

No. 17-914

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**

**Brief of the Association of Christian Schools
International as *Amicus Curiae*
in Support of Petitioner**

R. SCOTT FELDMANN
ANDREW A. WOOD
BAKER & HOSTETLER LLP
600 ANTON BLVD.
Costa Mesa, CA 92626
(714) 966-8862

ANDREW M. GROSSMAN
Counsel of Record
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for the Amicus Curiae

QUESTION PRESENTED

1. 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.
2. 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.

TABLE OF CONTENTS

	Page
INTEREST OF THE <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Circuits Are Split on Whether Purposeful Government Discrimination Burdens Religious Exercise Under RLUIPA ..	4
A. The First, Second, Seventh and Ninth Circuits Consider Religious Animus in Assessing Substantial Burden	5
B. The Sixth Circuit Anomalously—and Incorrectly—Held that Religious Animus Is “Irrelevant” To Substantial Burden	9
C. The Sixth Circuit Gave Short Shrift to the Burden of Distance When a Jurisdiction Excludes a Religious Institution from Its Borders	12
II. The Petition Presents Important and Recurring Issues Affecting Religious Schools’ Very Survival	14
III. The Court Should Grant Certiorari to Correct Lower Courts’ Resistance to Enforcing RLUIPA	18
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<i>Fortress Bible Church v. Feiner</i> , 694 F.3d 208 (2d Cir. 2012)	6, 7
<i>Guru Nanak Sikh Soc’y v. County of Sutter</i> , 456 F.3d 978 (9th Cir. 2006)	8–9
<i>Keystone Driller Co. v. General Excavator Co.</i> , 290 U.S. 240 (1933)	11–12
<i>Roman Catholic Bishop of Springfield v. City of Springfield</i> , 724 F.3d 78 (1st Cir. 2013)	5
<i>Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin</i> , 396 F.3d 895 (7th Cir. 2005)	7
<i>Shelley v. Kraemer</i> , 334 US 1 (1948)	12
<u>Statutory Provisions</u>	
42 U.S.C. § 2000cc	<i>passim</i>
<u>Other Authorities</u>	
Alliance of Christian Schools International, School Choice Research Study (Fall 2016)	17
Andrew D. Catt & Evan Rhinesmith, Why Parents Choose: A Survey of Private School and School Choice Parents in Indiana (June 2016)	15–16

Anya Kamenetz, <i>A New Study Reveals Much About How Parents Really Choose Schools</i> , National Public Radio (Jan. 15, 2015)	15
Daniel Dalton, RLUIPA Litigation History— Land Use Decisions (2000–2015) (2016)	19
Douglas Laycock, <i>State RFRAS and Land Use Regulation</i> , 32 U.C. Davis L. Rev. 755 (1999)	18–19
Hearing: Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7774-01 (daily ed. July 27, 2000)	11
Religious Liberty Protection Act of 1998: Hearing on S.2148 Before the Sen. Comm. on the Judiciary, 105th Cong.	19
Stephanie Ewert, U.S. Census Bureau, The Decline in Private School Enrollment (SEHSD Working Paper No. FY12-117, Jan. 2013)	14
U.S. Department of Transportation, NHTS Brief, “Travel to School: The Distance Factor,” January 2008	12

INTEREST OF THE *AMICUS CURIAE*¹

The Association of Christian Schools International is a nonprofit, non-denominational, religious association that provides support services to 24,000 Christian schools in more than 100 countries. ACSI serves 3,000 Christian preschools, elementary schools, and secondary schools and 90 post-secondary institutions in the United States. Member schools educate some 5.5 million children around the world, including 825,000 in the United States. ACSI accredits Protestant pre-K–12 schools, provides professional development and teacher certification, and offers member schools high-quality curricula, student testing, and a wide range of materials for student activities. ACSI and its members seek to advance the common good by providing quality education and spiritual formation to students. And their religious calling is to promote a vibrant Christian faith that embraces every aspect of life. As such, ACSI has an interest in protecting religious liberty and practice against government attempts to restrict them.

¹ Pursuant to Rule 37.2(a), all parties received at least 10 days' notice of the *amicus curiae*'s intent to file, and letters consenting to the filing of this brief are filed with the clerk. In accordance with Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Religious Land Use and Institutionalized Persons Act exists to provide a remedy for persons, assemblies, and institutions whose religious exercise is impaired without justification by government land-use decisions. To that end, it prohibits discrimination against religious practice. But, as do many civil rights laws, it goes further, prophylactically prohibiting land-use restrictions that impose a “substantial burden” on religious practice that is not justified by a compelling governmental interest and narrowly tailored to that interest. The entire point of subjecting these land-use restrictions to strict scrutiny is to smoke out facially neutral decisions actually motivated by religious animus, which occurs frequently when municipalities deny land-use permits sought by disfavored denominations or block the siting of religious institutions so as to avoid a hit to property tax collections.

The decision below misses the point. The Sixth Circuit interpreted RLUIPA’s substantial burden standard to reach only land-use decisions so oppressive that they would already violate the statute’s anti-discrimination provision. In so doing, it discounted entirely the impact of seemingly more minor actions that Congress understood still could be employed to substantially burden religious exercise: repeated permit denials, conflicting demands, patterns of conduct that hint at animus, and other evidence of purposeful discrimination. When the reality is that a

municipality has no intention of ever permitting a religious institution to operate within its borders, that constitutes a substantial burden.

But the decision below regards as irrelevant to that inquiry “whether there is evidence that the municipality’s decisionmaking process was arbitrary, capricious, or discriminatory.” Pet. App. 15a–16a. That position not only breaks with decisions of the First, Second, Seventh, and Ninth Circuits, but it also deprives RLUIPA’s substantial burden provision of any practical import: under the Sixth Circuit’s anomalous approach, a town could string along a religious school for years with delays and actions short of outright denial, a court would have to blind itself to the facts, and the school would have no recourse. That is not at all what Congress intended. Instead, when a municipality acts in bad faith to give a religious group the runaround on land-use permitting, a court should be able to take account of that in practical terms, recognizing the substantial burden it imposes on religious practice.

It is fitting that the Petitioner is a religious school, because religious schools will uniquely suffer under the Sixth Circuit’s approach. Increasingly, religious schools are in competition for students with alternative and charter schools, and location and convenience matter more than ever in attracting a viable student body. When a religious school is denied a land-use permit to move closer to potential students, that threatens its enrollment, its viability, and ultimately its religious mission. The questions presented

here are important and recurring, and only growing more so.

Certiorari is appropriate to promote uniform application of law, correct an aberrant decision, and restore RLUIPA's purpose of protecting religious practice against invidious discrimination. The petition should be granted.

ARGUMENT

The Sixth Circuit erred in holding that evidence of government hostility to religion is “irrelevant” to determining whether the implementation of land-use regulation imposes a “substantial burden” on religious exercise. RLUIPA subjects such burdens to strict scrutiny, the most searching standard of review. 42 U.S.C. § 20000cc(a)(1). But, in the Sixth Circuit's view, no searching at all is permitted: even devastating discrimination against a religious institution passes muster, so long as a government carries out the discrimination with subtlety and a modicum of self-restraint. In that way, the decision below eviscerates RLUIPA's land-use protections and, as the Sixth Circuit recognized, splits with the approach of other circuits.

I. The Circuits Are Split on Whether Purposeful Government Discrimination Burdens Religious Exercise Under RLUIPA

In holding that evidence of discrimination is “irrelevant” to substantial burden analysis under RLUIPA, the court below correctly acknowledged not

only that it was creating a circuit split, but also that it was setting itself apart from its sibling circuits. Pet. App. 16a (“[A]lthough 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.”). This Court’s review is necessary to ensure uniform application of the law and to correct the Sixth Circuit’s egregious misinterpretation of an important statute to protect religious liberty.

A. The First, Second, Seventh and Ninth Circuits Consider Religious Animus in Assessing Substantial Burden

The First Circuit has identified the correct approach. In *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78 (1st Cir. 2013), it recognized that substantial burden analysis must consider “whether the regulation at issue appears to target a religion, religious practice, or members of a religious organization because of hostility to that religion itself” because that is necessarily “relevant when determining whether a particular land use restriction imposes a substantial burden on a particular religious organization.” *Id.* at 96. Religious institutions, it recognized, can be vulnerable to “subtle forms of discrimination” that, while substantially curtailing their religious exercise, might otherwise fall outside of RLUIPA’s reach. *Id.* (quotation marks omitted).

Likewise, it explained, evidence of discrimination may help reveal when “local regulators have subject-

ed the religious organization to a process that may appear neutral on its face but in practice is designed to reach a predetermined outcome contrary to the group's requests." *Id.* This is only common sense: evidence of discrimination permits a court to recognize that "the fix is in" and provide appropriate relief.

And when substantial burden analysis takes appropriate account of hostility to religion, the First Circuit has explained, it "backstops the explicit prohibition of religious discrimination in RLUIPA's subsection (b) much in the same way as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Id.* at 97 (quotation marks omitted). In that way, this approach reads RLUIPA's several land-use provisions in *pari materia*, giving meaning and effect to the entirety of the statutory scheme.

The Second Circuit has staked out the same approach, for much the same reason. *Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d. Cir. 2012), involved a series of actions by a town to prevent a church from building a worship facility and school on land that it owned. The Second Circuit affirmed the district court's conclusion that "[t]he Town's desire to prevent the Church from building on its property relegated it to facilities that were wholly inadequate to accommodate its religious practice," amounting to a substantial burden. *Id.* at 220.

Evidence of purposeful discrimination was central to its analysis. In its view, "when the town's actions are arbitrary, capricious, unlawful, or taken in bad

faith, a substantial burden may be imposed because it appears that the applicant may have been discriminated against on the basis of its status as a religious institution.” *Id.* at 219. That is because evidence of bad faith can reveal when what may appear to be ordinary regulatory enforcement is really something far more burdensome. For example, such evidence may demonstrate that a “town’s stated willingness to consider another proposal is disingenuous,” causing a conditional denial that might not otherwise be seen as violating RLUIPA to “rise to the level of a substantial burden.” *Id.* Similarly, government actions that individually appear to impose only minor burden may, when considered together in the context of hostility to religion, “amount[] to a complete denial” that substantially burdens religious exercise. *Id.* Without considering the government’s discriminatory intent, a court would be blind to real substantial burden.

The Seventh Circuit also considers animus as a relevant factor in considering existence of a substantial burden on religious exercise under RLUIPA. In general, its decision in *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), proceeds along the same lines as the Second Circuit’s in *Fortress Bible Church*.

What makes the decision particularly notable is its consideration of the constitutional background against which RLUIPA’s substantial burden provision was enacted. “[I]f this provision is interpreted to

place religious institutions in *too* favorable a position in relation to other land users, there is a danger that it will run afoul of the clause of the First Amendment that forbids Congress (and, by interpretation of the Fourteenth Amendment, state and local governments as well) to establish a church.” *Id.* at 900. But, at the same time, the First Amendment does not bar the federal government and state governments from providing a remedy for government action that disadvantages religious practice.

Accordingly, to avoid possible constitutional doubt, the substantial burden provision is best understood as a “backstop[]” to RLUIPA’s explicit prohibition on discrimination that addresses “the vulnerability of religious institutions...to 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.* On this view, that provision is inseparable from concerns of animus to religion, and it would entirely misapprehend the statutory scheme to interpret and apply it otherwise.

Finally, the Ninth Circuit also regards evidence of hostility to religious exercise relevant to substantial burden analysis. *Guru Nanak Sikh Soc’y v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006), involved a town’s denial of two successive applications for a land-use permit by a religious institution even though, in its second application, it had complied with every request that the town made when it de-

nied the first. The court took the town’s unexplained denial of that application and inconsistent application of its zoning standards as evidence that any future applications would be met with the same hostility and therefore would be “fraught with uncertainty,” if not entirely “in vain.” *Id.* at 991. In that way, the town’s actions revealed its animus, which in turn served to evidence that there was a substantial burden on the institution’s religious exercise. *Id.* at 992.

In short, until the decision below, all four of the courts of appeals to consider the issue recognized that evidence of religious animus is, at the least, relevant to substantial burden analysis.

B. The Sixth Circuit Anomalously—and Incorrectly—Held that Religious Animus Is “Irrelevant” To Substantial Burden

Breaking with the First, Second, Seventh, and Ninth Circuits, the Sixth Circuit in the decision below declared “irrelevant” to substantial burden analysis “whether there is evidence that the municipality’s decisionmaking process was arbitrary, capricious, or discriminatory.” Pet. App. 16a. In so doing, the Court expressly “decline[d] to adopt th[e] approach” of other circuits, reasoning that the existence of RLUIPA’s separate prohibition on discrimination, 42 U.S.C. § 2000cc(b)(1), suggests that its substantial burden prohibition is unconcerned with discrimination. Pet. App. 16a–17a. It cannot be seriously disputed that the Sixth Circuit, in the decision

below, opted to chart its own course, creating a split in authority.

The course it pursued is well off the mark, missing the whole point of RLUIPA's substantial burden provision. If a town or city were to expressly bar all religious land uses, relief could be had under the Free Exercise Clause, as applied through the Fourteenth Amendment. What RLUIPA addresses is more insidious discrimination. Even where discrimination is not overt, such that it could be challenged under RLUIPA's prohibition against discrimination, 42 U.S.C. § 2000cc(b)(1), it may still in effect preclude the religious exercise of a person, assembly, or institution. Taking account of that effect is essential to discerning when land-use burdens that may appear to be neutral and inconsequential—like a permit denial with specific suggestions for mitigation and reapplication—are in fact discriminatory and substantial, because the government has no intention of ever treating the applicant fairly.

Yet, under the Sixth Circuit's approach, a city or town can string along a religious institution forever, so long as it takes no definitive action that might be regarded, in isolation, as "substantial." In effect, the Sixth Circuit provides a roadmap for municipalities to keep disfavored religious groups outside of their borders while escaping accountability under RLUIPA. By refusing to consider all the facts, including evidence of religious animus revealed through the totality of a religious institution's interactions with the municipality, the Sixth Circuit ap-

proach deprives RLUIPA's substantial burden provision of practical effect and frustrates the statutory purpose.

In fact, RLUIPA's sponsors in Congress identified the evil of subtle but substantial burden as the specific target of the legislation:

The hearing record compiled massive evidence that [the right to build, buy, or rent space for churches and synagogues] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized processes of land use regulation.

Hearing: Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7774-01, *S7774-01 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy). A court applying RLUIPA should not close its eyes to abuse of those "highly individualized process" on the basis that each exercise of discretion, in itself, appears a minor impediment to religious exercise.

Nor should the courts allow themselves to be used as tools of discrimination. Just as courts of equity apply the doctrine of "unclean hands" to protect themselves from abetting state action inextricably bound up with bad acts, so should courts be reluctant to sanction official discrimination. *Cf. Keystone*

Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933) (quotation marks omitted) (“The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity.”); *Shelley v. Kraemer*, 334 US 1 (1948). RLUIPA serves to allow courts to avoid that quandary, and it should be so enforced.

**C. The Sixth Circuit Gave Short Shrift to
the Burden of Distance When a
Jurisdiction Excludes a Religious
Institution from Its Borders**

Compounding its error, the decision below also raises the bar for what constitutes a “substantial burden,” holding in effect that a government may exclude a religious organization from a jurisdiction entirely so long as any location in the region is available. Underlying that decision is a pinched view of the burden that land-use decisions can impose on religious schools.

The Sixth Circuit was nonplussed about what amounts to tripling the time and distance required to take students to school. According to the U.S. Department of Transportation, the average K–6 student travels 3.6 miles to school.² And many of those students take the bus, freeing their parents from having to drive them. Yet the decision below held

² U.S. Department of Transportation, NHTS Brief, “Travel to School: The Distance Factor,” at 2, January 2008.

that a land-use decision that required students to travel an *additional* 12.1 miles—nearly three times the national average—was not a substantial burden, *as a matter of law*. Pet. App. 24a. Instead, in the view of the court below, this additional travel, undertaken entirely by parents without buses, was a “mere inconvenience.” *Id.*

But, as the Petition observes (at 27–28), political boundaries cannot be disregarded so lightly, particularly when they correspond with population boundaries and things like driving time that are tied up with religious institutions’ land-use needs and thereby their religious exercise.

As discussed further below, *see infra* § II, driving time and distance are no small matter for religious schools, which depend on the ability and willingness of families to transport students. When the parents of even a single student are unable or unwilling to undertake a longer trip—which is all but inevitable when a religious school is pushed out of an entire jurisdiction—that imposes a direct burden on the school, which necessarily forgoes religious instruction of that student. In other words, that religious exercise, in its entirety, is vitiated—because of a land-use decision. Contrary to the decision below, that is no “mere inconvenience,” but a substantial burden under any reasonable interpretation of the statute.

II. The Petition Presents Important and Recurring Issues Affecting Religious Schools' Very Survival

It should go without saying that religious schools cannot survive, much less thrive, without students, and location is one of the most important factors in recruiting students. A school that parents and students can access conveniently at least has a shot at drawing a sustainable student body. By contrast, a school that is located far from population centers begins every year at a disadvantage, with its survival ultimately at stake. As private religious schools face increasing competition with alternative and charter schools for students, location and convenience matter more than ever, increasing the frequency of land-use disputes subject to RLUIPA. For that reason, the questions presented by the petition are both important and recurring.

The rise in recent years of free alternative schools and charter schools has heightened the competition for students. According to a recent Census Bureau analysis, “[o]ver the last decade, government statistics seem to show that private school enrollment has declined.” Stephanie Ewert, U.S. Census Bureau, *The Decline in Private School Enrollment 1* (SEHSD Working Paper No. FY12-117, Jan. 2013).³ In Michigan, where the events at issue here took place, a 12 percent increase in charter school enrollment from

³ Available at <https://www.census.gov/library/working-papers/2013/demo/ewert-01.html>.

2008 to 2010 coincided with an 11 percent decrease in private school enrollment. *Id.* at 21. This is true nearly everywhere: over that period, “[p]rivate school enrollment decreased in cities, suburbs, and towns.” *Id.* at 9. The analysis concludes “that growth in the charter school movement has occurred in conjunction with the decline in private school enrollment.” *Id.* at 12.

Location and convenience are often what drives parents’ decisions in choosing schools for their children. For example, Tulane University’s Education Research Alliance for New Orleans found that, when parents were asked to grade nearby schools based on their preferences, “three-quarters of a mile in distance was equal to a letter grade in terms of family preferences. In other words, a C-grade school across the street was slightly preferable to a B-grade school just a mile away.” Anya Kamenetz, *A New Study Reveals Much About How Parents Really Choose Schools*, National Public Radio (Jan. 15, 2015).⁴ And 31 percent of Indiana private school parents reported in a survey that attending a school “closer to home and/or work” was a “Top 10” reason for choosing their current private school. Andrew D. Catt & Evan Rhinesmith, *Why Parents Choose: A Survey of Private School and School Choice Parents*

⁴ *Available at*

<https://www.npr.org/sections/ed/2015/01/15/376966406/a-new-study-reveals-much-about-how-parents-really-choose-schools>.

in Indiana 15 (June 2016).⁵ Among the top reasons cited by parents for leaving a previous school were “Location” and “Transportation Issues.” *Id.* at 35. For many families, seemingly small changes in distance can matter more than differences in educational performance or curriculum.

That makes sense when one considers the expense and time-burden of taking students to school. As for expense, simply applying the Internal Revenue Service’s current reimbursement rate for driving mileage to the facts of this case (180 school days per year, an additional 12.1 miles each way) results in a total *additional* cost of \$2,374 annually—or over one-third of the Petitioner’s annual tuition for grade school. Then there is the time burden. Because of the Respondent’s land-use actions, parents choosing to send their children to Livingston Christian Schools will drive an *additional* 4,356 miles annually, or 56,628 miles over the course of a 13-year K–12 education. Assuming a driving speed of 35 miles per hour, that amounts to an *additional* 125 hours of driving annually. All of these burdens would be multiplied if the students participate in extracurricular activities that require additional trips to and from school. As a practical matter, these burdens will turn away many families.

⁵ Available at <https://www.edchoice.org/wp-content/uploads/2017/03/Why-Parents-Choose-A-Survey-of-Private-School-and-School-Choice-Parents-in-Indiana-by-Andrew-D.-Catt-and-Evan-Rhinesmith.pdf>.

Indeed, according to a 2015 survey commissioned by the *amicus curiae*, distance to a preferred school is a major, and increasing, barrier to enrollment at religious schools. See Alliance of Christian Schools Intern., School Choice Research Study 4 (Fall 2016).⁶ Among prospective parents—that is, those who considered themselves open to Christian schooling—68 percent identified “accessible location” as a key factor in selecting a school for their children. *Id.* at 8. Not only did prospective parents rate “location” as being of “high importance,” but they also gave a “low” rating to Christian schools generally on that factor. *Id.* at 9. Fully 43 percent of parents of prospective students of Christian religious schools cited a “preferred school’s location” as the reason “[i]t is not possible to send a child to our preferred school.” *Id.* And the importance of distance is only increasing, with 79 percent of younger prospective parents citing location as a barrier to enrollment. *Id.* The pressure on religious schools to move to preserve enrollment is growing.

All of this factors directly into religious schools’ bottom lines. Many religious schools lack big endowments or the support of a wealthy denomination; instead, they depend on student tuition. Fewer students means less tuition, less revenue, and ultimately, less ability to shoulder the considerable overhead of running a school. Even for schools that do not de-

⁶ Available at

<https://www.acsi.org/Documents/Southeast/Barna%20ACSI%20School%20Choice%20Research%20Slides%202016.pdf>.

pend on tuition, students are what make the whole enterprise worthwhile.

In sum, when land-use restrictions bar religious schools from attractive locations, it undermines their competitiveness, their student bodies, their revenues, and ultimately their chances of survival. A poorly located school that cannot attract a sustainable student body year after year will inevitably close, depriving the community of its benefits and impeding (to say the least) its religious mission. That is why the issue of burdens on land use is so important to religious schools, as well as frequently recurring.

III. The Court Should Grant Certiorari to Correct Lower Courts' Resistance to Enforcing RLUIPA

RLUIPA was enacted to provide a remedy for invidious discrimination against religious institutions, but too often the lower courts have not been enforcing it with that end in mind. The numbers suggest that, notwithstanding the statute's clear and emphatic language, courts have not much changed how they address religious land-use disputes.

A pre-RLUIPA survey of Presbyterian congregations found that "32% of the congregations that had needed a land use permit reported that 'no clear rules permitted or forbade what we wanted to do, and everything was decided based on the specifics of this particular case (e.g., variance, waiver, special use permit, conditional use permit amendment to the zoning variance, etc.).'" Douglas Laycock, *State*

RFRAS and Land Use Regulation, 32 U.C. Davis L. Rev. 755, 767 (1999) (citing Religious Liberty Protection Act of 1998: Hearing on S.2148 Before the Sen. Comm. on the Judiciary, 105th Cong.).

Despite the enactment of RLUIPA, improper denial of land-use permits to religious organizations continues to be an important and recurring problem. Religious organization plaintiffs claiming a “substantial burden” prevailed only 22 percent of the time in RLUIPA land-use decisions from the time of RLUIPA’s passage in 2000 through 2015. Daniel Dalton, *RLUIPA Litigation History — Land Use Decisions (2000–2015)*, at 1 (2016).⁷

Without a proper calibration of the “substantial burden” standard, governments can easily hide improper reasons for their denial of necessary permits. RLUIPA is supposed to guard against animus against religious organizations because of their beliefs or for improper self-interested reasons, such as a preference to reserve parcels for businesses that pay taxes. If the Sixth Circuit’s narrowing of the scope of evidence for determination of burden is not corrected, then RLUIPA will have even less effect. RLUIPA’s protection will be minimal if courts are permitted to exclude the most relevant evidence to determining “substantial burden”: discrimination.

⁷ Available at

http://www.attorneysforlanduse.com/wp-content/uploads/sites/2/2015/11/RLUIPA_Case_History_41916.pdf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

R. SCOTT FELDMANN
ANDREW A. WOOD
BAKER & HOSTETLER LLP
600 ANTON BLVD.
Costa Mesa, CA 92626
(714) 966-8862

ANDREW M. GROSSMAN
Counsel of Record
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

JANUARY 2018