

No. 17-914

In the Supreme Court of the United States

LIVINGSTON CHRISTIAN SCHOOLS,
Petitioner,

v.

GENOA CHARTER TOWNSHIP,
Respondent.

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

BRIEF IN OPPOSITION

Carol A. Rosati
Anne McClorey McLaughlin
JOHNSON ROSATI SCHULTZ
& JOPPICH, P.C.
27555 Executive Drive
Suite 250
Farmington Hills, MI 48331
(248) 489-4100

T. Joseph Seward
Counsel of Record
SEWARD HENDERSON PLLC
210 East 3rd Street
Suite 212
Royal Oak, MI 48067
(248) 733-3580
jseward@sewardhenderson.com

Counsel for Respondent

QUESTIONS PRESENTED

- I. Should the Court grant certiorari to consider whether evidence of religious discrimination is relevant to a “substantial burden” claim under the Religious Land Use and Institutionalized Persons Act where (i) the petitioner failed to preserve the issue, (ii) the petitioner failed to present any evidence of religious discrimination, and (iii) the petitioner failed to identify a split among the circuits that should be resolved by this Court?
- II. Should the Court grant certiorari to consider whether evidence of exclusion from a jurisdiction is relevant to a “substantial burden” claim under the Religious Land Use and Institutionalized Persons Act where (i) the petitioner failed to present evidence that the respondent excluded the petitioner or other religious institutions from the jurisdiction, (ii) the petitioner failed to show that the Sixth Circuit’s decision creates a conflict among the circuits, and (iii) the petitioner failed to show that the Sixth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CITED AUTHORITIES	iii
STATEMENT OF THE CASE	1
I. FACTUAL BACKGROUND	4
II. PROCEDURAL HISTORY	21
REASONS FOR DENYING THE PETITION	22
I. DISCRIMINATION OR UNEQUAL TREATMENT	26
A. Waiver of Issue	27
B. Lack of Evidence	29
C. Purported Conflict Among Circuits	31
II. EXCLUSION FROM JURISDICTION	36
CONCLUSION	40

TABLE OF CITED AUTHORITIES

Cases

<i>Andon, L.L.C. v. City of Newport News</i> , 813 F.3d 510 (4th Cir. 2016)	39
<i>Beck v. Prupis</i> , 529 U.S. 494 (2000)	32
<i>Ben’s Bar, Inc. v. Village of Somerset</i> , 316 F.3d 702 (7th Cir. 2003)	40
<i>Chabad Lubavitch of Litchfield Cnty., Inc. v.</i> <i>Litchfield Historic Dist.</i> , 768 F.3d 183 (2d Cir. 2014)	35
<i>Civil Liberties for Urban Believers (CLUB) v. City of</i> <i>Chicago</i> , 342 F.3d 752 (7th Cir. 2003)	39
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	22
<i>Eagle Cove Camp & Conference Ctr., Inc. v. Town of</i> <i>Woodboro</i> , 734 F.3d 673 (7th Cir. 2013)	34
<i>Fortress Bible Church v. Feiner</i> , 694 F.3d 208 (2d Cir. 2012)	32
<i>Genesis Healthcare Corp. v. Symczyk</i> , 569 U.S. 66 (2013)	29
<i>Guru Nanak Sikh Society of Yuba City v. County of</i> <i>Sutter</i> , 456 F.3d 978 (9th Cir. 2006)	32, 35
<i>Hamilton v. Morgan</i> , 474 F.3d 854 (6th Cir. 2007)	28

<i>Henricks v. Pickaway Corr. Inst.</i> , 782 F.3d 744 (6th Cir. 2015)	28, 29
<i>Islamic Center of Mississippi, Inc. v. City of Starkville</i> , 840 F.2d 293 (5th Cir. 1988)	37, 38
<i>Joseph v. United States</i> , 135 S. Ct. 705 (2014)	29
<i>Kingdomware Tech., Inc. v. United States</i> , 136 S. Ct. 1969 (2016)	29
<i>Livingston Christian Sch. v. Genoa Charter Twp.</i> , 858 F.3d 996 (6th Cir. 2017)	22
<i>Livingston Christian Sch. v. Genoa Charter Twp.</i> , No. 15-12793, 2015 WL 5439942 (E.D. Mich. Sept. 15, 2015)	21
<i>Livingston Christian Sch. v. Genoa Charter Twp.</i> , No. 15-12793, 2016 WL 3549357 (E.D. Mich. June 30, 2016)	21, 22
<i>Midrash Sephardi, Inc. v. Town of Surfside</i> , 366 F.3d 1214 (11th Cir. 2004)	33
<i>OBB Personenverkehr AG v. Sachs</i> , 136 S. Ct. 390 (2015)	29
<i>Petra Presbyterian Church v. Village of Northbrook</i> , 489 F.3d 846 (7th Cir. 2007)	32, 33, 34
<i>Roman Catholic Bishop of Springfield v. City of Springfield</i> , 724 F.3d 78 (1st Cir. 2013)	32, 35, 39

<i>Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin</i> , 396 F.3d 895 (7th Cir. 2005)	<i>passim</i>
<i>Schad v. Borough of Mount Ephraim</i> , 452 U.S. 61 (1981)	39, 40
<i>Sossamon v. Texas</i> , 131 S. Ct. 1651 (2011)	22
<i>Star Satellite, Inc. v. City of Biloxi</i> , 779 F.2d 1074 (5th Cir. 1986)	40
<i>United States ex rel. Marlar v. BWXT Y-12, L.L.C.</i> , 525 F.3d 439 (6th Cir. 2008)	28
<i>United States v. Galletti</i> , 541 U.S. 114 (2004)	29
<i>United States v. Huntington Nat’l Bank</i> , 574 F.3d 329 (6th Cir. 2009)	28
<i>Vision Church v. Village of Long Grove</i> , 468 F.3d 975 (7th Cir. 2006)	40
<i>Westchester Day School v. Village of Mamaroneck</i> , 504 F.3d 338 (2d Cir. 2007)	32
Statutes	
42 U.S.C. § 2000bb, <i>et seq.</i>	22
42 U.S.C. § 2000cc	22, 25
42 U.S.C. § 2000cc(a)	26, 31
42 U.S.C. § 2000cc(b)	26, 31, 33
42 U.S.C. § 2000cc(b)(1)	26, 33
42 U.S.C. § 2000cc(b)(2)	26, 33

42 U.S.C. § 2000cc(b)(3)	26
42 U.S.C. § 2000cc-5(5)	23
42 U.S.C. § 2000cc-5(7)(A)-(B)	23
MICH.COMP.LAWS § 388.851b	12

Other Authorities

146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000)	23
--	----

Rules

S. Ct. Rule 10	41
S. Ct. Rule 10(a)	38
S. Ct. Rule 10(c)	40

STATEMENT OF THE CASE

Livingston Christian Schools (“the School”) instituted this litigation in August 2015, claiming that Genoa Charter Township (“the Township”) violated the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) by denying a special use permit for which the Brighton Church of the Nazarene (“the Church”) applied. The School has since applied for and obtained a special use permit from the Township, which allows the School to operate in the Church’s facility for the upcoming academic year. But the School still wants damages, costs, and attorney fees, and so this litigation continues.

For nine years preceding this litigation, the School operated in a 26,247 square foot facility situated on 1.6 acres in Pinckney. Earlier in this litigation, the School gave inconsistent reasons for its desire to relocate to the Church’s facility, none of which involved the financial difficulties discussed at length in its petition. The School’s reasons depended on its audience.

In its original complaint, the School asserted that the “size constraints” of the Pinckney facility necessitated relocation to a larger facility. R. 1, Pg ID 4. In its motion for temporary restraining order and preliminary injunction, supported by a sworn declaration, the School represented that its “growing enrollment” required moving to a larger facility. R. 4, Pg ID 101, 112; R. 4, Ex. 1, Pg ID 139. The School also told the District Court that its ability to maintain even its current enrollment is “entirely dependent” on relocation to a larger facility. R. 4, Ex. 1. Pg ID 140.

Statements by both the Church and the School belied this claim of “growing enrollment” requiring the School to relocate from Pinckney. When the Church applied for an amendment to its special use permit, it informed the Township Planning Commission that the School “wants” or “hope[s]” to grow. R. 11, Ex. 11, Pg ID 442, 444. The School informed students and parents that it decided to relocate due to “decreasing enrollment.” R. 11, Ex. 24, Pg ID 539.

Enrollment statistics further undermined the School’s claim that its “growing enrollment” demanded relocation to a larger facility. According to the School’s treasurer, the School enrolled 139 students for the 2014-2015 academic year. R. 4, Ex. 1. Pg ID 140. Data collected by the Center for Educational Performance and Information (“CEPI”), a division of the Michigan Department of Education, reflects enrollment figures of 160, 166, 189, 158, 154 and 138 students in each school year from 2009-2010 through 2014-2015, respectively. R. 35, Pg ID 950-951. CEPI’s data is similar to that collected by the National Center for Education Statistics (“NCES”) in the United States Department of Education. NCES’s available data indicates that the School enrolled 160, 193 and 158 students, respectively, in academic years 2009-2010, 2011-2012 and 2013-2014. R. 35, Pg ID 951. The School’s own data also reveals a steadily declining enrollment from the 2010-2011 academic year to the 2015-2016 academic year. R. 35, Ex. 34, Pg ID 1138.

In addition to these enrollment statistics, the evidence reflects that the School leased the Pinckney facility to another academic institution, which planned to move in with 200 students. After the meeting at which the Township Board voted to deny a special use permit, the School acknowledged that it had the ability to return to the Pinckney facility. Indeed, the School's own administrator stated: "The [S]chool is going to open. I can definitively tell you that. It will open on time. . . . We still have the Pinckney building available because we own it." R. 11, Ex. 28, Pg ID 546.

Confronted with its enrollment statistics and contradictory statements, the School backpedaled and reversed course. The School acknowledged "enrollment decreases, including double digit enrollment [decreases]" between the 2013-2014 academic year and the 2014-2015 academic year, and came up with yet another reason why it needed to relocate to the Church's facility. R. 16, Ex. 16, Pg ID 577. This time, the School hung its hat on the perceived appeal of the "centralized" and "populous" location of the Church's facility.¹ R. 16, Pg ID 561. Shortly thereafter, the

¹The Church's facility (7669 Brighton Road in Brighton, Michigan) is no more centralized than the Pinckney school (550 East Hamburg Street in Pinckney, Michigan); central Livingston County is no more accessible from the Church than from the Pinckney location. Perhaps the most centralized location in Livingston County is Howell City Hall (611 East Grand River Avenue in Howell). Livingston County, *Municipalities*, <https://www.livgov.com/pages/municipalities.aspx> (last accessed February 19, 2018). According to Google Maps, the Church is roughly 10 miles from Howell City Hall (an 18-minute drive) and the School's former building is about a 17-minute drive to City Hall 11 miles away or so.

School filed an amended complaint from which it removed its previous allegation that the “size constraints” of the Pinckney facility necessitated relocation to a larger site. The School newly alleged that its inability to relocate to the Church’s facility frustrated its mission to serve the “Livingston County community.” R. 23, Pg ID 668. Yet the School’s official website indicates that the School serves communities all over southeast Michigan—including in Washtenaw, Oakland, Ingham, and Jackson Counties. See <http://www.livingstonchristianschools.org/> (last accessed March 20, 2018). Some of those communities are quite a distance from Brighton. Jackson, for example, is about 54 miles from Brighton, travel time 53 minutes, while it takes about 44 minutes to travel the 43 miles from Manchester to Brighton.

Unfortunately, the pattern of deception continues. The School’s petition is rife with misstated facts and unsupported contentions. As but one example, the School contends that the denial of a special use permit forced it to find a site outside of Livingston County at which to exercise its religious mission. Petition at 11. But as noted above, the School’s own administrator admitted that the School could have returned to the Pinckney facility, which is in Livingston County. R. 11, Ex. 28, Pg ID 546.

I. FACTUAL BACKGROUND

Over two decades ago, the Church purchased property in the Township’s suburban residential zoning district. In 1991, the Church obtained a special use permit to conduct its worship services and ministries on the property. Thereafter, the Church constructed a 27,620 square foot facility in various phases.

Around August 2000, the Church applied for a special use permit to add a 6,960 square foot pavilion-like building for use as a skate park. The Church viewed the skate park as a means to keep things under control and regulate the hours during which youth utilized the Church's facility. The Church advised that youth would be permitted to use the skate park for skateboarding and in-line skating, perhaps volleyball games and picnics in the future, at no charge. The Church denied any other planned activities for the skate park. The Township Planning Commission recommended a special use permit subject to conditions. The Township Board approved a special use permit with the recommended conditions.

Around April 2003, the Church applied for another special use permit to add a 17,600 square foot building for use as a sanctuary. The Church advised that it planned to convert the existing sanctuary into Sunday school classrooms. The Township Planning Commission recommended a special use permit subject to conditions regarding the skate park. The recommended conditions required the Church to improve and maintain the landscape near the east property line, set forth rules for the skate park in the liability waiver form, turn off the outdoor lighting at 11:00 p.m., erect at least two signs to inform youth that outdoor skating is prohibited, cease commercial activity, and provide a security guard to patrol the parking lot during the evening. The Township Board approved a special use permit with the recommended conditions.

In July 2013, Church applied for a special use permit to add a 16,120 square foot building for use as classrooms and a gymnasium. The Church advised of its intent to use the classrooms for Sunday school. When asked by the Township Planning Commission, the Church expressly disclaimed any intent to use the classrooms for a private school. The Township Planning Commission stressed the need for the Church to mitigate “annoyances to the neighbors,” who frequently voiced complaints about the disruptive nature of the Church’s activities. The Planning Commission directed the Church to submit a revised site plan that addressed the landscape issues, as well as a revised environmental impact assessment that reflected resolution of the problems regarding noise and misuse of the property in the evening. The Planning Commission later recommended a special use permit subject to the conditions of the special use permit issued in 2003, among others. The Township Board approved a special use permit with the recommended conditions. Thereafter, the Church “totally reworked” the site plan without notifying—let alone obtaining approval from—the Township. The Church delayed completion of the landscape plan because it “wanted to get [its] building done first.”

Around November 2013, the School met with the Church to discuss the prospect of creating a partnership. According to the School, the Church expressed a willingness to lease portions of the Church’s facility to the School.

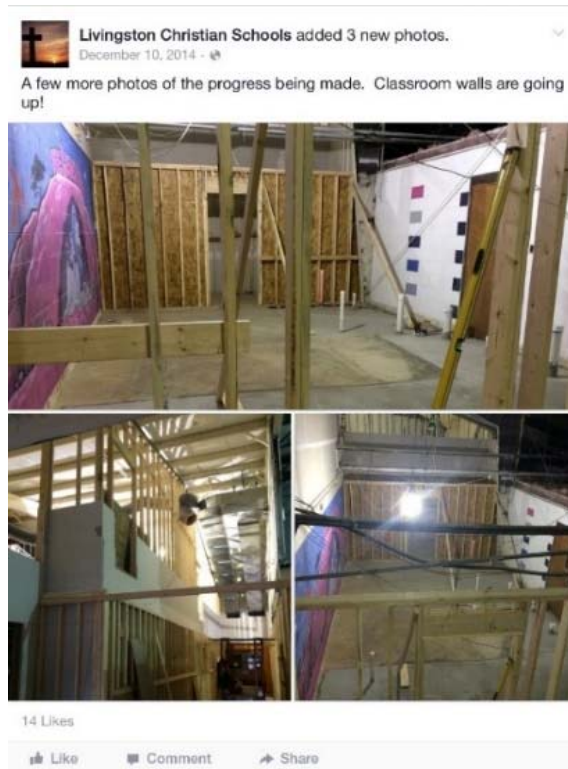
In May 2014, the School met to discuss financing for the purchase of the Pinckney facility from the Roman Catholic Diocese of Lansing (“the Diocese”). A few months later, the School met to discuss the anticipated relocation to the Church’s facility. The School agreed that it could not disclose the relocation to the Church’s facility until it completed the process of attempting to purchase the Pinckney facility.

In November 2014, the School held a meeting to inform students and parents of the anticipated relocation to the Church’s facility. The School advised that it decided to relocate due to “three consecutive years of decreasing enrollment” The School noted that even if the relocation to the Church’s facility did not immediately increase enrollment, the School “would still be in a better financial position” The School assured students and parents that the School would remain “totally independent of [C]hurch governance.”

Several weeks later, the Church and the School entered into a lease agreement. The Church agreed to lease a portion of its facility to the School for a five-year period to commence in June 2015. The School pre-paid the Church \$70,000.00 in rent, announced and advertised relocation to the Church's facility, and opened enrollment for students despite the absence of a special use permit. In late 2014, four months before the Church even applied for a special use permit, the School posted the following photograph on its social media page:



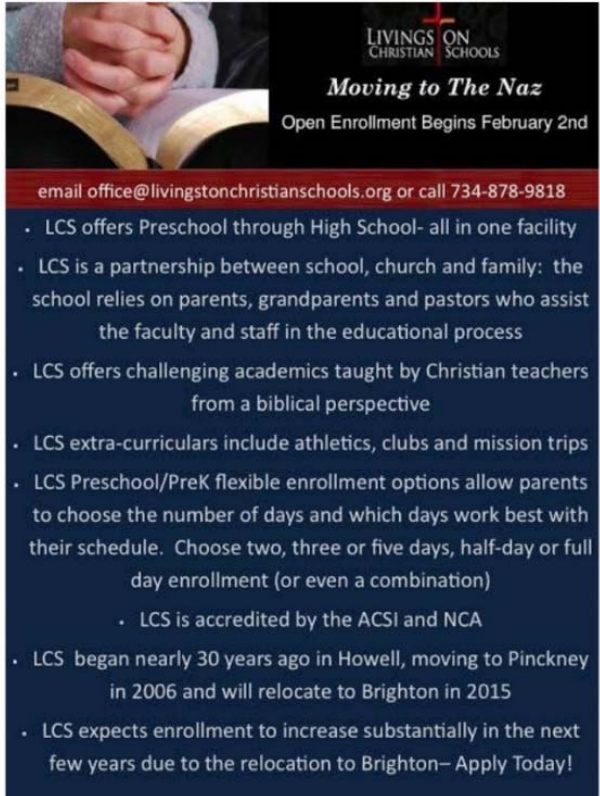
A month later, the School posted on its social media page another picture, “its” classrooms being constructed for which the Church had still not applied for a special use permit:



Two months before the Church applied for a special use permit, the School posted yet again on its social media page about its new location, this time including an enrollment brochure:

 **Livingston Christian Schools**
January 30 · 🌐

Enrollment opens up to the public on Monday! Please pass this information along and share it on your facebook page. Thanks for helping us get the word out!



LIVINGSTON CHRISTIAN SCHOOLS
Moving to The Naz
Open Enrollment Begins February 2nd

email office@livingstonchristianschools.org or call 734-878-9818

- LCS offers Preschool through High School- all in one facility
- LCS is a partnership between school, church and family: the school relies on parents, grandparents and pastors who assist the faculty and staff in the educational process
- LCS offers challenging academics taught by Christian teachers from a biblical perspective
- LCS extra-curriculars include athletics, clubs and mission trips
- LCS Preschool/PreK flexible enrollment options allow parents to choose the number of days and which days work best with their schedule. Choose two, three or five days, half-day or full day enrollment (or even a combination)
 - LCS is accredited by the ACSI and NCA
- LCS began nearly 30 years ago in Howell, moving to Pinckney in 2006 and will relocate to Brighton in 2015
- LCS expects enrollment to increase substantially in the next few years due to the relocation to Brighton— Apply Today!

The Township learned about the School's anticipated relocation to the Church's facility "through the grapevine." The Township then advised the Church of the need to apply for a special use permit.

In January 2015, the School offered the Diocese \$300,000.00 for the Pinckney facility. The Diocese characterized the School's offer as "disingenuous," as the Diocese had learned of the School's plans to vacate the Pinckney location after the 2014-2015 academic year and relocate to the Church's facility before the 2015-2016 academic year. The Diocese asked the School to advise of its intentions regarding vacation of the Pinckney property and satisfaction of the debt to the Diocese. The School characterized the plan to relocate to the Church's facility as a "back-up plan" even though the School had already entered into a lease agreement with the Church, pre-paid the Church \$70,000.00 in rent, announced and advertised relocation to the Church's facility, and opened enrollment for students. The School advised the Diocese of its commitment to its \$300,000.00 offer. The Diocese ultimately accepted that offer, and executed a purchase agreement with the School for the Pinckney facility in March 2015.

Almost simultaneously in March 2015, the Church applied for an amendment to the special use permit issued in 2013. The Church proposed that its special use permit be amended to allow the School's use of designated parts of its facility for the School's educational institution. The site plan approved in 2013 accompanied the Church's application.

Initial review of the Church's submittal raised concerns. The Brighton Area Fire Authority advised that the Church's site plan failed to meet the

Township's fire prevention code for site and building accessibility. LSL Planning, the Township's planning and zoning consultant, also detailed several concerns with the Church's application. Further, the Church submitted the site plan to the Livingston County Building Department for review. However, the Michigan Department of Licensing and Regulatory Affairs is generally responsible for such review under the Construction of School Buildings Act. See MICH.COMP.LAWS § 388.851b.

The first public hearing regarding the Church's application to amend its special use permit took place in April 2015. The Church acknowledged that it had failed to fully implement its landscape plan and advised that it expected to complete that plan within ninety days. The Township Planning Commission expressed concerns regarding traffic. The Church acknowledged that it is a "traffic generator." Although Brighton Road "is a major artery," the Church indicated that "there would be no busses." Neighbors and residents also raised the following issues regarding traffic:

- Traffic on Brighton Road is "horrid." The intersection is "crazy" and "very dangerous." The traffic signal at the intersection is "difficult." On top of that, the intersection lacks a pedestrian signal.
- They fear for the safety of their children. The area had already been the scene of several accidents involving pedestrians and bicyclists.
- Three schools in the area—Hornung Elementary School with 400 students, Maltby Middle School

with 900 students, and Brighton High School with 1200 students—use Brighton Road. A new school may open at the church next door, and another new school may open in a nearby facility. The new schools will also use Brighton Road. Many of the schools do not use busses to transport students. When Brighton Road is busy, traffic diverts onto residential streets. There will never be a dead zone during which they will be able to get out of their neighborhood. As it stands, they have to turn right in order to turn left.

- The likelihood of traffic jams and the impact of emissions on the environment are causes for concern. The wear and tear on Brighton Road is also a cause for concern.

Neighbors expressed further concerns regarding the history of problems with the Church:

- They experienced problems “every day” for over a decade. As the Church grew, so did their problems.
- The Church’s failure to satisfy conditions intended to address the problems had become “a pattern.”
- The Church failed to maintain and improve the landscape.
- The Church failed to implement measures to ensure their privacy and safety.

- The Church failed to control the noise and youth activity in the parking lot, which woke them up at night.
- The Church allowed illegal uses of the property.
- The activity on the Church's property, which "sometimes [persisted for] 24 hours a day," became "too much."
- They experienced difficulty selling their homes, as people "do not want to live near this activity."
- The Church offered "endless lies" and "contradictions" instead of concrete solutions.

The Township Planning Commission tabled the Church's application for an amendment to its special use permit and directed the Church to submit a traffic study, along with a site circulation plan. The Church retained Boss Engineering ("Boss") to perform a traffic study and develop a site circulation plan.

After the first public hearing, the Church submitted Boss's traffic study and site circulation plan. At the recommendation of Township consulting engineers, Tetra Tech, the Planning Commission requested a more detailed traffic study and site circulation plan that accounted for the School's projected growth to 250 students and 35 staff members.

The second public hearing regarding the Church's application to amend its special use permit took place in May 2015. Neighbors again addressed problems with the Church. One neighbor pointed out that the Church had yet to resolve the landscape issues or the noise issues. Another neighbor stated that the Church had

“not been honoring [its] promises and guarantees to [its] neighbors since 2000.” Neighbors also raised traffic concerns. The Church admitted that it had failed to submit the additional traffic study and site circulation plan requested by the Planning Commission. The Commission again tabled the Church’s application for an amendment to its special use permit.

After the second public hearing, the Church submitted Boss’s revised traffic study and site circulation plan. Tetra Tech commented that the revised traffic study and site circulation plan contained improper analysis, reflected inconsistency, and otherwise remained deficient in several material respects. The Planning Commission instructed the Church to submit a revised traffic study and site circulation plan that addressed Tetra Tech’s comments and concerns.

During this process, in May 2015, the School met to discuss a proposal from Light of the World Academy (“the Academy”), a formerly faith-based educational institution that decided to secularize and operate a publicly-funded charter school. The Academy proposed to lease or buy the Pinckney property from the School.

The third public hearing on the Church’s application to amend its special use permit took place in June 2015. A neighbor expressed concern “with the increased traffic on Brighton Road and possible cut-through traffic in his subdivision.” He noted that if people are unable to turn left out of the Church parking lot, they will turn around at the entrance to his subdivision and cause congestion in the left turn lane. Another neighbor expressed disbelief that the proposed amendment to the Church’s special use permit made it

“this far because the traffic in this area is so bad.” The Planning Commission tabled the Church’s application for an amendment to its special use permit.

After the third public hearing, the Church submitted Boss’s second revised traffic study and site circulation plan. Boss concluded that if the School held classes from 8:00 a.m. to 3:00 p.m. to avoid overlapping peaks with the nearby high school (which held classes from 7:25 a.m. to 2:25 p.m.) and the nearby middle school (which held classes from 8:30 a.m. to 3:30 p.m.), it would minimally impact traffic on Brighton Road. Boss concluded that the School would significantly impact traffic in the Church parking lot, which provided a single driveway for access to and from Brighton Road. Boss recommended that the Church (1) develop traffic control and pedestrian safety guidelines to which students and parents must “strictly” adhere; and (2) implement traffic control directors.

A memorandum from Fleis & VandenBrink Engineering (“F & V”) accompanied the second revised traffic study and site circulation plan. F & V advised that “[w]ithout proper on-site facilities, off-site traffic operations may be interrupted.” F & V recommended that the Church (1) create a one-way, counter-clockwise circulation with 325 feet of sidewalk for a student loading zone; (2) physically separate the student loading zone from the parking lot; (3) add signage and pavement markings to designate the student loading zone; (4) allocate staff to direct traffic into the student loading zone and to restrict access to the parking lot; (5) require students to enter their parents’ vehicles on the passenger side; (6) hold an informational meeting

and distribute a pamphlet to notify parents and staff members of the student loading zone, the circulation pattern, and the proposed traffic operation plan; and (7) instruct parents and staff members that students must be accompanied by an adult between the parking lot and the building used for the School's educational institution.

Tetra Tech reviewed the second revised traffic study and site circulation plan. Tetra Tech commented on the need for additional traffic management provisions and temporary measures to separate students awaiting pick-up from parking lot traffic. Tetra Tech also stressed the importance of providing traffic control directors with proper instructions.

LSL Planning, the Township's planning and zoning consultant, reviewed the Church's application for an amendment to its special use permit. LSL Planning concluded that because the proposed amendment is a "major amendment," a new application for a special use permit would be required.

Before the fourth and final public hearing regarding the Church's application to amend its special use permit, the Township Planning Commission received a number of letters from neighbors. They expressed concerns regarding traffic and public safety, adverse impacts on Brighton Road, landscape, noise, loitering and littering, illegal activity around their neighborhood, lack of privacy, and negative impacts on property values due to increased traffic and use of the Church's facility. They opposed the School's use of the Church's facility.

The fourth public hearing regarding the Church's application took place in July 2015. The Planning Commission recommended that the Township Board approve a special use permit to include the School as an accessory use, subject to conditions. At the Township Board's next meeting, however, a motion to approve a special use permit failed by a 4-3 vote. The School met and decided that it would keep its educational institution open, even if doing so meant that it would need to return to the Pinckney facility.

Because the motion to approve had failed, the Township Board formally denied a special use permit in a 4-3 vote at its meeting of August 3, 2015. The Board identified the following grounds for its denial:

- 1) The expanded use of the [C]hurch to include [the School] will exacerbate the existing and historical negative impacts of the [C]hurch on the adjacent neighborhood. The need for active traffic management and restricted egress from the facility provides that the site cannot accommodate the use properly and it increases the potential for negative off-site traffic impacts.
- 2) The proposed use is not consistent with the following goals of the Master Plan:
 - a) "Achieve well-planned, safe, balanced, and pleasant residential neighborhoods."
 - b) "Promote harmonious and organized development consistent with adjacent land uses."
- 3) The [proposed use] is contrary to the statement of purpose for the Single Family Residential

Zoning in regard to [Sections] 3.01.02(e) and (g) and (i) as follows:

- a) 3.01.02(e) – “Discourage any use of land which may overburden public infrastructure and services and the areas natural resources.”
 - b) 3.01.02(g) – “Discourage land use which would generate excessive traffic on residential streets.”
 - c) 3.01.02(i) – “Prohibit any land use that would substantially interfere with the development, utilization or continuation of single family dwellings in the District.”
- 5) The proposed use significantly alters the existing or intended character of the general vicinity.
- 6) The need for traffic management personnel and the potential off-site impacts created by forced right-turn only exiting will be detrimental to the natural environment, public health, safety or welfare by reason of excessive production of traffic. The proposed “D” condition on exit from Church grounds during pick-up and drop-off provides a detriment to the existing walking path, other neighborhoods/buildings for turn-around, in addition to an impact on neighborhood travel including traffic from Worden Lake, Pine Creek, and travelers from the west towards Brighton. In addition, current conditions of this area also include the primary hub for the Brighton Area Schools, [including Hornung Elementary School, Maltby

Intermediate School, Scranton Middle School, and Brighton High School]. While not all students attending Scranton will flow through Brighton Road, Scranton was not taken into consideration. It is reasonable to suggest parents with students at both schools drop off at the High School and then proceed to Scranton which starts school at 7:50 a.m.

- 7) The potential negative impacts to be created by the use will not be sufficiently mitigated by the conditions of the proposal.
- 8) The . . . Church has a history of non-compliance with past site plan and ordinance requirements resulting in a negative impact on surrounding neighborhoods, notably found in Planning Commission minutes from August 28, 2000, May 12, 2003, July 22, 2013 and April 2015 through current. Historical and consistent behavior suggests further non-compliance from [the Church]. Specific issues include the following:
 - a) The [Church] has not yet fully implemented the project approved by the Township in 2013. Of particular note are the installation of additional landscaping and parking lot islands;
 - b) The [Church] has continued to allow a driver's testing operation, despite being informed that it is an illegal nonconforming use of the property; and
 - c) The [Church] has demonstrated disregard for existing approvals by making significant changes to [its] building design contrary to

the approved 2013 plans and without necessary permits or approvals to do so.

Following the Township Board's formal denial of a special use permit, the Church sent the School an apology. The Church acknowledged that it made a lot of mistakes in an effort to move things along in a quick fashion, "which probably caused [it] to get sloppy." As to the lease agreement, the Church offered to refund the School's money because the Church did not want to take advantage of the situation.

More than two weeks *after* the Township Board denied a special use permit, the School entered into an agreement to lease the Pinckney facility to the Academy. At that time, the School decided to relocate to Whitmore Lake Middle School.

II. PROCEDURAL HISTORY

The School filed a complaint against the Township on August 8, 2015, raising a RLUIPA claim. R. 1. On August 12, 2015, the School filed a motion for preliminary injunction. R. 4. The District Court denied the motion for preliminary injunction on September 15, 2015. *Livingston Christian Sch. v. Genoa Charter Twp.*, No. 15-12793, 2015 WL 5439942 (E.D. Mich. Sept. 15, 2015). R. 22. The same day, the School filed an amended complaint against the Township, revising the RLUIPA claim and adding claims under the First and Fourteenth Amendments. R. 23.

On March 7, 2016, the Township filed a motion for summary judgment. R. 35. The District Court granted the Township's motion for summary judgment on June 30, 2016. Pet. App. B; see also *Livingston Christian*

Sch. v. Genoa Charter Twp., No. 15-12793, 2016 WL 3549357 (E.D. Mich. June 30, 2016).

As to the District Court's grant of summary judgment of the RLUIPA claim, the School filed a notice of appeal on July 21, 2016. The Sixth Circuit affirmed the District Court's grant of summary judgment on June 2, 2017. Pet. App. A; see also *Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996 (6th Cir. 2017).

The School filed a petition for rehearing *en banc* on June 16, 2017, which the Sixth Circuit denied on July 26, 2017. Pet. App. C. The Sixth Circuit issued its mandate on August 3, 2017.

REASONS FOR DENYING THE PETITION

Congress enacted RLUIPA, which is codified at 42 U.S.C. § 2000cc, after this Court invalidated the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, *et seq.*, as applied to state and local government. *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005). RLUIPA borrows elements from RFRA, but the former is “less sweeping in scope” than the latter. *Sossamon v. Texas*, 131 S. Ct. 1651, 1656 (2011). RLUIPA targets two areas, one of which is the regulation of land use. *Cutter*, 544 U.S. at 715; *Sossamon*, 131 S. Ct. at 1656. The regulations regarding land use provide:

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation² in a manner that imposes a substantial burden³ on the religious exercise⁴ of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

² The term “land use regulation” is defined as “a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.” 42 U.S.C. § 2000cc-5(5).

³ RLUIPA does not define “substantial burden.” Congress has directed courts to interpret RLUIPA’s substantial burden requirement in accordance with this Court’s jurisprudence regarding the Free Exercise Clause of the First Amendment. See 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (“The term ‘substantial burden’ . . . is not intended to be given any broader interpretation than the Supreme Court’s articulation of the concept of substantial burden on religious exercise”).

⁴ The term “religious exercise” encompasses “any exercise of religion” and includes the use or intended use of real property “for the purpose of religious exercise” 42 U.S.C. § 2000cc-5(7)(A)-(B).

- (A) is in furtherance of a compelling governmental interest; and
- (B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

- (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
- (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
- (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the

proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

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.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that—

- (A)** totally excludes religious assemblies from a jurisdiction; or
- (B)** unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc.

The School urges the Court to grant certiorari to address two issues: that the School was the victim of unequal treatment or discrimination by the Township,

and that the Township excluded the School from its jurisdiction. But the School did not assert a claim for unequal treatment under § 2000cc(b)(1), or for discrimination under § 2000cc(b)(2). The School also failed to raise a claim under § 2000cc(b)(3), which addresses exclusion from a jurisdiction. The School asserted a claim only under § 2000cc(a), which addresses substantial burdens on religious exercise.

The School has waived any claim under § 2000cc(b), but now wants the Court to address whether evidence of discrimination or unequal treatment and exclusion from a jurisdiction can support a claim under § 2000cc(a). Specifically, the School petitions the Court to address (i) whether discrimination or unequal treatment is relevant to the substantial burden inquiry; and (ii) whether exclusion from a jurisdiction is relevant to the substantial burden inquiry.

I. DISCRIMINATION OR UNEQUAL TREATMENT

The School argues that the Township discriminated against the School by allowing a driver training program but disallowing a special use permit. The School glosses over the relevant facts, simply stating that the Township denied a special use permit “while allowing an unapproved secular activity to continue on the very same property.” Petition at 13. Thus, an overview of the relevant (and undisputed) facts is necessary.

The Church allowed AK Services to use its parking lot as a testing site for various licenses (driver licenses, commercial licenses, and motorcycle licenses) without approval from the Township—a topic of discussion at several of the Planning Commission’s meetings. R. 11,

Ex. 7, Pg ID 423-24, Ex. 8 Pg ID 427-28. In April 2015, the Church requested that the Township deem the driver certification program a permissible use. R. 45, Ex. 1. The Church noted that while it does not profit from allowing AK Services to use its parking lot as a testing site, it does receive “generous” donations from AK Services for several of its programs. *Id.* Kelly VanMarter, the Assistant Township Manager and Community Development Director, testified that she and other Township representatives met with AK Services to discuss the driver certification program. R. 43, Ex. F, Pg ID 1310. VanMarter testified that during the meeting, she and other Township representatives contemplated whether to amend the zoning ordinance to identify the driver certification program as a special use. *Id.* The Township ultimately honored the Church’s request and allowed the driver’s certification program to continue. *Id.*

A. Waiver of Issue

The School contends that it suffered discrimination at the hands of the Township, and further contends that such discrimination is relevant to the “substantial burden” inquiry of the RLUIPA claim. In a footnote, the School asserts that it preserved this argument by raising it in its appellate brief and during its oral argument. Not so.

In the District Court, the School argued that the alleged discrimination violated the *First Amendment*, not *RLUIPA*. In fact, the School made no mention of the alleged discrimination in the context of the RLUIPA claim. In the appeal to the Sixth Circuit, the School abandoned the First Amendment claim. See Pet. App. at 6a. Although the School referred to the alleged

discrimination in the analysis of the “compelling government interest” component of the RLUIPA claim, the School did not discuss the alleged discrimination in the analysis of the “substantial burden” component of the RLUIPA claim. The School’s claim that it raised the argument in its appellate brief is false. Indeed, the Sixth Circuit called the School out for failing to raise and preserve the argument. See Pet. App. at 16a, observing that the School had “not argued that it faced a substantial burden as a result of any discriminatory decisionmaking by the Township”. The School’s apparent belief that it preserved the argument by raising it during oral argument is misplaced. The Sixth Circuit has stated, in no uncertain terms:

Generally speaking: (1) a party does not preserve an argument by saying in its opening brief (whether through a footnote or not) that it may raise the issue later, for example, in a reply brief or at oral argument; (2) a party does not preserve an argument by raising it for the first time at oral argument; and (3) a party does not preserve an argument by raising it for the first time in a motion for reconsideration or rehearing.

United States v. Huntington Nat’l Bank, 574 F.3d 329, 331 (6th Cir. 2009) (internal citations omitted). That rule is well settled in the Sixth Circuit. See, e.g., *United States ex rel. Marlar v. BWXT Y-12, L.L.C.*, 525 F.3d 439, 450 n. 6 (6th Cir. 2008) (issue raised during party’s oral argument, but not in party’s opening brief, deemed waived); *Hamilton v. Morgan*, 474 F.3d 854, 861 n. 5 (6th Cir. 2007) (issue “not raised prior to oral argument” deemed waived); *Henricks v. Pickaway Corr.*

Inst., 782 F.3d 744, 751 n. 3 (6th Cir. 2015) (argument raised “for the first time at oral argument” deemed “forfeited on appeal”). And “that rule (which all the federal courts of appeals employ) makes excellent sense: It ensures that opposing parties will have notice of every issue in an appeal, and that neither they nor reviewing courts will incur needless costs from eleventh-hour changes of course.” *Joseph v. United States*, 135 S. Ct. 705 (2014) (Kagan, J., concurring).

When an argument is not properly raised below, this Court deems it forfeited and typically declines to consider it. *Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) (citing *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397-98 (2015)); see also *United States v. Galletti*, 541 U.S. 114, 120 n. 2 (2004). Certiorari can and should be denied on this ground alone, as the School has not drawn the Court’s attention to any exceptional or “unusual circumstances” that warrant deviation from this well-settled rule. *Sachs*, 136 S. Ct. at 398. Quite the opposite, the School makes only a passing reference to and tries to deflect attention from the waiver issue.

The purported existence of a circuit split on the issue does not compel a different conclusion. This Court will not resolve a split among the circuits on an issue that is not properly before the Court, which includes an issue that has been waived. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72-73 (2013).

B. Lack of Evidence

If the Court is inclined to take up the question raised by the School, it should wait for a case in which there is actually evidence of religious discrimination.

This is not such a case. There is not even a scintilla of evidence from which to infer religious discrimination.

At oral argument in the Sixth Circuit, the School seemingly conceded that there is not strong evidence of religious animus but submitted that there is at least a “whiff” of such animus. Court Audio Recording of Oral Argument, available at: <https://tinyurl.com/y84cew6j> (27:23-27:36) (last accessed February 7, 2018). There is not.

The fact that the Township considered whether to amend the zoning ordinance to allow the driver certification program *at the request of a religious organization* (*viz.*, the Church)—a fact conveniently omitted from the School’s petition—cuts against the School’s argument that the prospective amendment represents religious hostility. So, too, does the fact that the primary uses of the Church’s facility, all of which have been approved by the Township at one point or another, are religious uses.

Further, the School’s claim of religious hostility is based on an “apples to oranges” comparison. The Township’s unwillingness to approve the School’s *regular* and *constant* use of the Church’s facility cannot be regarded as religious hostility simply because the Township permitted the driver certification program’s *occasional* and *infrequent* use of the Church’s parking lot—a use that neither adds hundreds of individuals nor presents traffic concerns. Suffice it to say that the School and the driver certification program are not similarly situated or otherwise amenable to comparison. There is no evidence from which to infer that if the School had been a secular organization or if

the intended use had been a secular use, the Township would have approved a special use permit.

C. Purported Conflict Among Circuits

At the outset, the Court should note that to the extent the Sixth Circuit created a conflict among the circuits, it did so only in dictum:

[W]e note one often-cited factor: whether there is evidence that the municipality’s decisionmaking process was arbitrary, capricious, or discriminatory. . . . *We deem this factor irrelevant in the present case* because [the School] has not argued that it faced a substantial burden as a result of any discriminatory decisionmaking by the Township.
 . . .

Pet. App. at 16a (emphasis added).

The Sixth Circuit opined that evidence of discriminatory decision-making is more appropriately considered when evaluating whether a government action is narrowly tailored to serve a compelling state interest—an inquiry that should only be undertaken after finding that a substantial burden exists. Pet. App. at 16a. The Sixth Circuit also stated that if evidence of discrimination could make out a claim under the “substantial burden” provision of RLUIPA, then the “equal terms” and “nondiscrimination” provisions of RLUIPA would be rendered meaningless or superfluous. Pet. App. 16a-17a; compare 42 U.S.C. § 2000cc(a) with 42 U.S.C. § 2000cc(b). In so doing, the Sixth Circuit took note of the “longstanding canon of statutory construction” that “terms in a statute should not be construed so as to render any provision of that

statute meaningless or superfluous.” *Beck v. Prupis*, 529 U.S. 494, 506 (2000).

The School cites the Seventh Circuit’s decisions in *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) and *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846 (7th Cir. 2007), the First Circuit’s decision in *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78 (1st Cir. 2013), the Second Circuit’s decisions in *Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2012) and *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), and the Ninth Circuit’s decision in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006). The School submits that in all of these decisions, the courts held that evidence of discrimination is relevant to the “substantial burden” analysis. From that premise, the School contends that the Sixth Circuit’s reasoning conflicts with authoritative decisions from other circuits.

The decisions all draw upon the Seventh Circuit’s decision in *Saints Constantine & Helen*. See *Petra Presbyterian Church*, 489 F.3d at 851; *Roman Catholic Bishop*, 724 F.3d at 97; *Fortress Bible Church*, 694 F.3d at 219; *Westchester Day Sch.*, 504 F.3d at 351; and *Guru Nanak Sikh Soc’y*, 456 F.3d at 992 n. 20. In that case, the Seventh Circuit—like the Sixth Circuit in this case—observed that the “equal terms” provision of RLUIPA, rather than the “substantial burden” provision of RLUIPA, is designed to combat unequal treatment:

[T]he City, flaunting as it were its own incompetence, suggests that the Church can't complain about being treated badly so long as it is treated no worse than other applicants for zoning variances. But that is a misreading of RLUIPA. A *separate* provision of the Act forbids government to "impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1); see also *id.*, § 2000cc(b)(2). The "substantial burden" provision under which this suit was brought must thus mean something different from "greater burden than imposed on secular institutions."

Saints Constantine & Helen, 396 F.3d at 900 (emphasis in original).⁵ The School contends that the following excerpt from *Saints Constantine & Helen* compels a different conclusion:

If a land-use decision . . . imposes a substantial burden on religious exercise . . . , and the decision maker cannot justify it, the inference

⁵ In *Petra Presbyterian Church*, the Seventh Circuit again observed that the "equal terms" provision, rather than the "substantial burden" provision, is designed to combat unequal treatment. Specifically, the Seventh Circuit stated that the "equal terms" provision codifies the Free Exercise Clause of the First Amendment, which prohibits "arbitrarily treat[ing] religious membership organizations worse than other membership organizations." *Petra Presbyterian Church*, 489 F.3d at 849 (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004)).

arises that hostility to religion, or more likely to a particular sect, influenced the decision.

Saints Constantine & Helen, 396 F.3d at 900. The above-cited excerpt simply does not stand for the proposition that if a religious institution can show discrimination, then the religious institution can likewise satisfy the “substantial burden” element. The excerpt stands for the proposition that if the religious institution can satisfy the “substantial burden” element *and* the government cannot satisfy the “compelling interest” element, then an inference of discrimination arises. The Seventh Circuit found a substantial burden not because the government discriminated against the religious institution, but because the alternative courses of action proposed by the government would have resulted in “delay, uncertainty, and expense.” *Id.* at 901. As the Seventh Circuit acknowledged in subsequent decisions, the government’s inability to put forth a compelling interest is why the inference of discrimination arose. See *Petra Presbyterian Church*, 489 F.3d at 851 (noting that in *Saints Constantine & Helen*, “the denial was so utterly groundless as to create an inference of religious discrimination”); *Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro*, 734 F.3d 673, 681 (7th Cir. 2013) (noting that in *Saints Constantine & Helen*, “there were indicia of bad faith by the City that led the Court to find no compelling governmental interest that the City could put forth to justify its substantial burden on the Church”). To that end, the Sixth Circuit’s decision in this case can be reconciled with the Seventh Circuit’s decision. As noted above, the Sixth Circuit reasoned that evidence of discriminatory decision-making is more appropriately considered when evaluating

whether a government action is narrowly tailored to serve a compelling state interest. Pet. App. at 16a.

Moreover, the type of discrimination to which *Saints Constantine & Helen* referred is not the type of discrimination alleged by the School. In *Saints Constantine & Helen*, the Seventh Circuit stated that the substantial burden provision combats “subtle forms of discrimination when . . . a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards.” *Saints Constantine & Helen*, 396 F.3d at 900 (emphasis added). Such subtle forms of discrimination may occur when “local governments . . . use broad and discretionary land use rationales as leverage to select the precise parcel of land where a religious group can worship.” *Guru Nanak*, 456 F.3d at 992 n. 20. Such subtle forms of discrimination may also occur when “local regulators disregard objective criteria and instead act adversely to a religious organization based on the objections of a ‘small but influential’ group in the community” or when “local regulators base their decisions on misunderstandings of legal principles.” *Roman Catholic Bishop*, 724 F.3d at 97.

The nondiscrimination and equal terms provisions, by contrast, regulate “overtly discriminatory acts that are often characterized by arbitrary or unequal treatment of religious institutions.” *Chabad Lubavitch of Litchfield Cnty., Inc. v. Litchfield Historic Dist.*, 768 F.3d 183, 193, 195 (2d Cir. 2014) (emphasis added). That is the type of discrimination alleged by the School, which says that the Township treated its proposed religious use of the Church’s facility less favorably than

the driver certification program's secular use of the Church's parking lot.

To be sure, there were no allegations of overt discrimination or unequal treatment in *Saints Constantine & Helen*. The inference of religious hostility arose because of "repeated legal errors" by city officials, which "cast[] doubt on their good faith." *Saints Constantine & Helen*, 396 F.3d at 899.

II. EXCLUSION FROM JURISDICTION

The School argues that according to the Sixth Circuit's decision, a local government may exclude a religious institution from its jurisdiction. But that generalization really cannot be implied from the Sixth Circuit's decision. The Sixth Circuit stated:

Genoa Township is relatively small—it has a total area of 36.3 square miles out of Livingston County's total 565.25 square miles. [Citation omitted]. The Township is located between Brighton and Howell—two "areas" that [the School] has stated would suffice for its school, but that are located at least in part outside of Genoa Township. [Citation omitted]. We take judicial notice of the geographic map of Livingston County and the corresponding square-mileage calculations.

Moreover, the boundaries of jurisdictions on the local-government level are often arbitrary in practice. Holding that a religious institution is substantially burdened any time that it cannot locate within such a small area—even if it could locate just across the border of the town limits—would be tantamount to giving religious

institutions a free pass from zoning laws. [Citations omitted]. In sum, RLUIPA does not automatically require every minor municipality to have at least one religious school within its borders.

We therefore conclude that the proper inquiry should be more functional and factually driven. When a religious institution has an available alternative outside of a desired jurisdiction, and where the distance from the desired location to the alternative property is reasonably close, the artificial boundaries of a particular jurisdiction become less important. The record here does not indicate that traveling the roughly dozen miles to Pinckney would be unduly burdensome to [the School's] students. Nor does the record demonstrate that [the School's] religious beliefs required it to locate within Genoa Township specifically. [The School] instead seeks to serve Livingston County as a whole. Under these circumstances, we hold as a matter of law that [the School] was not substantially burdened simply because it could not relocate within Genoa Township.

Pet. App. at 29a-30a.

In its petition for rehearing *en banc*, the School argued that the Sixth Circuit's reasoning conflicted "with settled law in other circuits." Whether the School advances the same argument here is not entirely clear, as the School directs the Court's attention to only one decision from one other circuit—the Fifth Circuit's decision in *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988).

In *Islamic Center*, a group of students attempted to establish a Muslim mosque near their university. The local zoning ordinance prohibited the use of buildings as churches in all areas within city limits unless the city board granted an exception. The students repeatedly requested, and the city board repeatedly denied, exceptions for a number of alternative sites. The record reflected that the city board had never denied an exception to any other religious group and that a number of Christian churches—25 to be precise—had been located near the campus. The Fifth Circuit stated that “the availability of other sites outside city limits does not permit a city to forbid the exercise of a constitutionally protected right within its limits.” *Id.* at 300.

The School cannot legitimately argue that the Sixth Circuit’s decision conflicts with *Islamic Center* “on the same important matter.” S. Ct. Rule 10(a). *Islamic Center* involved a claim under the First Amendment’s Free Exercise Clause, not a claim under RLUIPA. Moreover, the ordinance in *Islamic Center* left “no practical alternatives for establishing a mosque in the city limits.” *Islamic Center*, 840 F.2d at 302. In this case, the Township did no such thing. Just because the Township denied a special use permit that would have allowed the School to relocate to *the Church’s facility* does not mean that the Township effectively barred the School from operating within *the Township’s borders*. And just because the obvious alternatives happen to be outside of the Township’s borders does not mean that the Township effectively barred the School from operating within the Township’s borders. The School did not try to relocate to any other location within the

Township's borders, and the Township thus did not consider any other location within its borders.

The Sixth Circuit's decision is actually consistent with decisions from other circuits, which establish that RLUIPA does not give the School special status or otherwise allow the School to relocate to wherever it pleases. In *Andon, L.L.C. v. City of Newport News*, 813 F.3d 510 (4th Cir. 2016), for example, the Fourth Circuit stated that the inability to locate "within a geographic area will not by itself support a substantial burden claim under RLUIPA." *Id.* at 516 (citing *Civil Liberties for Urban Believers (CLUB) v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003)); see also *Roman Catholic Bishop*, 724 F.3d at 96. Indeed, "the unavailability of land within a particular jurisdiction can result from the reality of competitive real estate markets, not the municipality's actions." Pet. App. at 29a (citing *CLUB*, 342 F.3d at 762).

The School also cites the Court's decision in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) for the proposition 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." *Id.* at 76-77. *Schad* involved an adult bookstore where a customer could sit in a booth, insert a coin, and watch an adult film. The bookstore later introduced another coin-operated mechanism where a customer could watch a live dancer, usually nude, perform behind a glass panel. The borough determined that such activity violated its zoning ordinance, which provided that live entertainment—including nude dancing—was "not a permitted use in any establishment" in the borough. *Id.* at 65. The bookstore

challenged the imposition of criminal penalties under the ordinance, claiming that the prohibition on live entertainment violated, *inter alia*, the First Amendment's guarantee of free expression. This Court agreed and held that the ordinance, as applied to the bookstore, was constitutionally infirm.

The School fails to show that the Sixth Circuit decided an important federal question in a way that conflicts with *Schad*. S. Ct. Rule 10(c). The ordinance in *Schad* “*totally* exclude[d] all live entertainment, including nonobscene nude dancing that is otherwise protected by the First Amendment.” *Schad*, 452 U.S. at 76 (emphasis added). “*Schad* applies only to the *complete* and *total* exclusion of activity or expression protected by the First Amendment.” *Vision Church v. Village of Long Grove*, 468 F.3d 975, 989 (7th Cir. 2006) (emphasis added); see also *Ben’s Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 716 n. 21 (7th Cir. 2003) (*Schad* addressed an “ordinance [that] completely prohibit[ed] the expressive conduct at issue”); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986) (the ordinance in *Schad* “provide[d] for the total exclusion of some kinds of speech”). As the Sixth Circuit recognized in this case, the Township has not completely banned religiously-oriented schools from its borders. Pet. App. at 26a.

CONCLUSION

The Court should not devote its limited resources to this case. The School has waived the issues presented in the petition. If the Court is inclined to consider the issues, it should wait for a case in which there is evidence to support the claims. There is no evidence here that the School was the target of religious hostility

or that the School was effectively excluded from the Township's borders. Finally, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." S. Ct. Rule 10. The School has not given this Court a reason to exercise such discretion. For these reasons, the Township respectfully requests that this Honorable Court deny the School's petition for a writ of certiorari.

Respectfully submitted,

T. Joseph Seward
Counsel of Record
 SEWARD HENDERSON PLLC
 210 East 3rd Street, Suite 212
 Royal Oak, Michigan 48067
 (248) 733-3580
 jseward@sewardhenderson.com

Carol A. Rosati
 Anne McClorey McLaughlin
 JOHNSON ROSATI SCHULTZ
 & JOPPICH, P.C.
 27555 Executive Drive, Suite 250
 Farmington Hills, Michigan 48331
 (248) 489-4100

Counsel for Respondent