UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ISLAMIC CENTER OF MURFREESBORO AND DR. OSSAMA BAHLOUL, *Plaintiffs,* v. RUTHERFORD COUNTY, TENNESSEE, *Defendant*.	CIVIL NO. _____

Plaintiffs' Memorandum of Law in Support of Plaintiffs' Application for a Temporary Restraining Order or Preliminary Injunction

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INTRODUCTION

The question in this case is whether a mosque can be subjected to a different land-use approval process than a church, merely because local anti-Islamic protests have made the mosque controversial. Under the Religious Land Use and Institutionalized Persons Act of 2000, the Free Exercise Clause, and the Equal Protection Clause of the U.S. Constitution, the answer is clear: A mosque cannot be treated worse than a church.

Plaintiff Islamic Center of Murfreesboro (ICM) is a Muslim house of worship that has been part of the Murfreesboro community for over thirty years. ICM recently completed construction on a new mosque and sought permission to use the mosque in time for its annual religious observance of Ramadan—the most holy month of the Muslim calendar—which starts at sundown on Thursday, July 19. But permission to use the mosque has been denied on the ground that the mosque is allegedly more controversial than a typical church, and therefore the land-use planning meetings involving the mosque are subject to a heightened standard of public notice. This double standard for the mosque has deprived ICM of its legal rights under federal law and the Constitution, serves no public purpose, and threatens to cripple ICM's ability to observe Ramadan. ICM therefore requests a temporary restraining order or preliminary injunction permitting it to use its mosque in time for the start of Ramadan tomorrow evening.

STATEMENT OF FACTS

I. ICM is confined to inadequate facilities.

ICM is a Muslim religious organization that has been serving Rutherford County since 1982. Verified Complaint ("Compl.") ¶ 8. Organized as a public-benefit corporation under Tennessee law, ICM holds religious services, provides Muslim religious education, and engages in community service. *Id.*

ICM currently serves 250 to 300 families (averaging four members per family), plus 400 to 500 Muslim students attending Middle Tennessee State University. Compl. ¶ 9. For the last few years, it has held religious services in an approximately 2,100 square-foot mosque. Compl. ¶ 10. That mosque is far too small to accommodate the number of congregants who wish to worship there. Each week, hundreds of men must attempt to squeeze into a 1,200 square-foot room that lacks proper ventilation or air-conditioning for the space. Compl. ¶ 11. Due to the lack of space, women must use a small, converted garage and view the Imam on closed circuit television. *Id.* Many congregants have had to pray in the corridors, and some have had to stand in the parking lot for services, despite the fact that no sound is projected into the parking lot. Compl. ¶ 12.

The mosque also lacks facilities for child care, space for a library or after-school programs, facilities for ritual washing required before prayers, and space for funeral rituals or larger celebrations such as religious holidays. Compl. ¶ 13.

Due to the cramped conditions, a number of families have stopped attending services. Compl. ¶ 14. Elderly members have avoided coming to payers because of the crowds. *Id.* And because the current location has no facilities for child care, many families with young children have simply stopped attending altogether. Compl. ¶ 15.

II. ICM gains permission to build a new facility.

In March of 2009, ICM began to search for a new facility. Compl. ¶ 16. In November of 2009, the Mosque purchased property in a residential district in an unincorporated portion of Rutherford County, Tennessee, on Veals Road ("the Veals Road Property"). Compl. ¶ 17. In December of 2009, the Mosque formed a planning committee to oversee plans to construct a facility, including a new building on the property. Compl. ¶ 18.

In April 2010, ICM applied to Rutherford County for site-plan approval for the construction of a 52,000 square-foot facility at its Veals Road Property, the first phase of which would consist

of a 12,000 square-foot building. Compl. ¶ 19. The facility would serve as a mosque for worship, a space for religious education, counseling, and other religious activities, and a center for inter-faith and community activities. *Id.*

On May 24, 2010, the Regional Planning Commission held a regularly scheduled meeting, at which it reviewed, among other things, a site plan submitted by ICM. Compl. ¶ 20. The Planning Commission advertised this meeting in the same way it advertises its other meetings: by publishing a notice in both the print and online versions of the *Murfreesboro Post*, which is a newspaper of general circulation in Rutherford County. Compl. ¶ 21. At the May 24 meeting, the Planning Commission approved ICM's site plan by a vote of 10 to 0. Compl. ¶ 22.

Following the vote, the mosque sought and obtained a building permit from Rutherford County authorizing the construction of the new building. Compl. ¶ 23. As of July 17, 2012, construction on the new building has been completed, and the mosque has requested a final inspection and certificate of occupancy from the County. Compl. ¶ 24.

III. ICM faces hostility.

During planning and construction, ICM has been confronted with numerous acts of anti-Muslim animus. Compl. ¶ 25. For example, shortly after purchasing the Veals Road Property, ICM posted a sign at the property stating "Future Site of the Islamic Center of Murfreesboro." In January 2010, however, the sign was vandalized and the words "Not Welcome" were painted on it. Compl. ¶ 26. After ICM replaced the sign, on or about June 23, 2010, the second sign was also vandalized and broken in half. Compl. ¶ 27.

On July 14, 2010, several hundred opponents of the mosque held a rally in the public square in Murfreesboro. At least one protestor carried a sign that bore words to the effect of, "Mosque Leaders Support Killing Converts." Compl. ¶ 28.

Construction at Veals Road Property began in August 2010. Compl. ¶ 29. But on August 28, 2010, during the Muslim holy month of Ramadan, a large construction vehicle at the Veals Road construction site was intentionally set on fire. *Id.* The Federal Bureau of Investigation has offered a $20,000 reward in connection with an investigation into the arson, and an investigation remains open, but the case remains unsolved. Compl. ¶ 30.

Since 2010, the Mosque has received a number of offensive phone messages. For example, one message said, "You need to leave American Soil. You are not wanted here." Compl. ¶ 32. Another said, "Your 'religion' is a sham . . . . My God says you will be crushed in the end . . ." Another said, "The beginning of the end of Islam in America has begun." *Id.*

On September 5, 2011, ICM received a threatening, expletive-ridden phone call stating that a bomb would be placed at ICM on September 11, 2011. Compl. ¶ 33. ICM cancelled activities for that weekend, and many members were deterred from showing up for prayer services. *Id.* In connection with the bomb threat, a federal grand jury indicted Javier Alan Correa with one count of intentionally obstructing by threat of force the free exercise of religious beliefs and one count of using an instrument of interstate commerce to communicate a threat to destroy a building by means of an explosive device. U.S. Department of Justice, Press Release, *Texas Man Indicted For Threatening to Bomb Islamic Center In Mufreeesboro, Tennessee* (June 21, 2012), available at http://www.justice.gov/usao/tnm/pressReleases/2012/6-21-12A.html. Correa faces a maximum penalty of 20 years in prison. *Id.*

Because of the vocal opposition to the Veals Road project, ICM had significant difficulty obtaining construction services. Compl. ¶ 34. Several construction contractors declined to work on the project because of the public opposition. Compl. ¶ 35. Another general contractor initially agreed to work on the project, but was later forced to withdraw when he could not locate or

contract with subcontractors willing to work on the project. Compl. ¶ 36. Because of these problems, ICM paid significantly more for the project than it would have otherwise. Compl. ¶ 37.

ICM has also had to pay a security guard to protect its Veals Road Property during hours that construction is not underway. Compl. ¶ 39. It has installed a security system in its building, and members are now worried about their ability to worship safely. *Id.*

IV. ICM is subjected to a different and worse legal standard.

In September 2010, local residents sued Rutherford County in state Chancery Court, seeking to stop construction of the new mosque. Compl. ¶ 30; *see also* Compl. Ex. D (Complaint). Among other things, they argued that the County had violated the residents' rights under the Due Process Clause of the United States and Tennessee Constitutions when the County allegedly failed to determine whether Islam is a religion and whether ICM is a religious organization entitled to protection under the First Amendment. Compl. ¶ 41. Counsel for the local residents repeatedly compared ICM to Osama bin Laden,[1] argued that Islam is not a religion,[2] and maintained that Muslims are not entitled to protection under the First Amendment.[3] *See generally* Compl. Ex. E (Trial Transcript). The local residents also argued that the County violated the provisions of the Tennessee Open Meetings law by allegedly failing to provide adequate public

[1] *E.g.*, Compl. Ex. E (Trial Tr. Vol. 1, Sept. 27, 2010) at 7-8 (opening statement) ("If the planning commission approved the permit to Osama bin Laden, would they still take the position that we don't have – we're not entitled to come up here and have a hearing and ask for the Court to address this particular issue? And I would submit that what the planning commission has approved is not far from that suggestion.")

[2] *E.g.*, Trial Tr. Vol. 3, Sept. 29, 2010, at 77 (direct examination) ("Q. Can you show me where the United States of America's government has recognized Islam as a religion? . . . Q. I'm telling you it needs to be decided.").

[3] *E.g.*, Compl. Ex. E (Trial Tr. Vol. 1, Sept. 27, 2010) at 6 (opening statement) ("It must be clear that any practice of Islam in a free society, the United States, cannot and must not include the practice of sharia. . . . Why would we extend to any religion the right to cancel out the Constitution for which we're founded upon . . . ?").

notice of the meeting at which the Rutherford County Regional Planning Commission approved ICM's site plan. Compl. ¶ 43; Compl. Ex. D at 8-10 (Complaint).

On May 29, 2012, the Chancery Court issued a Memorandum Opinion concluding that the County had violated the Tennessee Open Meetings Act. Compl. Ex. A (Chancery Op.). That Act, in pertinent part, provides that, before a governmental body holds a "previously scheduled" meeting, it must "give adequate public notice of such meeting." Tenn. Code Ann. § 8-44-103(n); *see also* Compl. Ex. A (Chancery Op.) at 4. According to the Chancery Court, whether notice is adequate must be determined based on the "totality of the circumstances." *Id.* at 4 n.5 (citing *Memphis Publishing Co. v. City of Memphis*, 513 S.W. 2d 511, 513 (Tenn. 1974)).

The Chancery Court acknowledged that the County had published notice of its regularly scheduled Planning Commission meeting in the online and print editions of the *Murfreesboro Post*. Compl. Ex. A (Chancery Op.) at 6. It also acknowledged that this is the same way the County provided notice of all of its regularly scheduled Planning Commission meetings. *Id.* ("Publication in the manner in which the notice was provided in the *Murfreesboro Post* apparently was done simply because this was the way business was generally accomplished."). Nevertheless, the court held that approval of ICM's site plan was subject to a heightened standard of notice because it was "an issue of major importance to citizens." *Id.* Specifically, the court emphasized that the mosque was "a matter of great public importance and a matter of tremendous public interest," and that "no Court decisions in the history of this county have attracted the volume of public attention which this litigation has drawn." *Id.* at 3.[4] Thus, the court held that the

[4] *See also id.* at 4 (noting "the significance of the matters decided and the overall general interest of the community as a whole"); *id.* at 5 (requiring heightened notice "when significant business is discussed at an otherwise routine public meeting); *id.* (noting that "citizens may be lulled into the mind set that only routine matters will be raised at a meeting, when suddenly a matter which is to them of earthshaking importance suddenly comes forth"); *id.* at 6 (noting "the magnitude of the matters" involving the mosque).

County's typical form of notice was inadequate for purposes of the mosque, and that approval of the mosque's site plan was "void, *ab initio*." Compl. Ex. A (Chancery Order) at 1.

To our knowledge, this is the first time in any county in Tennessee that approval of a site plan at a routine Planning Commission meeting has been invalidated under the Tennessee Open Meetings Act. In fact, from 2000 to 2007, Rutherford County received twenty other site plans from religious organizations that were similarly situated to ICM. Compl. ¶ 47; Compl. Ex. F (Interrogatory Responses) at 19-20. All twenty site plans were approved at Planning Commission meetings using the same public notice procedure. *Id.* All twenty were for Christian churches. *Id.* The only site plan rendered void for lack of adequate public notice was ICM's. Compl. ¶ 47.

Five days after the Chancery Court issued its order, on June 6, 2012, the local residents brought another action in Chancery Court seeking a writ of mandamus or an injunction compelling the County to stop construction on the new mosque. Compl. ¶ 49. On June 13, 2012, the Chancery Court declined to order the County to stop construction, but enjoined the County from issuing a certificate of occupancy for the completed mosque. Compl. ¶ 50; Compl. Ex. C (Transcript) at 33-34.

On July 16, 2012, construction on the new mosque was substantially complete. Compl. ¶ 51. On that date, ICM's contractor requested a final building inspection and issuance of a certificate of occupancy. Compl. ¶ 52. But by letter dated July 17, 2012, the County, citing the Chancery Court order, declined to perform the final inspection or issue the certificate of occupancy. Compl. ¶ 53; Compl. Ex. B (Letter).

ARGUMENT

When considering a request for a temporary restraining order or preliminary injunction, a court must balance four factors: (1) whether the plaintiff has shown "a strong likelihood of success on the merits"; (2) whether the plaintiff will suffer "irreparable injury" in the absence of an

injunction, (3) whether granting the injunction will cause "substantial harm to others"; and (4) whether granting the injunction will serve "the public interest." *Workman v. Bredesen*, 486 F.3d 896, 905 (6th Cir. 2007); *Solis v. Tennessee Commerce Bancorp, Inc.*; 713 F.Supp.2d 701 (M.D. Tenn. 2010). "None of these factors is a prerequisite that must be met in every action." *Id.* (internal quotations omitted). Rather, "these factors are to be balanced." *Sellers v. University of Rio Grande*, 838 F. Supp. 2d 677 (S.D. Ohio 2012). Here, all four factors weigh heavily in favor of granting a TRO or preliminary injunction.

I. ICM has a strong likelihood of success on the merits.

If ICM were a Christian church, it would have been granted a certificate of occupancy and would be worshipping in its new facility today. But ICM is not a Christian church. It is a Muslim mosque. And because the new mosque has proven controversial among local residents, ICM has been subjected to a heightened standard of notice in the zoning process. Such a double standard violates the Equal Protection Clause, the Free Exercise Clause, and RLUIPA.

A. The differential treatment of ICM violates the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "'deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Am. XIV. This is "essentially a direction that all persons similarly situated be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

The Supreme Court has recognized several different types of equal protection claims with several different levels of scrutiny. *See generally Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002). Laws burdening a "fundamental right" or distinguishing on the basis of a "suspect class" receive strict scrutiny. *Id.* Laws burdening a quasi-suspect class, such as gender and illegitimacy, receive intermediate scrutiny. *Id.* All other laws merely receive rational basis review.

Id. Here, it does not matter what level of scrutiny applies, because the double standard applied to ICM fails even rational basis review.[5]

1. The double standard for a "controversial" mosque fails rational basis review under *Cleburne*.

The most relevant equal protection case is *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985). There, a city's zoning ordinance required a special use permit for group homes for the mentally disabled, but not for similar uses such as a boarding house, nursing home, family dwelling, or dormitory. *Id.* at 447. The operator of a group home challenged the denial of a permit as a violation of the Equal Protection Clause.

The Supreme Court held that the ordinance failed rational basis review because "the record d[id] not reveal any rational basis for believing that the [group] home would pose any special threat to the city's legitimate interests." *Id.* at 448. Specifically, the city argued that a permit was required because it "was concerned with the negative attitude of the majority of property owners" located near the group home. *Id.* at 448. But the Supreme Court held that "mere negative attitudes" of nearby residents was an illegitimate basis for subjecting the group home to a different legal standard. *Id.* "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.*

The Sixth Circuit interpreted and applied *Cleburne* in *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354 (6th Cir. 1992). There, a city required operators of community training centers (CTCs), which helped reintegrate federal offenders into society, to apply for a special use permit; but operators of other group homes did not need a permit. *Id.* at 1355. The city argued that the

[5] Strict scrutiny is most appropriate here, because the Sixth Circuit has repeatedly said that the free exercise of religion is among the "fundamental rights" that trigger strict scrutiny under the Equal Protection Clause. *See, e.g.*, *Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008); ("Strict scrutiny applies where the classification affecting eligibility for benefits is based on religion or burdens the exercise of religion."); *Bower v. Village of Mount Sterling*, 44 Fed. Appx. 670, 676, 2002 WL 1752270, *5 (6th Cir. 2002) (Strict scrutiny applies "when a statute or government act interferes with a person's fundamental rights, such as freedom of speech or religion.").

differential treatment was justified "based upon the perception that CTCs posed a potential threat to the community and exceeded the threat which could be anticipated from other uses." *Id.* at 1360. But the Sixth Circuit held that this justification was invalid under *Cleburne*, because "the city had not shown that CTC occupants are more likely to commit crimes than [other] residents of the community." *Id.* In particular, evidence of "substantial community opposition to [the] proposed CTC" demonstrated that "the purpose behind different treatment of CTCs by the current zoning regulations is to assure residents of the East Washington Street area that they would not find themselves with a CTC as a neighbor." *Id.* at 1361.

Cleburne and *Bannum* are controlling here. As in those cases, the mosque has been subjected to different legal treatment; in particular, at least twenty similarly situated churches—all Christian—received approval of their site plans under the County's standard notice procedures. Compl. Ex. F (Interrogatory Responses) at 19-20. The mosque was the only one to have a site plan invalidated. And as in *Cleburne* and *Bannum*, the justification for treating the mosque differently was the hostility of neighbors. As the Chancery Court put it, heightened notice was required because the mosque was "a matter of tremendous public interest." Compl. Ex. A (Chancery Op.) at 3. This is precisely what the Courts in *Cleburne* and *Bannum* prohibited—specifically, "the [government] may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." *Cleburne*, 473 U.S. at 448.

Indeed, this case is even stronger than *Cleburne* or *Bannum*, because in those cases, the cities at least offered *pretextual* justifications for the differential treatment. For example, the city in *Cleburne* cited concerns about "avoiding concentration of population," "lessening congestion of the streets," or reducing density in a flood plain, *id.* at 449-51, and the city in *Bannum* cited concerns about "prevention of over concentration," "parking," and "strain on public safety ser-

vices," 958 F.2d at 1361. But here, there is not even a *pretextual* justification for treating the mosque differently. The only stated reason for subjecting the mosque to a heightened notice standard is that the mosque was controversial among local residents. That is a quintessential violation of the Equal Protection Clause under *Cleburne*. *Cf. Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002) (invalidating regulation that "was nothing more than an attempt to prevent economic competition"); *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (invalidating differential treatment of firearms owners).

Finally, the heightened notice standard applied to the mosque is particularly irrational in this case, because, as the Chancery Court pointed out, "the citizens [of Rutherford County] do not have the right to be heard at the public meeting" on a site use plan. Compl. Ex. A (Chancery Op.) at 8. Thus, the only result of heightened public notice is that more citizens can show up at a meeting where they have no right to be heard. This serves no public purpose except to erect an extra hurdle in the path of the mosque.

2. The differential treatment of the mosque treats ICM as a "class of one."

The Supreme Court has also recognized a valid equal protection claim "where the plaintiff alleges that he or she has been treated differently from similarly situated individuals," and there is no rational basis for the different treatment. *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 575 (6th Cir. 2008) (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)); *Davis v. Prison Health Services*, 679 F.3d 433 (6th Cir. 2012). This is called a "class of one" claim. *Braun*, 519 F.3d at 575. To prevail on a class-of-one claim, the plaintiff must either (1) "negate every conceivable basis which might support the government action," or (2) "demonstrate that the challenged governmental action was motivated by animus or ill-will." *Ziss Bros. Const. Co., Inc. v. City of Independence, Ohio*, 439 Fed. Appx. 467, 476, 2011 WL 3795734, *9 (6th Cir. 2011).

Loesel v. City of Frankenmuth, 743 F. Supp. 2d 619, 625 (E.D. Mich. 2010), is instructive. There, a landowner entered an option agreement to sell his property to Wal-Mart. The city then adopted a zoning ordinance that prevented Wal-Mart from building a store on the property, but did not affect other retail stores. *Id.* at 625. The landowner brought a class-of-one claim, and the city moved for summary judgment on the ground that Wal-Mart was not similarly situated to the other retail stores.

The court ruled in favor of the landowner. Noting the similarities between Wal-Mart and the other retail stores, the court held that the landowner had presented sufficient evidence for a jury to conclude that they were similarly situated. *Id.* at 625. It also held that the landowner had presented sufficient evidence to undermine the city's stated rationales for the differential treatment—namely, promoting land use stability, maintaining the historical Bavarian character of the community, and protecting pedestrian accessibility. *Id.* Ultimately, the jury found in favor of the landowner and awarded $3.6 million in damages. *Id.* at 628.

ICM's case is significantly stronger than *Loesel*. In *Loesel*, the other retail stores differed from Wal-Mart because they were subject to a different zoning classification and predated the new zoning ordinance. But here, there are no relevant differences between ICM and the twenty Christian churches that received approval for their site plans. The only alleged difference is that the mosque is more controversial; but that is not a legitimate zoning criterion. Similarly, in *Loesel*, the city offered several potentially legitimate rationales for treating Wal-Mart differently, including promoting land-use stability, maintaining the character of the neighborhood, and protecting pedestrian accessibility. But here, the only stated justification for treating the mosque differently is that it is controversial—again, not a valid zoning criterion. Thus, under *Loesel*, ICM has established a likelihood of success on its class-of-one claim.

Other cases support the same result. *See, e.g.*, *Briner v. City of Ontario*, 370 Fed. Appx. 682, 705-706, 2010 WL 1141152, *21 (6th Cir. 2010) (summary judgment against a class-of-one claim was inappropriate where a city official admitted that plaintiff's case "was the only time he had ever sought to have a political sign removed or to prosecute someone for posting such a sign"); *Bower v. Village of Mount Sterling*, 44 Fed. Appx. 670, 678, 2002 WL 1752270, *7 (6th Cir. 2002) (plaintiff's made out a class-of-one claim where the village applied a different legal process to his hiring than to other candidates).

B. The differential treatment of ICM violates the Free Exercise Clause.

The differential treatment of ICM also violates the Free Exercise Clause. The Free Exercise Clause provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. Under Supreme Court precedent, a law burdening religious exercise typically does *not* violate the Free Exercise Clause if it is "neutral and generally applicable." *Employment Division v. Smith*, 494 U.S. 872, 880 (1990). But if the law is "not neutral or not of general application," it is subject to strict scrutiny; that is, it is unconstitutional unless it is narrowly tailored to advance a compelling governmental interest. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

There are several different ways that a plaintiff can prove that a law is not neutral or generally applicable. *See generally Stormans, Inc. v. Selecky*, --- F.Supp.2d ----, 2012 WL 600702, *32-*53 (W.D. Wash. 2012) (collecting and analyzing cases). Here, the differential treatment of the mosque is not neutral or generally applicable for two independent reasons: (1) The law has been applied in a discriminatory manner, and (2) the law allows for individualized assessments of the underlying conduct.

1. The law is not generally applicable because it has been applied in a discriminatory fashion.

One way to prove a free exercise violation is to show that a facially neutral and generally applicable law has "been enforced in a discriminatory manner." *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3rd Cir. 2004) (Alito, J.); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167-72 (3rd Cir. 2002).

The most relevant case is the Fifth Circuit's decision in *Islamic Ctr. of Mississippi, Inc.* v. *City of Starkville, Miss.*, 840 F.2d 293 (5th Cir. 1988). There, a zoning ordinance prohibited the use of buildings as churches unless the city granted an exception. *Id*. The Islamic Center of Mississippi applied for an exception, but the city rejected it, citing neighborhood complaints about "congestion, parking, and traffic problems." *Id*. at 296. Yet the city had approved numerous exceptions for Christian churches, including one located next door to the Islamic Center.

The Fifth Circuit held that differential treatment of the Islamic Center violated the Free Exercise Clause: "[T]he City has advanced no rational basis other than neighborhood opposition to show why the exception granted all other religious centers was denied the Islamic Center." *Id.* at 302. But as the Fifth Circuit explained, "neighborhood opposition" is not a legitimate basis for differential treatment. Thus, the city violated the Free Exercise Clause by "appl[ying] different standards to approving a Muslim mosque than it had adopted for worship facilities of other faiths." *Id.* at 303.

That is precisely what has occurred here. From 2000 to 2007, the County approved all twenty site plans submitted by similarly situated Christian churches. Compl. Ex. F (Interrogatory Responses) at 19-20. Only ICM was held to a heightened standard of notice, and only because the mosque was deemed "a matter of great public importance and a matter of tremendous public interest." Compl. Ex. A (Chancery Op.) at 3. Thus, the mosque was subjected to a different legal standard based on the "[p]rivate biases" of the community. *Islamic Center*, 840 F.2d at 302. That

is a violation of the Free Exercise Clause. *See also Tenafly*, 309 F.3d at 168 (striking down a facially neutral ordinance where "selective, discretionary application" of the ordinance to Orthodox Jews "'single[d] out' the plaintiffs' religiously motivated conduct for discriminatory treatment").

2. The law is not generally applicable because it allows for individualized assessments of the underlying conduct.

A second, independent way to show that a law is not generally applicable is to show that it gives the government discretion to make "individualized exemptions" from a general rule. *Lukumi*, 508 U.S. at 537; *accord Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963); *Blackhawk*, 381 F.3d at 209; *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Rader v. Johnston*, 924 F.Supp. 1540, 1551-52 (D. Neb. 1996). A law allowing "individualized exemptions" requires strict scrutiny because it "creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk*, 381 F.3d at 209 (citing *Smith*).

In *Blackhawk*, for example, any person wishing to keep wildlife in captivity was required by the government to pay a permitting fee. However, the government could waive the fee if a waiver would be "consistent with sound game or wildlife management activities" or the Code's intent. *Id.* at 205. The Third Circuit held that this waiver provision was "sufficiently open-ended" to allow the government to grant individualized exemptions on a discretionary, case-by-case basis. This brought "the regulation within the individualized exemption rule" and triggered strict scrutiny. *Id.* at 210.

Similarly, in *Sherbert v. Verner*, 374 U.S. 398, 401 (1963), a state law denied unemployment benefits to any person who refused to work "without good cause." The Supreme Court struck down the application of the "good cause" provision to a plaintiff who refused to work on the Sabbath. *Id.* at 408-09. As the Court explained in *Smith*, the "good cause" language triggered

strict scrutiny because it "lent itself to individualized governmental assessment of the reasons for the relevant conduct." 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

In short, when the government applies an "across-the-board" prohibition on particular conduct, there is little risk of covert discrimination against religiously motivated conduct. *Smith*, 494 U.S. at 884. But when an open-ended law grants the government discretion to grant exceptions on a case-by-case basis, there is a significant risk that the law will be "applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk*, 381 F.3d at 209 (citing *Smith*).

That is just what occurred here. The Tennessee Open Meetings Act provides that the government must give "adequate public notice" of its meetings. According to the Chancery Court, this open-ended requirement must be applied on a case-by-case basis based on the "totality of the circumstances." Compl. Ex. A (Chancery Op.) at 4 n.5. Thus, the County is free—and indeed, in the opinion of the Chancery Court, required—to impose heightened notice requirements on the basis of how controversial a religious project might be. This opens the door for the law to be "applied in practice in a way that discriminates against religiously motivated conduct"—thus requiring strict scrutiny. *Blackhawk*, 381 F.3d at 209 (citing *Smith*).

3. The law cannot satisfy strict scrutiny.

As explained above, the differential treatment of the mosque cannot even satisfy rational basis review, let alone strict scrutiny. Thus, ICM has demonstrated a likelihood of success on its free exercise claim.

C. The differential treatment of ICM violates RLUIPA's nondiscrimination provision.

The differential treatment of the mosque also violates the nondiscrimination provision of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.* (RLUIPA). Passed by wide bipartisan margins and signed into law by President Clinton in 2000,

RLUIPA is a federal civil rights statute designed to provide "heightened protection" for the free exercise of religion—particularly in the area of "land-use regulation." *Cutter v. Wilkinson*, 544 U.S. 709, 714, 716 (2005). RLUIPA's nondiscrimination provision states: "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2).

Few cases have applied this provision, in part because issues of religious discrimination are often resolved on other grounds, such as the Equal Protection or Free Exercise Clauses. *See, e.g.*, *Reaching Hearts Intern., Inc. v. Prince George's County*, 584 F. Supp. 2d 766 (D. Md. 2008) (upholding a jury's verdict of discrimination under the Equal Protection Clause, where the county denied zoning relief in part because of "religion-based public sentiment"). But the court's decision in *Hollywood Community Synagogue, Inc. v. City of Hollywood, Fla.*, 430 F. Supp. 2d 1296, 1319 (S.D. Fla. 2006), is instructive.

There, the city denied a special exception application from a Jewish synagogue. The synagogue alleged that "there were ten other house of worship Special Exception applications filed with the City in the last twenty years, and not one except the Synagogue's was denied." *Id.* Indeed, the city had never previously denied a request by a place of worship to operate in a residential zone until it denied the synagogue's application." *Id.* This, the court, held, was sufficient to make out a claim of discrimination under RLUIPA. *Id.* at 1321.

Here, too, the County approved site plans from twenty Christian churches; none except ICM's was invalidated. In fact, we are aware of no other site plan in Tennessee that has ever been invalidated for lack of adequate public notice. Thus, ICM is likely to succeed on its claim of discrimination under RLUIPA.

D. The differential treatment of ICM violates RLUIPA's substantial burden provision.

Finally, the denial of permission to use the new mosque violates RLUIPA's substantial burden provision. That provision states:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). Under this provision, the key question is whether the denial of permission to use the new mosque imposes a "substantial burden" on ICM's religious exercise.

As many courts have pointed out, "a burden need not be found insuperable to be held substantial."[6] Accordingly, courts have found a "substantial burden" under RLUIPA in a wide variety of circumstances—including where a church is confined to religiously inadequate facilities;[7] where a church has "no quick, reliable, or economically feasible alternatives" to its existing facilities;[8] where the government has rejected a church's request on arbitrary or inconsistent grounds[9] or subjected the church to unfair dealing;[10] or where a church suffers "delay, uncertainty, and expense" during the zoning process.[11]

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[6] *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 634 F.3d 1037, 1046 (9th Cir. 2011); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) (same); *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 901 (7th Cir. 2005) (same); *Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 584 F. Supp. 2d 766, 785 n.14 (D. Md. 2008) (same).

[7] *Sts. Constantine*, 396 F.3d at 898 (church was outgrowing existing facilities in a nearby town); *International Church*, 673 F.3d at 1070 ("[T]he district court in this case erred in determining that the denial of space adequate to house all of the Church's operations was not a substantial burden.").

[8] *Westchester Day Sch.*, 504 F.3d at 352-53.

[9] *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 992 (9th Cir. 2006) (finding a substantial burden where the county had "to a significantly great extent lessened the prospect of Guru Nanak being able to construct a temple in the future")

[10] *World Outreach Conference Center* v. *City of Chicago*, 591 F.3d 531 (7th Cir. 2009).

[11] *Sts. Constantine & Helen*, 396 F.3d at 901.

All of these circumstances are present here. First, as noted above, ICM's current facilities are grossly inadequate for its current needs. Hundreds of male congregants must squeeze into a 1,200 square-foot room with inadequate ventilation; female congregants must view the Imam on closed circuit television from a converted garage; many congregants have had to pray in the corridors or parking lot; the building lacks adequate facilities for a library, after-school programs, ritual foot-washing, funeral rituals, or larger celebrations of religious holidays; elderly congregants have stopped coming to prayer because of overcrowding; and a number of families have stopped attending due to the lack of facilities for child care. Compl. ¶¶ 10-15. Under *Sts. Constantine* and *International Church*, being confined to such inadequate facilities is a substantial burden. *Sts. Constantine*, 396 F.3d at 898; *International Church*, 673 F.3d at 1070.

Second, like the Jewish day school in *Westchester*, ICM has "no quick, reliable, or economically feasible alternatives." 504 F.3d at 352-53. It has invested significant time, energy, and financial capital in the purchase of its property and construction of its new mosque. If it is denied the opportunity to occupy that property, this investment will be lost.

Third, ICM has been subjected to arbitrary and unfair treatment—namely, a heightened standard of notice that has never been applied to any other house of worship. This is similar to the Sikh temple in *Guru Nanak*, where the Ninth Circuit found a substantial burden based in part on the "inconsistent decision-making" of the county, which suggested that the Sikhs would have a difficult time ever getting a permit granted. *Guru Nanak*, 456 F.3d at 990-91; *see also Sts. Constantine*, 396 F.3d at 901 (finding a substantial burden where there was a "whiff of bad faith" from the city).

Fourth, like the church in *Sts. Constantine*, ICM has suffered increased "delay, uncertainty, and expense" during the zoning process. 396 F.3d at 901. In particular, due to the public opposition to the new mosque, ICM has had significant difficulty and increased expense in obtaining

construction services, has had to pay a security guard to protect its property, and has had to install a security system in its building. Compl. ¶¶ 34-37. Although these costs are not directly attributable to the County, they are the result of the public opposition to which the County has given legal effect. Moreover, ICM currently faces significant uncertainty over whether it will be permitted to occupy its new mosque for the annual observances of Ramadan.

Finally, the Sixth Circuit's decision in *DiLaura v. Township of Ann Arbor*, 112 Fed. Appx. 445 (6th Cir. 2004), is also instructive. There, the plaintiffs sought permission to use property as a religious retreat intended for prayer. But the town instead issued a permit to operate the property as a bed and breakfast. The Sixth Circuit held that requiring the plaintiff to operate the retreat center as a bed-and-breakfast constituted a substantial burden. *Id.* at *1. Specifically, the bed-and-breakfast permit would have obligated the plaintiffs to charge a fee to its guests; would have prohibited the plaintiffs from serving communion wine; and would have prevented the plaintiffs from providing lunch and dinner. Taken together, these restrictions "would have effectively barred the plaintiffs from using the property in the exercise of their religion," and thus constituted a substantial burden. *Id.*

Here, too, the denial of a certificate of occupancy has "effectively barred the [mosque] from using the property in the exercise of their religion." ICM has accordingly suffered a substantial burden.[12] Moreover, for the reasons described above, the differential treatment of the mosque cannot satisfy strict scrutiny. Thus, ICM has established a likelihood of success on the merits of its substantial burden claim.

[12] The Sixth Circuit's unpublished decision in *Living Water Church of God v. Charter Tp. of Meridian*, 258 Fed. Appx. 729 (6th Cir. 2007), is distinguishable. There, the decision rested largely on the fact that the church was permitted to build a larger facility that would meet most, if not all of its needs, without seeking government approval. *Id.* at *10. The Court also emphasized that there was no evidence of any animus toward the church. *Id.* at *11. Here, by contrast, ICM has no opportunity to meet its current needs without government approval, and the denial of a certificate of occupancy was expressly based on the animus of local residents.

II. ICM will suffer irreparable injury in the absence of a TRO or preliminary injunction.

Not only is ICM likely to succeed on the merits, it will also suffer irreparable harm in the absence of a TRO or preliminary injunction. As the Supreme Court and Sixth Circuit have repeatedly held: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Bays v. City of Fairborn*, 668 F.3d 814, 825 (6th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009) (same). This is no mere boilerplate. Rather, it is rooted both in "the intangible nature o[f] the benefits flowing from the exercise of [First Amendment] rights" and in "the fear that, if those rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989) (quoting *Cate v. Oldham*, 707 F.2d 1176, 1188-89 (11th Cir. 1983)). Of course, this rule applies to the Free Exercise Clause just as much as it applies to the Free Speech Clause. *See Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002). It also applies to violations of RLUIPA, which is a civil rights statute intended to enforce the Free Exercise Clause. *See, e.g., Vietnamese Buddhism Study Temple In America v. City of Garden Grove*, 460 F. Supp. 2d 1165, 1173 (C.D. Cal. 2006) (temple "clearly demonstrated that it would suffer substantial and irreparable injury" due to RLUIPA violation); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1230 (C.D. Cal. 2002) ("Little serious question exists that . . . [the church] would suffer irreparable injury" due to a violation of RLUIPA.).

Here, in the absence of a TRO permitting ICM to use its new mosque during Ramadan, ICM will suffer a significant loss of First Amendment rights. Ramadan is the most holy month of the Muslim calendar, when religious observance and mosque attendance is at its highest. Without access to the new mosque, many members of the community will be prevented from worshipping during Ramadan due to overcrowding. The discriminatory treatment of the mosque also sends a

powerful message to the Muslim community that they are second-class citizens, not worthy of the same rights or protection as Christian churches. Finally, ICM has long emphasized the goal of completing construction and using the new mosque for religious services by the start of Ramadan. Without access to the mosque, this goal will be thwarted. Each of these harms is precisely the sort of "intangible" injury that cannot be adequately compensated with damages, and therefore constitutes irreparable harm. *Newsom*, 888 F.2d at 378; *see also Sampson v. Murray*, 415 U.S. 61, 90 (1974) (harm is "irreparable" when "adequate compensatory or other corrective relief" will not be available at a later date).

III. A TRO or preliminary injunction will not cause substantial harm to others.

Nor will a TRO or preliminary injunction cause any harm—let alone substantial harm—to the County or third parties. The County has not asserted any legitimate interest in enforcing a heightened standard of notice against ICM. In fact, the County has appealed the Chancery Court's decision and has maintained that it has no desire to apply a heightened standard to mosques. Thus, in this respect, the County's interests are aligned with those of ICM. *Cf. Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (government suffers no cognizable harm when an unconstitutional law is enjoined).

Nor would the County or third parties suffer any harm if ICM were permitted to use its new building. To the contrary, the Planning Commission voted unanimously to approve ICM's site plan; it has permitted ICM to complete construction; and ICM has complied with all relevant zoning and building codes. *See* Compl. ¶¶ 22-24. Thus, allowing the mosque to use its new building would be consistent with the County's prior approval of the mosque, and would be consistent with the County's overall land use policies and regulations, which are designed to protect the overall interests of the community. *Cf. Bays v. City of Fairborn*, 668 F.3d 814, 825

(6th Cir. 2012) ("[I]f the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere its enjoinment.")

IV. A TRO or preliminary injunction is in the public interest.

Lastly, the public interest weighs heavily in favor of granting a TRO or preliminary injunction. As the Sixth Circuit has explained: "When a constitutional violation is likely, . . . the public interest militates in favor of injunctive relief because 'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010). In particular, "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties." *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009). Thus, "the public interest would be advanced by issuance of a preliminary injunction enjoining enforcement of those portions of challenged statutes that are of questionable constitutionality." *Id.* The public interest is also served by ensuring that Muslims are treated on an equal basis will all other religious communities.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Application for a Temporary Restraining Order or Preliminary Injunction.

Respectfully submitted this 17th day of July, 2012.

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