the speaking limitation and removal provision was to maintain order and to ensure that all audience members wishing to speak had the opportunity to do so. As such, [Petitioners] *have failed to come forward with any evidence that the City's rules were not content-neutral or narrowly tailored*.
>
> Additionally, [Petitioners] had ample alternative channels of communication. The City established a location just outside City Hall, where individuals, including the [Petitioners], could gather and express their opinions and concerns about individuals who practice Islam, terrorism and other views not germane to whether the Consent Judgment should be approved. Lastly, the contact information for each Councilmember is available on the City's website and [Petitioners] were able to contact the members to express their views.

App. 46-47 (emphasis added).

In its ruling on the validity of the Consent Judgment, the district court accepted Respondents' argument and held that the Consent Judgment did not violate any zoning regulations because the City Council was authorized to approve the construction of the mosque *without having to comply or demonstrate compliance in any way* with the Zoning Ordinance because the City Council was acting as an "approving

authority" and not a "reviewing authority." Per the district court:

> [T]he Zoning Code unambiguously requires the City Council to consider the discretionary standards[9] with respect to a special land use application when it is the "reviewing authority." Conversely, when City Council is designated the "approving authority" only, the Zoning Code is silent with respect to the same requirement to consider the discretionary standards under the Code. *Id*. at § 25.01(A)(4) (stating that the City Council shall be the approving authority with respect to special approval land use pursuant to a consent judgment).

App. 39.

Petitioners filed a timely notice of appeal. On August 14, 2019, the Sixth Circuit affirmed the district court's ruling. App. 1-50. On September 10, 2019, the Sixth Circuit denied Petitioners' petition for rehearing en banc. App. 53. This petition follows.

REASONS FOR GRANTING THE PETITION

This case involves a politically charged subject: a challenge to the City Council's approval via a consent decree of the construction of a large mosque in a largely Chaldean Christian neighborhood in the City. But the controversial nature of this case should not be the basis for this Court to deny review. Rather, it is all the more reason to grant review. *See Am. Freedom Def.*

[9] As noted previously, these standards are not "discretionary," they are mandatory.

Initiative v. King Cnty., 136 S. Ct. 1022, 1025 (2016) (Thomas, J., joined by Alito, J., dissenting) ("To be sure, this case involves speech that some may consider offensive, on a politically charged subject. That is all the more reason to grant review."). Indeed, it is often within the context of politically charged and controversial matters that constitutional freedoms require the greatest clarification and protection. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *NAACP v. Button*, 371 U.S. 415 (1963).

Review by this Court is necessary because the Sixth Circuit committed precedent-setting errors of exceptional public importance and issued an opinion that directly conflicts with this Court's precedent and the well-established precedent of other federal courts. Sup. Ct. R. 10(c). Accordingly, there are two primary reasons justifying review.

First, the City's prior restraint on Petitioners' speech at the City Council meeting, a public forum which was convened in part to discuss whether the City should permit the construction of a mosque pursuant to the challenged Consent Judgment, operated as an unlawful content- and viewpoint-based restriction in violation of the First Amendment.

The Sixth Circuit's First Amendment decision conflicts with *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017), and with established precedent which holds that when the government designates a particular forum for speech, such as a city council meeting, speech restrictions must be *content-neutral*. *See Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 176 (1976) ("[W]hen the board sits in public

meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of . . . the content of their speech."). Accordingly, the panel was wrong on the viewpoint issue, and it was wrong with regard to the applicable standard.[10] App. 14-22.

Second, it is well established that "[a] federal consent decree or settlement agreement cannot be a means for state officials to evade state law. . . . Municipalities may not waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public." *League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d 1052, 1058 (9th Cir. 2007) (declaring invalid a settlement agreement approved by a federal district court that granted an Orthodox Jewish congregation approval to operate a synagogue in a residential-zoned area contrary to the local zoning laws and stating, "[b]y placing its imprimatur on the Settlement Agreement, the district court effectively authorized the City to disregard its local ordinances in the name of RLUIPA"). The Consent Judgment does not comply with local and state zoning laws, and it was not necessary to rectify the

[10] The district court and Respondents agreed that content-based restrictions were impermissible in this forum. App. at 17 (citing standard in *Jobe v. City of Catlettsburg*, 409 F. 3d 261, 266 (6th Cir. 2005)); Answer ¶ 38 [admitting that the City Council meeting is a public forum and that the City "may apply restrictions to the time, place, and manner of speech so long as those restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications"] R.29, Pg. ID 1147). However, the district court wrongly concluded that the restriction was content neutral. *See supra.*

violation of federal law. It is, therefore, invalid, contrary to the panel's opinion. App. at 11-14.

Review is warranted and necessary.

I. THE CITY COUNCIL RULE PROHIBITING PETITIONERS' SPEECH VIOLATED THE FIRST AMENDMENT.

The City Council held a meeting to discuss whether the City should continue to defend the Planning Commission's decision by rejecting the proposed Consent Judgment or whether it should extricate itself from the controversial litigation by capitulating to AICC's demand that it be permitted to construct the mosque via the proposed Consent Judgment.

As expected, many City residents, including most of the Petitioners, had very strong opinions as to why they did not want the City to capitulate and permit the construction. As noted above, during his deposition, Respondent Taylor described these views as "good faith concerns." (R.67-12, Pg. ID 1774).

Yet, during the City Council meeting, and prior to anyone speaking on the subject of whether the City should or should not permit the mosque construction via the Consent Judgment, Respondent Taylor imposed a speech restriction that prohibited Petitioners from expressing their "good faith concerns" because the speech was deemed to be an attack on Islam. The panel incorrectly upheld this content- and viewpoint-based restriction. App. at 9-14.

More specifically, Respondent Taylor warned the speakers prior to the public comment period that he

would not permit "any comments about anybody's religion . . . . And any comments regarding other religions or disagreements with religions will be called out of order." (R.67-12, Pg. ID 1776).

Respondent Taylor testified that he was enforcing a City Council rule. (*See* R.67-12, Pg. ID 1776; *id*., Pg. ID 1777 ["If somebody came up at any council meeting and started to talk about somebody else's religious beliefs or attacking them for their religious beliefs, they would be called out of order. I was just specifying it at this meeting."]).

As a matter of law, Respondent Taylor was imposing an unlawful viewpoint-based restriction,[11] and he was doing so through the enforcement of a single rule that operated as a prior restraint on Petitioners' speech. To begin, the panel is wrong to suggest that religion was not "relevant" to the discussion (and to treat this as a separate "relevance rule"). App. at 9-13). Per Respondent Taylor:

> Q. And you were specifying it [*i.e.*, the speech restriction] at this meeting because the subject of the consent judgment was the construction of a mosque; correct?
> A. I was specifying it at this meeting because *I anticipated that some speakers would want to talk about religion*.
> Q. In the context of the construction of this mosque on 15 Mile Road; correct?

[11] Viewpoint discrimination is an egregious form of content discrimination. *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 248 (6th Cir. 2015) (en banc).

> A. Yes, and the context of that agenda typically was to approve the consent judgment.
> Q. And the consent judgment was effectively the approval of the construction of the mosque on 15 Mile Road?
> * * *
> THE WITNESS: The consent judgment speaks for itself, obviously, but, yes, *the subject matter was a mosque*.
> BY MR. MUISE:
> Q. *And so a mosque is a religious place of worship*?
> A. *Yes, of course*.

(R.67-12, Pg. ID 1777 [emphasis added]).

Further, the fact that this City Council rule was viewpoint based is evidenced by the fact that Respondent Taylor would not permit any speaker to make a comment that he deemed critical of (*i.e.*, an "attack" on) Islam.[12] Per Respondent Taylor:

> Q. With regard to the public comment period at the February 21, 2017, city council meeting, you previously testified that private citizens who were going to comment were not permitted to attack another person or institution in their comments; is that right?
> A. That's correct.
> Q. So, for example, the private citizen would not be permitted to oppose the construction of the

[12] (*See* R.29, Pg. ID 1149-50 [admitting that the speaker was called out of order because her comment "was disparaging to Muslims"]).

> mosque *based on the view* that Islam is a religion of violence. That would be considered an attack on Islam?
> A. Yeah, I would view that as an attack on an institution, the institution of Islam, and also on the AICC.
> Q. Similarly, then, not to permit—wouldn't permit a private citizen to express opposition to the mosque *based on the speaker's view* that AICC was associated with terrorism in some way; correct?
> A. I would not have tolerated that.

(R.67-12, Pg. ID 1786 [emphasis added]).

Under controlling law and contrary to the panel's opinion, the challenged speech restriction is not only an *unlawful* content-based restriction, *see Glendale Assocs., Ltd. v. N.L.R.B.*, 347 F.3d 1145, 1155 (9th Cir. 2003) ("A rule is defined as a content-based restriction on speech when the regulating party must examine the speech to determine if it is acceptable."), the very basis for this restriction (*i.e.*, Respondents did not want any comments during the public hearing that might offend anyone's religion) demonstrates that it is also an unlawful viewpoint-based restriction. This Court's decision in *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017), is controlling and compels a summary reversal on this issue. *See id*. at 1763 ("Giving offense is a viewpoint."); *see also Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126, 1131-32 (9th Cir. 2018) (holding that the County's refusal to display an ad on its transit advertising space, a nonpublic forum, based on a claim that the ad was demeaning and disparaging toward

Muslims was an unlawful viewpoint-based restriction and expressly relying upon *Matal*); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 33 (2d Cir. 2018) (holding that "*Matal* compels the conclusion that defendants have unconstitutionally discriminated against WD's viewpoint by denying its Lunch Program application because WD branded itself and its products with ethnic slurs").

The Sixth Circuit's departure from this and other precedent, *see Police Dep't of the City of Chi. v. Mosley,* 408 U.S. 92, 96 (1972) (stating that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"); *Madison Joint Sch. Dist.,* 429 U.S. at 176 (citing *Mosley*), should be reversed.

II. THE CONSENT JUDGMENT IS INVALID BECAUSE IT DISREGARDS ZONING LAWS AND WAS NOT NECESSARY TO RECTIFY THE VIOLATION OF FEDERAL LAW.

When this litigation commenced, the City's attorneys argued that the City Council need only "consider" the zoning standards (*i.e.*, the Council was not required to make any record demonstrating *compliance* with the standards), and thus it was Petitioners' burden to prove a negative (*i.e.*, that the Council did not simply "consider" the standards). (*See* R.14, Pg. ID 520 [arguing that the "standards" need only be "considered" by the Council]).

Following the close of discovery, the City's argument changed to the one it presented on appeal: when "approving" a special approval land use via a consent decree, the City Council is not required to *comply* with *any* zoning standards. (Appellees' Br. at 20 ["Since Council is only the approving authority, it is not required to consider the § 25.02 standards or find that a consent judgment complies with those standards before approval . . . ."). This position was necessitated by the fact that nothing in the Consent Judgment, the City Council meeting, or the minutes of that meeting sets forth *facts* demonstrating that the mosque construction *complies* with the zoning regulations. This untenable position forced the City's Rule 30(b)(6) witness to concede during his deposition that the City Council could theoretically approve the construction of a nuclear power plant in a residential district to resolve litigation via a consent decree. (R.67-4, Pg. ID 1644).

The district court agreed with the City, and it did so by concluding that the "Zoning Code is silent" as to whether the City Council must *apply* the zoning standards when it is "designated the 'approving authority' only." App. 39. The panel claimed that it was not going to resolve this conflict regarding the application of the Zoning Ordinance, App. 7, but it nonetheless resolved the matter *de facto* in the City's favor by upholding the City Council's approval of the mosque construction, App. 7-9.

The panel's opinion is wrong. Not only does the Zoning Ordinance not support this position, the MZEA, which trumps the Zoning Ordinance, *see Whitman v. Galien Twp.*, 288 Mich. App. 672, 687 (Mich. Ct. App.

2010) ("Because the zoning ordinance does not comply with the MZEA, the zoning board's decision to grant a special-use permit did not comport with the law . . . ."), expressly rejects it,[13] and for good reason: zoning laws "are enacted for the benefit of the public," *League of Residential Neighborhood Advocates*, 498 F.3d at 1055-56, not for the benefit of politicians or city lawyers who want to avoid controversial litigation.

In the final analysis, there are serious and harmful policy implications created by the panel's opinion. If an application for special zoning couldn't get approval through the Planning Commission, the party seeking the special zoning could simply "sue and settle," relying on the fact that potentially costly and controversial litigation would force the City Council to exercise this super-zoning-authority the City claims it possesses. That theoretical nuclear power plant could become a reality. But the Zoning Ordinance and the MZEA do not permit such an abuse of power. And only this Court can remedy the error and halt this harmful practice by granting review and reversing the Sixth Circuit.

As noted above, the Planning Commission *unanimously* disapproved the mosque construction based on the factual record. And the Commission made specific findings setting forth the basis for its decision based on the *mandatory* zoning requirements. (R.67-5, Pg. ID 1657; 67-10, Pg. ID 1758-59). The Consent Judgment does not remedy these violations. The

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[13] Mich. Comp. Laws § 125.3502 (mandating "a statement of findings and conclusions . . . which specifies the basis for the decision" for all special land use approvals).

Consent Judgment only marginally reduced the height. The approved height still *far exceeds* other structures in the immediate areas as a matter of fact. The Consent Judgment did not reduce the building size, and this is particularly troubling in light of the postage-stamp size of the parcel (4.3 acres). The Consent Judgment did *not* consider ancillary uses of the building, *it provides parking for only 3,205 square feet of the space*, and it does not require any definitive overflow parking plan—at best, it only requires a vague "reasonable effort." And the Consent judgment does nothing to remedy the defect that the scale and height of the proposed building on the site are not harmonious with the character of existing buildings in the vicinity of the relevant R-60 zoning district. The proposed site is inappropriate for this large construction. (*See* R.67-5, Pg. ID 1657; R.67-10, Pg. ID 1758-59).

As noted, during his testimony, Respondent Taylor confirmed that he "support[ed] the planning commission's decision in this case," that "the planning commission arrived at the right decision" and that this decision was "based on legitimate planning and zoning issues." (R.67-12, Pg. ID 1781-82). The City's designated Rule 30(b)(6) witness confirmed, stating the he "agree[d] with the planning commission's determination." (R.67-4, Pg. ID 1650).

Nothing in the Consent Judgment, stated during the City Council meeting, or drafted in the minutes of that meeting demonstrates that the mosque construction complies with the required zoning standards. And the panel did not, because it could not,

identify such compliance with any specific facts.[14] Indeed, by its own terms, the Consent Judgment trumps local zoning regulations. (R.67-20, Pg. ID 1837 ["Except as modified by this Consent Judgment, AICC shall comply with all City codes . . . ."], Pg. ID 1838 ["To the extent that this Consent Judgment conflicts with any City Ordinance . . . , the terms of this Consent Judgment shall control."],). The panel's opinion is wrong, and it establishes a dangerous precedent by permitting a "sue and settle" policy to the detriment of the general public.

In sum, the Consent Judgment is invalid, and the law overwhelmingly affirms that a *federal* court has the authority and the duty to declare invalid a *federal* consent decree that violates state law and that is not *necessary* to rectify the *violation of federal law*, as in this case. *See League of Residential Neighborhood Advocates*, 498 F.3d at 1058 (invalidating a consent decree that violated local zoning laws); *Perkins v. City of Chi. Heights*, 47 F.3d 212, 216 (7th Cir. 1995) (stating that without "properly supported findings that such a remedy is *necessary* to rectify a *violation of federal law*," the "parties can only agree to that which they have the power to do outside of litigation"); *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 270 (8th Cir. 2011) (invalidating a consent decree and stating,

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[14] The panel claims that "[i]t is abundantly clear that the City Council *did* consider these and all other relevant criteria," offering generalizations about "noise, size and height of building, parking, and traffic." App. at 7-8. But the record is "abundantly clear" that the mosque does not *comply* with the zoning requirements, even when accepting the few minor and meaningless concessions made in the Consent Judgment.

"State actors cannot enter into an agreement allowing them to act outside their legal authority, even if that agreement is styled as a 'consent judgment' and approved by a court"); *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 341-42 (7th Cir. 1987) (same); *Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468, 477-79 (D.C. Cir. 1998) (same); *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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