No.

IN THE

Supreme Court of the United States

LIVINGSTON CHRISTIAN SCHOOLS,
Petitioner,

v.

GENOA CHARTER TOWNSHIP,
Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

Kelly J. Shackelford
Hiram S. Sasser, III
Stephanie N. Taub
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway, Suite 1600
Plano, TX 75075
(972) 941-4444

Robert K. Kelner
Counsel of Record
Andrew Leff
Jack Lund
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
rkelner@cov.com

QUESTIONS PRESENTED

Whether evidence that religious animus motivated a government's land use decision is relevant to the substantial burden inquiry under the Religious Land Use and Institutionalized Persons Act.

Whether a government's effective exclusion of a religious organization from its jurisdiction is relevant to the substantial burden inquiry under the Religious Land Use and Institutionalized Persons Act.

PARTIES TO THE PROCEEDING

Petitioner is Livingston Christian Schools, which was plaintiff-appellant below.

Respondent is Genoa Charter Township, which was defendant-appellee below.

RULE 29.6 STATEMENT

Petitioner Livingston Christian Schools is a 501(c)(3) non-profit organization that has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES Page(s)

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Livingston Christian Schools respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on June 2, 2017, affirming the district court's grant of summary judgment to Respondent Genoa Charter Township.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 858 F.3d 996. The opinion of the district court (Pet. App. 33a-62a) is unreported but is available at 2016 WL 3549357.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 2, 2017. A timely rehearing petition was denied on July 26, 2017. On October 17, 2017, Justice Kagan extended the time for Livingston Christian Schools to petition for a writ of certiorari to and including December 23, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Religious Land Use and Institutionalized Persons Act provides, in relevant part:

> 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).

STATEMENT OF THE CASE

Genoa Charter Township's Board had never rejected its Planning Commission's recommendations until—in a thinly-veiled act of religious discrimination—it refused to allow one church to use its building as a Christian school. Due to a lack of available alternatives, this refusal threatened the school's continued existence and functionally excluded the school from pursuing its religious mission in the Township.

I. Statutory Background

The purpose of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, is to "protect the free exercise of religion from unnecessary government interference." 146 CONG. REC. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Charles T. Canady). RLUIPA's sponsors, Senators Edward Kennedy and Orrin Hatch, recognized the importance of physical space to the free exercise of religion: "The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes." 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy). But because "[t]he standards in individualized land use decisions are often vague, discretionary, and subjective[,] . . . [l]and use regulation has a disparate impact on churches and especially on small faiths and nondenominational churches." H.R. Rep. No. 106-219, at 24 (1999).

Congress passed RLUIPA to solve this problem, decreeing that "[n]o government shall impose or

implement a land use regulation in a manner that imposes a *substantial burden* on the religious exercise of a . . . religious assembly or institution[.]" 42 U.S.C. § 2000cc(a)(1) (emphasis added). RLUIPA does not define "substantial burden" but instead relies on courts to determine whether a government-imposed burden is in fact substantial. *See* 146 CONG. REC. at S7776.

II. Factual Background

Livingston Christian Schools ("LCS"), a non-denominational Christian school serving students from pre-kindergarten through high school, was incorporated in 2005 to provide religious, Christian education specifically for children in Livingston County, Michigan. *See* Dkt. 4, Ex. 2.[1] For the nine years prior to the 2015-2016 school year, LCS operated in a building at 550 E. Hamburg Street, Pinckney, Michigan (the "Pinckney Property"). Dkt. 43, Ex. A. But LCS's finances deteriorated during its time at the Pinckney Property. *Id.* Due to the Pinckney Property's location and the extensive maintenance required to continue operating at that facility, LCS became financially unable to make payments on the property. *Id.*

LCS's financial predicament posed an existential threat to its survival. Indeed, as LCS's Treasurer Scott Panning testified, "the LCS Board determined in late-2012 that LCS would end in dissolution if the school remained in Pinckney on a long-term basis." *Id.* LCS determined that its "only

[1] Citations to "Dkt." refer to the District Court docket in this action, No. 15-cv-12793 (E.D. Mich), and all cited documents are available on PACER.

means of survival" as a "faith-based school in Livingston County was to relocate the school to the Brighton or Howell area that is more populated, contains many more churches of various Christian faiths from which to attract students, and which possesses greater access to the interstate and major commuter roads." *Id.* LCS accordingly began to search for potential sites "that would be suitable for relocation of the school operations." *Id.*

The search for a new location did not go well. LCS considered relocating to a former elementary school, numerous churches in the Brighton area, and several vacant buildings. *Id.* Each location was fatally flawed for cost reasons or because of limited space. *Id.* LCS found only one viable location to house their religious school: a building owned by the Brighton Nazarene Church ("BNC") in Genoa Charter Township (the "Township"). *Id.*

On November 25, 2014, LCS entered into a written lease agreement with BNC, allowing LCS to relocate its operations to BNC's Genoa Township property (the "BNC Property"), beginning on June 1, 2015. *Id.*; *see also* Dkt. 43, Ex. C. As planned, LCS would begin operating for the 2015-2016 school year in existing BNC buildings. No new facilities would need to be built. Dkt. 43, Ex. C. At that time, however, LCS was unaware that BNC would need additional zoning approvals from the Township to enable LCS to occupy its new space. Dkt. 43, Ex. A.

The Township informed BNC in early 2015 that an amendment to BNC's then existing special use permit would be required for the proposed school. Dkt. 43, Ex. F. BNC accordingly applied for an

amendment on March 18, 2015 (the "Application"). Dkt. 43, Ex. G.

Because LCS's ongoing financial difficulties made it impossible to continue operating at the Pinckney Property, LCS began arranging to move to BNC's property. After signing the lease with BNC, but before learning that zoning approvals were required, LCS invested substantial funds in preparing the BNC facility for school use, and began marketing its new location to families of current and prospective students. Dkt. 43, Ex. A.

Around the same time, because the Pinckney Property remained insufficient for long-term LCS operations, LCS leased the Pinckney Property to Light of the World Academy ("LOTWA") to operate a public charter school. *Id.* Testimony from LOTWA's President, Laura Burwell, confirms that while the Pinckney Property is sufficient for publicly funded charter school operations, it would not be a viable location for an unsubsidized, tuition-based school like LCS. Dkt. 43, Ex. D. Ms. Burwell testified that LOTWA had previously been a private school, but it became a public charter school when it moved into the Pinckney Property. *Id.* LOTWA made that change "in order to maintain a student population" that would have continued "shrinking" if it remained a private school in the Pinckney area. *Id.* Simply put, the Pinckney Property could not support a private school. *Id.* If LCS remained at that property, it too would have only been able to keep its doors open by transitioning to a public charter school and thereby abandoning its religious mission of providing a Christian education to Livingston County students.

LCS's hopes, therefore, rested entirely on the BNC Property and the Township's approval of the Application.

The special use permit review process is governed by Article 19 of the Township's zoning ordinance. *See* Dkt. 43, Ex. E. Under the ordinance, the Planning Commission makes a determination whether or not an application should be approved, and then it forwards its determination to the Township Board for final action. *Id.* The Township Board then "shall" take one of the following actions: "Approval," "Denial," or "Conditional Approval," the latter of which means that the "Township Board may impose reasonable conditions with the approval of a special land use[.]" *Id.* Prior to its consideration of the Application submitted by BNC, the Township Board had *never* in its history acted contrary to the Planning Commission's determination, according to Kelly VanMarter, the Assistant Township Manager. *Id.*

In this case, the Planning Commission engaged LSL Planning ("LSL") and Tetra Tech for a "Technical Review" of the Application. *See generally* Dkt. 43, Ex. K; Dkt. 43, Ex. L. LSL, the Township's professional planning consultants since before 2003, "reviewed the [Application] in accordance with the applicable provisions of the Genoa Township Zoning Ordinance" and concluded that the Application met all relevant standards. *See* Dkt. 43, Ex. K. LSL found the Application to be "consistent with" the "overall goal" of the Township's Master Plan. *Id.* LSL identified only two potential problems: the ongoing driver's training program taking place in the BNC parking lot, which LSL believed "should be discontinued," and the potential of the new school "to create severe *on-site*

congestion in the form of stacking/traffic back-up[.]" *Id.* (emphasis added). As to the latter issue, LSL "will defer to the Township Engineer for any technical comments[.]" *Id.*

That engineer, Tetra Tech, the Township's civil and traffic engineering firm, analyzed the two traffic studies submitted with the Application. The studies were performed by Boss Engineering ("Boss") and Fleis & VandenBrink ("F&V"), which determined that LCS's use of the BNC Property "will have minimal impact on Brighton Road" and "no impact" on the nearby traffic signals. Dkt. 43, Ex. H. Tetra Tech agreed with these findings, and informed the Township that it had no objection to LCS's occupancy of the BNC Property so long as LCS implemented the on-site traffic management measures proposed as part of the Application. *See* Dkt. 43, Ex. L.

Similarly, Michael Goryl of the Livingston County Road Commission concluded that LCS would have a "relatively minor impact on Brighton Road." Dkt. 43, Ex. I. In sum, all of the experts and engineers who assessed LCS's environmental impact concluded that permitting LCS to operate on the BNC Property would not disrupt the neighborhood nor conflict with the Township's Master Plan.

The Township Planning Commission agreed. The Planning Commission determined that the Application was consistent with the zoning ordinance and recommended approval, subject to certain conditions. *See* Dkt. 43, Ex. M. "In an effort to move this item forward and allow [LCS] to prepare for the start of school," VanMarter prepared a memorandum to the Township Board recommending "APPROVAL of

the [Application] with conditions," stating that "[t]his approval is recommended based upon consistency with the standards of section 19.03 of the zoning ordinance." Dkt. 43, Ex. N (emphasis in original). Michael Archinal, the Township Manager and Zoning Administrator for the past 18 years, signed Ms. VanMarter's memorandum and testified that he agreed with Ms. VanMarter's conclusions and recommendations. *Id.*; Dkt. 43, Ex. O.

Despite the traffic studies from Boss and F&V, despite the planning review by LSL, despite the traffic review by Tetra Tech, despite the determination made by the Planning Commission, despite multiple formal comments from members of the community in support of, and none opposed to, the Application, and despite Assistant Township Manager Kelly VanMarter's recommendation, the Township Board denied the Application without explanation. Dkt. 43, Ex. P.

No explanation was given until August 3, 2015. Ms. VanMarter testified that because the initial denial did not constitute the "formal[]" action required by the Township Board to deny a special use permit, she drafted, after the fact, proposed grounds for the denial. Dkt. 43, Ex. F.

The Township Board formally denied the Application on August 3, 2015—several weeks after denying the Application without explanation—purportedly for the following reasons (among others): (1) "expanded use of the church to include a K-12 school will exacerbate the existing and historical negative impacts of the church on the adjacent neighborhood"; (2) the proposed use would neither "[a]chieve well-planned, safe, balanced, and pleasant

residential neighborhoods," nor "[p]romote harmonious and organized development consistent with adjacent land uses"; (3) LCS's use "is contrary to the statement of purpose for the Single Family Residential Zoning," which "[p]rohibit[s] any land use that would substantially interfere with the development, utilization or continuation of single family dwellings in the District"; (4) "[t]he proposed use significantly alters the existing or intended character of the general vicinity"; (5) "excessive production of traffic" will "be detrimental to the natural environment, public health, safety or welfare"; (6) the "potential negative impacts to be created by the use will not be sufficiently mitigated by the conditions of the proposal"; and, despite the fact that the use in question was that of LCS, not the church, (7) "The Nazarene Church has a history of non-compliance with past site plan and ordinance requirements resulting in a negative impact on surrounding neighborhoods[.]" Dkt. 43, Ex. Q.

In sum, the Township Board denied LCS the right to use the BNC Property for its religious mission due to worry about the "character" of the neighborhood, traffic and safety concerns *not* shared by the Township's own experts, and *BNC's* prior conduct on the same parcel of land.

As support for their last justification, the Township Board cited a third party's use of the BNC Property parking lot for an unapproved secular driving school. Yet the Township assured the driving school that no action would be taken to curtail its secular use of the property. *See* Dkt. 43, Ex. F; Dkt. 43, Ex. Q. No such assurance was afforded to LCS's religious mission.

Without a suitable long-term facility, LCS was forced to settle for a stopgap measure for the 2015-2016 school year. LCS spent that year at a former middle school building—outside Livingston County—on a short-term lease from Whitmore Lake Public Schools (the "Whitmore Lake Property"). Dkt. 43, Ex. A. This was not a viable long-term solution, however. The Whitmore Lake Property was merely a short-term fix because the Whitmore Lake School District intended to re-occupy the building for public school use sometime in the near future and because LCS's religious purpose is to provide religious education in Livingston County, not a neighboring county. Dkt. 43, Ex. B. LCS's lease also overlapped with several others at the Whitmore Lake Property, which posed a security risk. *Id.* And LCS was contractually prohibited from enrolling students from the Whitmore Lake School District. *Id.* LCS thus could not make long-term investments in the Whitmore Lake Property, and this instability harmed LCS's enrollment, according to LCS Principal Ted Nast. *Id.*

Prospective new families have consistently stated that they are much less interested in enrolling in LCS if the school is located at the Whitmore Lake Property, than if it occupies its lease at the BNC Property. *Id.* In fact, as a direct result of the Township's denial of the Application for LCS to relocate to the BNC Property, LCS lost a substantial portion of its student body: 15 returning students, as well as 18 new students who had planned to attend LCS for the 2015-2016 school year. *Id.* According to Principal Nast, LCS was "expecting an additional decrease in enrollment if LCS is unable to move into the BNC [Property] for school operations on a full-

time basis." *Id.* As the record demonstrates, LCS's survival was very much in doubt if it could not move to the BNC Property.

III. Procedural History

Facing an uncertain future, and having been barred from pursuing its religious mission of providing Christian education to children in Livingston County, LCS sued to vindicate its rights. LCS brought suit in the Eastern District of Michigan, on August 7, 2015, asserting claims under RLUIPA. *See* Dkt. 1. LCS moved for a temporary restraining order enjoining the Township from interfering with LCS's use of its leasehold as a school. Dkt. 4. The District Court denied the motion, and the parties engaged in discovery. Dkt. 22. The Township then moved for summary judgment on all of LCS's claims, arguing that alternative sites were available to LCS *outside* the Township's borders. Dkt. 35. The District Court granted this motion. Pet. App. 33a.

Regarding LCS's RLUIPA claim, the District Court held that the Township did not impose a "substantial burden" on LCS because denying the special use permit made it merely "less convenient or more expensive for LCS to operate its school[.]" Pet. App. 47a. The Township did not, according to the District Court, prevent LCS "from exercising its religious beliefs[.]" Pet. App. 48a-49a. This was both factually and legally erroneous, so LCS appealed.

A Sixth Circuit panel affirmed on somewhat different grounds, holding that a fact-finder could not conclude that the Board imposed a substantial burden on LCS—notwithstanding evidence of the Township

Board's discriminatory intent, including that denial of the permit forced LCS out of the Township's borders, that the Township Board acted in disregard of its own Planning Commission and experts, and that the Township denied LCS's permit while allowing an unapproved secular activity to continue on the very same property. *See* Pet. App. 1a. To justify this ruling, the Court of Appeals adopted a novel position: In conducting the "substantial burden" analysis required under RLUIPA, it would not consider "evidence of alleged discrimination" against LCS. Pet. App. 16a. As set forth in greater detail below, this brings the Sixth Circuit into direct conflict with every one of its sister circuits to face this same issue and undermines RLUIPA's crucial protections for religious liberty. The full court denied LCS's petition for rehearing en banc on July 26, 2017. Pet. App. 63a.

Following denial of rehearing, the Township approved a new special use permit allowing LCS finally to occupy and use the BNC Property.[2] This does not moot the action, however. LCS's claims for damages—proximately caused by the more than stwo-year delay in LCS occupying the only suitable religious school facility in Livingston County—remain in controversy. *See* Dkt. 23. As do its related claims for declaratory relief, attorneys' fees, and costs. *See id.*

[2] The Township Board approved the special use permit on November 20, 2017, subject to LCS meeting certain conditions within 60 days. That new permit has not been issued yet, but it is scheduled to be issued no later than January 20, 2018.

SUMMARY OF ARGUMENT

This case is about whether evidence of religious animus should be considered in the substantial burden analysis required under RLUIPA. All four circuits to consider this question before 2017 answered in the affirmative. But then the Sixth Circuit panel below explicitly broke from the First, Second, Seventh, and Ninth Circuits and held that courts may *not* consider such evidence—contrary to the intention of RLUIPA's framers.

The purpose of RLUIPA is to "protect the free exercise of religion from unnecessary government interference." 146 CONG. REC. at E1235. The panel's decision in this case thwarts this goal by unduly restricting the type of evidence a court may consider when analyzing whether a local or state government has imposed a "substantial burden" on religious exercise—and creates a clear split with every other circuit to address this issue.

Under RLUIPA, a religious institution is entitled to relief if it establishes that a local government used its land use permitting process to impose a substantial burden on the institution's religious exercise, and did so in a manner that was not narrowly tailored to serve a compelling governmental interest. *See* 42 U.S.C. § 2000cc(a)(1). Other circuit courts have treated evidence that the land use decision was motivated by religious animus as relevant to whether the decision imposed a substantial burden. The panel in this case explicitly rejected that view and disregarded record evidence suggesting that the adverse decision by Genoa Charter Township reflected religious animus.

The panel also held that a land use decision allowing religious exercise to take place only outside the jurisdiction of the decision-making body does not constitute a substantial burden under RLUIPA. The Court should grant certiorari to correct the panel's errors and to align the law of this circuit with that of all other circuits that have considered these questions.

REASONS FOR GRANTING THE WRIT

I. A Circuit Split Exists as to Whether Evidence that Religious Animus Motivated a Government's Land Use Decision Should Be Considered under RLUIPA's "Substantial Burden" Framework.

Congress enacted RLUIPA to combat religious discrimination. *See* 146 CONG. REC. at S7775 (noting "a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case."). Indeed, its animating purpose was to "protect religious land uses from discriminatory processes used to exclude or otherwise limit the location of churches and synagogues in municipalities across the country." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1236 (11th Cir. 2004).

Petitioner Livingston Christian Schools was the victim of an "individualized," discriminatory process, in which Respondent Genoa Charter

Township rejected LCS's request to open a school within the Township—despite recommendations from the Township's Planning Commission and all of its experts that LCS's request be approved. When LCS tried to vindicate its federally guaranteed right to be free from "substantial burden" on its religious exercise, the Sixth Circuit broke with all other circuits that "have taken evidence of alleged discrimination into account in considering whether there was a substantial burden on religious exercise," and "decline[d] to adopt this approach." Pet. App. 16a. The resulting circuit split is now plain, pitting the Sixth Circuit (which acknowledges creating this split in the opinion below), against the First, Second, Seventh, and Ninth. Each of these circuits has recognized that evidence of a discriminatory intent to burden religious exercise is relevant to the issue of whether a religious organization was in fact substantially burdened.

This Court should grant a writ of certiorari to resolve this new circuit split and to clarify the meaning of "substantial burden" in the land use context.

A. This Court Has Not Spoken on the Meaning of "Substantial Burden" in the Land Use Context under RLUIPA.

The panel observed that this Court has not yet "had occasion to focus on the substantial-burden inquiry under RLUIPA in the land-use context." Pet. App. 9a. *See also Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 94 (1st Cir. 2013) ("The Supreme Court . . . has never

provided a working definition of 'substantial burden' in [the land use] context.").

Without guidance, many lower courts have attempted to define "substantial burden" by reference to this Court's free exercise jurisprudence prior to *Emp't Div. Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). *See e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d at 1226 ("The Supreme Court's definition of 'substantial burden' within its free exercise cases is instructive in determining what Congress understood 'substantial burden' to mean in RLUIPA.")

Invariably, these courts look to *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and the Court's succession of unemployment compensation decisions that includes *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Bd. of Indian Emp't Sec. Div.*, 450 U.S. 707 (1991), *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987), and *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829 (1989). *See e.g., Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) (citing *Sherbert* and *Thomas*).

One challenge for courts adopting this approach is that the fact patterns in the pre-*Smith* cases differ from those arising in land use decisions. Thus, applying the logic in one set of cases to the facts in a new set of cases leaves many questions unanswered. *See Westchester*, 504 F.3d at 348-49 (observing that "in the context of land use, a religious institution is not ordinarily faced with the same dilemma [faced in the pre-*Smith* free exercise cases] of choosing between religious precepts and government benefits.").

Furthermore, this Court did not use the term "substantial burden" in these pre-*Smith* cases. It made its first appearance only in 1989, and was not clearly defined. *See Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989), one year before *Smith*.

Lower courts since have struggled to define substantial burden, offering a variety of formulations. *See e.g.*, *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 556 (4th Cir. 2013) ("[A] plaintiff can succeed on a [RLUIPA] substantial burden claim by establishing that a government regulation puts substantial pressure on it to modify its behavior."); *Westchester*, 504 F.3d at 349 (asking whether "government action . . . directly coerces the religious institution to change its behavior" (emphasis omitted)); *Midrash Sephardi*, 366 F.3d at 1227 (stating that substantial burdens "place more than an inconvenience on religious exercise" and are "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly"); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("[I]n the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable.").

Other lower courts have also looked to the ordinary meaning of the words "substantial" and "burden." *See e.g.*, *San Jose Christian Coll. v. City of Morgan Hill*, 360 F. 2d 1024, 1034 (9th Cir. 2004) (citing *A-Z Int'l. v. Phillips*, 323 F.3d 1141, 1146 (9th

Cir. 2003)) (focusing on the "ordinary, contemporary, common meaning" of the substantial burden provision of RLUIPA); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F. 3d 1214, 1226 (11th Cir. 2004) ("Because RLUIPA does not define 'substantial burden,' we give the term its ordinary or natural meaning").

This approach has also sown division across the circuits. *Compare San Jose Christian*, 360 F. 2d at 1034 (defining "burden" as "something that is oppressive" and defining "substantial" as "significantly great") *with Midrash Sephardi*, 366 F.3d at 1227 (stating that substantial burdens "place more than an inconvenience on religious exercise" and are "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly"). The Ninth Circuit, recognizing this problem, remarked of its own decision in *San Jose Christian* that the fact that substantial burden "means a 'significantly great restriction or onus' says nothing about what kind or level of restriction is 'significantly great.'" *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1078 (9th Cir. 2008).

The result is a patchwork across, and even within, the circuits, of formulations, definitions, and tests that tend not to be well-suited to the land use context or the purposes of RLUIPA more generally. *See* Robert M. Bernstein, *Abandoning the Use of Abstract Formulations in Interpreting RLUIPA's Substantial Burden Provision in Religious Land Use Cases*, 36 COLUM. J. OF L. & THE ARTS 283 (2013) (discussing this patchwork of standards and arguing that it should be replaced by a uniform, holistic

inquiry contemplated by RLUIPA). *See also Roman Catholic*, 724 F.3d 78 (citing this problem and adopting Bernstein's approach).

B. The Sixth Circuit's Decision Below Creates a Circuit Split Regarding the Relevance of Religious Animus in the Substantial Burden Analysis under RLUIPA.

Despite RLUIPA's clear purpose to prevent local land use tribunals from using their discretion as a pretext for discrimination against religious institutions, the Sixth Circuit below concluded that "evidence that the municipality's decisionmaking process was arbitrary, capricious, or discriminatory" is "irrelevant" to the substantial burden inquiry.[3] Pet. App. 15a-16a. This ruling conflicts with the law in each of the other four circuits that have considered the same question. This Court should grant certiorari to resolve this circuit split and to create a framework that can be applied equally and uniformly to similarly situated parties nationwide.

---

[3] The Township may argue, as it did in its response to LCS's request for rehearing en banc, that the question of whether a court may consider evidence of discrimination in the substantial burden analysis was not properly presented below. This argument is plainly wrong. The Sixth Circuit generally requires only that an issue be "raised in an appellate brief *or* at oral argument." *Costo v. U.S.*, 922 F.2d 302, 302 (6th Cir. 1990) (emphasis added). Yet here the issue was clearly presented in *both*. *See, e.g.,* Oral Arg. at 27:23-28:28, *Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996 (6th Cir. 2017), https://tinyurl.com/y84cew6j.

i. The Sixth Circuit Is Now at Odds with the First, Second, Seventh, and Ninth Circuits.

Prior to the panel's decision below, every federal Court of Appeals confronted with evidence of religious animus or discrimination has found that evidence to be probative of a substantial burden under RLUIPA.

The Seventh Circuit Court of Appeals addressed this question first, in *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005). The Court there was faced with a church whose rezoning application had been denied by the city Planning Commission—despite the Director of Planning recommending approval—over hypothetical concerns that the Church might resell the land at a later date. Given the city's seemingly contrived reasons for denying the church's application, the Sts. Constantine and Helen Greek Orthodox Church argued that the city substantially burdened its exercise of religion by discriminating against it in favor of non-religious land uses. The Court of Appeals considered this evidence of religious animus and found a substantial burden.

Evidence of religious discrimination is properly considered under the substantial burden framework, according to the Seventh Circuit: "the 'substantial burden' provision backstops the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Id.* at 900. This protection is crucial, according to the Seventh Circuit,

due to the "vulnerability of religious institutions—especially those that are not affiliated with the mainstream [Christian] sects . . . —to subtle forms of discrimination[.]" *Id*. Accordingly, if a "decision maker cannot justify" a land use decision, "the inference arises that hostility to religion . . . influenced the decision." *Id.* This inference led the Court to rule that "[t[he burden here was substantial." *Id.* at 901.

The Ninth Circuit agreed. In *Guru Nanak Sikh Soc'y of Yuba City v. Cty. of Sutter*, that court declared that evidence of religious animus supports a finding of substantial burden. 456 F.3d 978 (9th Cir. 2006). Indeed, the Ninth Circuit quoted *Sts. Constantine* in pronouncing, "RLUIPA's substantial burden test aims to protect religious groups from 'subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards.'" *Id.* at 992 n. 20 (quoting *Sts. Constantine*, 396 F.3d at 900). The Court went on to find a substantial burden because *Guru Nanak*, just like this case, involved decision makers who "inconsistently applied" specific policies and ignored findings of fact "without explanation." *Id*. at 990-91.[4]

The Second Circuit agreed later that year in *Westchester,* 504 F.3d 338. The Court of Appeals began by acknowledging, as the Seventh and Ninth

---

[4] The Seventh Circuit reaffirmed this key proposition in *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846 (7th Cir. 2007), holding in that case that "the denial was so utterly groundless as to create an inference of religious discrimination," giving rise to an inference of substantial burden. *Id.* at 851.

Circuits had, that "[t]he arbitrary application of laws to religious organizations may reflect bias or discrimination against religion." *Id.* at 350. The Second Circuit then explicitly agreed with *Sts. Constantine*: That the application of the law by the decision maker was arbitrary and capricious was "relevant to" the "particular substantial burden claim." *Id.* at 351. The Second Circuit was suspicious when, as here, "[m]any of these grounds [for a ruling adverse to a religious institution] were conceived *after* the [decision maker] closed its hearing process." *Id.* at 346 (emphasis added). Accordingly, the Second Circuit considered the Village of Mamaroneck's alleged "bias or discrimination against religion" and found a substantial burden. *Id.* at 350-53.

The Second Circuit reaffirmed this ruling more recently in *Fortress Bible Church v. Feiner*. 694 F.3d 208 (2d Cir. 2012). Citing *Westchester*, the Court explicitly tied its finding of substantial burden to the town's anti-religion discrimination: "Our conclusion that the Church was substantially burdened is bolstered by the arbitrary, capricious, and *discriminatory* nature of the Town's actions, taken in bad faith." *Id.* at 219 (emphasis added).

Finally and most recently, the First Circuit in *Roman Catholic*, agreed with the Second, Seventh, and Ninth Circuits: "even when the evidence does not necessarily show the explicit discrimination 'on the basis of religion' contemplated by" § 2000cc(b)(1) of RLUIPA, a court may consider "an 'inference' of hostility to a religious organization" "[u]nder the substantial burden framework[.]" 724 F.3d at 97 (citing *Sts. Constantine,* 396 F.3d at 900). *Roman Catholic* and these other decisions taken together

demonstrate that the First, Second, Seventh, and Ninth Circuits are in accord: evidence of religious animus or discrimination is relevant to a RLUIPA claim of substantial burden.

But the most recent decision on this question, from the Sixth Circuit Court of Appeals in this action, strikes out on its own. In its opinion below, the Sixth Circuit explicitly broke with its sister circuits: "although several other circuits have taken evidence of alleged discrimination into account in considering whether there was a substantial burden on religious exercise, we decline to adopt this approach." Pet. App. 16a. The panel went on to explain that such evidence is "more appropriately considered when evaluating whether a governmental action was narrowly tailored to serve a compelling state interest[.]" *Id.* But the First, Second, Seventh, and Ninth Circuits explicitly disagree. *See, e.g., Westchester*, 504 F.3d at 351 (quoting *Sts. Constantine*, 396 F.3d at 900) ("Where the arbitrary, capricious, or unlawful nature of a defendant's challenged action suggests that a religious institution received less than even-handed treatment, the application of RLUIPA's substantial burden provision usefully 'backstops the explicit prohibition of religious discrimination in the later section of the Act.'"). The Sixth Circuit's only support for its contrary pronouncement is its earlier decision in *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729 (6th Cir. 2007), but that only highlights the circuit split.

The panel then cites the Fourth Circuit's decision in *Bethel*, 706 F.3d 548 for the proposition that "[f]inding a substantial burden due to evidence of discrimination would obviate the need for" RLUIPA's

equal terms and nondiscrimination provisions. Pet. App. 17a. But *Bethel* does *not* say this. The Fourth Circuit held only that "a religious organization asserting that a land use regulation has imposed a substantial burden on its religious exercise *need not show* that the land use regulation targeted it." *Bethel*, 706 F.3d at 557 (emphasis added). Petitioner does not contest this. But it simply does not follow from *Bethel* that evidence of targeting or other discrimination *cannot* support a finding of substantial burden.

The First, Second, Seventh, and Ninth Circuits could not have been clearer that, in the words of *Roman Catholic*, a court may consider "an 'inference' of hostility to a religious organization" "[u]nder the substantial burden framework[.]" 724 F.3d at 97. The Sixth Circuit sticks out like a sore thumb on this point. The Supreme Court should grant certiorari to resolve this circuit split.

ii. Lack of Clarity Among the Circuits Has Caused Inconsistent Application of RLUIPA in District Courts.

Because the circuits have adopted varied and often nebulous definitions of "substantial burden," factually similar district court cases often produce wildly disparate results.

For example, in *Episcopal Student Found. v. City of Ann Arbor*, a religious organization alleged that it had "outgrown its current [historically zoned] facility" and could not "accommodate all of the individuals who wish[ed] to attend worship services" and further, "because its current building only [had] a

'small and outdated kitchen' and lack[ed] a dining area . . . it [was] unable to fulfill its religious mission to help the hungry by preparing and serving meals at the church." 341 F. Supp. 2d 691, 693-94 (E.D. Mich. 2004). The district court, applying a mechanical test derived from pre-*Smith* jurisprudence, granted the city summary judgment because the denial of the plaintiff's permit did not "coerce its members into abandoning or violating" their beliefs. *Id.* at 704, 706.

Similarly, in *Chabad Lubavitch of Litchfield Cty. v. Borough of Litchfield*, a religious organization alleged that it needed to expand its current facilities to accommodate its religious mission, in that case including "a rabbi's study, a ritual bath" and "two kosher kitchens." No. 09-cv-1419, 2016 WL 370696, at *6 (D. Conn. Jan. 27, 2016). Unlike in *Episcopal Student Foundation*, the district court in *Chabad Lubavitch* scrutinized the zoning authority's behavior through a six-factor test, finding that "[g]enuine issues of material fact exist regarding a number of the factors" and thus denying the defendant's motion for summary judgement. *Id.* at *19 (internal citations and quotations omitted). The hodge-podge of standards applied by courts across the country reflect confusion regarding the substantial burden standard and result in inconsistent decisions that erode RLUIPA's effectiveness in protecting against religious discrimination.

II. Exclusion of a Religious Organization from an Entire Jurisdiction is Relevant to Substantial Burden Under RLUIPA

The court below also held that a town's effective exclusion of an organization's religious

exercise from its entire jurisdiction does not substantially burden the organization's religious exercise. Shutting its eyes to the relevance of political boundaries, the court wrote that "the boundaries of jurisdictions on the local-government level are often arbitrary in practice." Pet. App. 29a. In two related lines of cases, however, this Court has emphasized the importance of political boundaries in cases involving freedom of expression and free exercise of religion.

In *Schad v. Borough of Mt. Ephraim*, this Court noted that "[one] is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." 452 U.S. 61, 76-77 (1981) (internal citation omitted). Other courts have since applied this principle in the free exercise context. *See, e.g., Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009). Indeed, where a municipality can point only to alternatives for religious exercise *outside* its geographic borders, the inference of discrimination is strong. *See Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) ("By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion.").

Relatedly, this Court has used the term "religious gerrymander" to describe a form of subtle discrimination in which a government enacts rules designed to look neutral but which have the effect of keeping a particular religious organization or practice outside of its borders. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *Walz v. Tax Comm'n of New York City,* 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

Condemning this behavior, this Court held that "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'" *Church of the Lukumi Babalu Aye*, 508 U.S. at 534 (citing *Walz,* 397 U.S. at 696).

Use of local land use proceedings effectively to exclude a particular religious institution from the entire jurisdiction raises a strong inference of religious discrimination, and is at least relevant to the analysis of substantial burden under RLUIPA. The record in this case established that LCS, whose mission, as stated in its bylaws, is to provide Christian education in Livingston County, was left with no viable location in the County after its permit was denied. The Sixth Circuit erroneously treated that fact as irrelevant. This Court should grant certiorari to consider the need for a remand to take into account evidence of religious discrimination, including the fact that denial of the special use permit effectively forced LCS to leave the jurisdiction in order to carry out its religious mission.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully Submitted,

Kelly J. Shackelford
Hiram S. Sasser, III
Stephanie N. Taub
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, TX 75075
(972) 941-4444

Robert K. Kelner
Counsel of Record
Andrew Leff
Jack Lund
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
rkelner@cov.com

Date: December 26, 2017