ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 16-2060

LIVINGSTON CHRISTIAN SCHOOLS,

Plaintiff-Appellant,

v.

GENOA CHARTER TOWNSHIP

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

REPLY BRIEF OF PLAINTIFF-APPELLANT LIVINGSTON CHRISTIAN SCHOOLS

Hiram S. Sasser, III
Stephanie N. Taub
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
Telephone: (972) 941-4444
Facsimile: (972) 941-4457
hsasser@firstliberty.org

Robert K. Kelner
Andrew Leff
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001-4956
Telephone: (202) 662-6000
Facsimile: (202) 662-6291
rkelner@cov.com

Counsel for Plaintiff-Appellant Livingston Christian Schools

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

SUMMARY OF THE ARGUMENT

Genoa Charter Township devotes much of its brief to its view of the material facts. The Township marshals its evidence that the Brighton Nazarene Church ("BNC"), which is not a party to this case, had a troubled history with the Township. Likewise, the Township argues at length that Livingston Christian Schools ("LCS") did not need to move to a new space because its enrollment was shrinking rather than growing. LCS has a very different view of those facts, and as described in its opening brief, its view is supported by record evidence. If these points of fact are as central to the case as the Township contends in its brief, then clearly there is a genuine dispute as to material facts, meaning that the District Court's grant of summary judgment was in error. *See* Fed. R. Civ. P. 56.

Moreover, the legal conclusion adopted by the Township, and apparently by the District Court, that there was no "substantial burden" on LCS's exercise of its religion because its landlord, BNC, remained free to operate as a church on the site in question, is directly at odds with settled law and would create an exception that swallows the rule of RLUIPA.

In light of the genuine disputes as to material facts, and the District Court's erroneous construction of RLUIPA's substantial burden standard, the judgment of the District Court should be reversed and the case remanded for further proceedings.

ARGUMENT

I. This Court Should Reverse Because the Township Imposed a Substantial Burden on LCS's Religious Exercise.

Because the Township denied the Special Use Permit that LCS needed to move its students into the new location at Brighton Nazarene Church, LCS has been left with no other viable location in which to continue its operations on anything other than a stop-gap basis. Record testimony demonstrated that this threatens the school's very survival. As a matter of law, this constitutes a substantial burden under RLUIPA.

A. BNC's Past Actions Have No Bearing on Whether LCS Was Substantially Burdened.

On appeal, as before the District Court, the Township remains fixated on the past conduct of a non-party to this lawsuit, the Brighton Nazarene Church. Yet BNC's only relationship to LCS is that of a landlord to its tenant. LCS is an interdenominational school that is not connected to BNC's Nazarene Christian denomination. They do not share a common religious mission, and parents who send their children to LCS are not necessarily looking for their children to be educated in, or to worship in, the Nazarene tradition. LCS looks to the church as an operating venue, like any other venue. The school and the church exercise their respective religious rights differently and independently.

Both the District Court and the Township conflate the religious exercise rights of BNC and LCS, as if they were one and the same institution, when analyzing LCS's RLUIPA claim under the test in *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729 (6th Cir. 2007). This fundamentally misconstrues RLUIPA, which does not provide that the government may substantially burden one group's religious conduct just as long as it leaves another group unhampered on the same physical site.

Separate and apart from this error, the Township now erroneously suggests that BNC's prior alleged wrongdoing should be imputed to LCS when assessing whether the Township placed a substantial burden on LCS's religious exercise. There is no valid legal basis for considering the past behavior of BNC – a non-party to this action – in analyzing the burden imposed on LCS. This Court has recognized that a lessee's interest in a property gives rise to a free exercise right by the lessee that is cognizable under RLUIPA. *See DiLaura v. Ann Arbor Charter Twp.*, 30 F. App'x 501, 507 (6th Cir. 2002). The question of whether a substantial burden is placed on a lessee's rights cannot depend on the good behavior of its landlord because that would vitiate the lessee's own statutory rights. *See* 42 U.S.C. § 2000cc-5(5) (RLUIPA protects "leasehold" interests); *Opulent Life Church v. City of Holly Springs, Miss.*, 687 F.3d 279, 294-95 (5th Cir. 2012) (recognizing

this protection). For these reasons, the Court's inquiry should focus on the burden placed on LCS, not the alleged past bad behavior of the church.

B. The Township Effectively Barred LCS from Using Its Lease in the Exercise of Its Religion.

The Township does not, and cannot, offer a serious response to LCS's contention that it has been "effectively" barred from using its lease in the exercise of its religion, in violation of the standard set in *Living Water*. 258 F. App'x at 737. Instead, the Township claims that the fact that "the Church, not the School, applied for the special use permit is a critical fact that appears to be lost on the School." Appellee's Brief, D. 34, Page ID # 50. Much of the Township's argument turns on this claim.

The fact that the church applied for the Special Use Permit, as required by local law, simply is not relevant to the decision of this case. An inquiry that hinged on this fact would produce absurd results. *Living Water* cannot have created a test whereby the result in this case would change if LCS had a secular landlord that did not use its un-leased property for religious exercise. The fact that someone else uses a portion of a parcel of land for religious exercise can have no bearing on the free exercise rights of a lessee. RLUIPA protects the free exercise rights of all persons, it doesn't provide for a zero-sum game, in which one group's religious exercise on a site crowds out another's.

C. Because LCS Faced Dissolution If It Could Not Occupy the BNC Property, the Township Placed Substantial Pressure on LCS to Violate its Religious Beliefs.

This Court's decision in *Living Water* is fundamentally about scale. The Court found no substantial burden in that case because the religious institution there had "demonstrated only that it cannot operate its church on the *scale* it desires." 258 F. App'x at 741 (emphasis in original). Indeed, Living Water Church of God itself had framed the burden as "a size issue." *Id.* at 737. The church there never suggested that it would be "unable to carry out its church missions and ministries" without a special use permit. *Id.* at 739. Nor had it demonstrated that its existing facility was inadequate. *Id.* at 741-42. All the court in *Living Water* decided was that the plaintiff "cannot operate its church on the *scale* it desires." *Id.* at 741 (emphasis in original).

But this case is not about scale – it is about survival. LCS was not looking to expand. Rather, LCS leased the BNC Property because its administrators feared the school would go out of business if forced to continue to operate out of the Pinckney Property. *See generally* Appellant's Brief, D. 25, Page ID # 3-4. According to LCS Treasurer Scott Panning, remaining at the Pinckney Property directly threatened the "ability of LCS to maintain its <u>existence</u> in furtherance of its religious mission[.]" Declaration of Scott Panning, RE 43-2, Page ID # 1250 (emphasis added). "[T]he only means of <u>survival</u> for LCS as the sole accredited K-12

faith-based school in Livingston County was to relocate the school to the Brighton or Howell area[.]" *Id.*, Page ID # 1246 (emphasis added). And the only viable location in all of Livingston County, based on LCS's extensive research, was the BNC Property. Declaration of Ted Nast, RE 43-3, Page ID # 1253-1254. Simply put, LCS was going out of business if it could not move into the Brighton Nazarene Church facility.[1] Although the Township disagrees with that conclusion, and spends much of its brief taking issue with it, this is a material issue of fact that is clearly in dispute. This Court must draw all factual inferences in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (On summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-81 (6th Cir. 1989) (recognizing and applying the *Anderson* standard). The Panning Declaration by itself provides sufficient evidence supporting LCS's position that if the point is as central to the case as the Township suggests, the District Court should not have resolved the factual dispute itself at summary judgment.

[1] *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, to which the Township cites, is therefore distinguishable. *See* 100 F. App'x 70 (3d Cir. 2004). There was no suggestion in that case that the religious institution would be forced out of business without the ability to build on its new land.

The Township cites *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), which is inapposite pre-RLUIPA authority, as support for its position that the burden imposed on LCS is not substantial. *See* Appellee's Brief, D. 25, Page ID # 66-67. But *Lakewood* too, like *Living Water*, is fundamentally about scale, not survival. Indeed, the religious institution in *Lakewood* already owned a viable building in the city, and it had purchased the disputed land because it wanted to build a "larger" facility. 699 F.2d at 304. The city in *Lakewood* merely denied a religious institution the right to expand, just like the municipality in *Living Water*. But this case is not about scale. LCS is not looking to grow for the sake of growing. It is looking to avoid bankruptcy.

Harbor Missionary Church Corporation v. City of San Buenaventura provides a better analogy. 642 F. App'x 726 (9th Cir. 2016). In that case, the city forced a church to pay $1.4 million in order to practice its "sacred dut[y]" of ministering to the homeless. 642 F. App'x at 728-29. This "substantial cost . . . substantially burdens the Church's religious exercise[.]" *Id.* at 729. The Township does not address *Harbor Missionary* directly because it cannot. Its only retort is that the Township did not "force the School to sell or lease the Pinckney facility and raise substantial funds in order to continue providing religious education elsewhere." Appellee's Brief, D. 34, Page ID # 66. True enough. Instead, the

Township barred LCS from using the *only* suitable facility in the entire county. Declaration of Ted Nast, RE 43-3, Page ID # 1253-1254. The attendant "delay, uncertainty, and expense" matches or exceeds that which was found to be substantial in *Harbor Missionary*. 642 F. App'x at 729.

And contrary to the Township's argument, *Harbor Missionary* does not conflict with *Living Water* on this point. Appellee's Brief, D. 34, Page ID # 65-66. Indeed, because "substantial burden" is a fact-intensive inquiry, a purely financial burden may be substantial if it is sufficiently onerous. *See Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 392 (1990) ("a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices"). *See also* Federal Land Use Law & Litigation § 7:29 (2016 ed.) ("in some cases, expense can be considered as a substantial burden"). That the burden was insufficiently onerous in *Living Water* does not mean that no amount of "delay, uncertainty, and expense" are substantial in this Circuit. And because the Township's denial of a Special Use Permit goes beyond ordinary expense and instead threatens LCS with dissolution, *see supra*, the Township clearly imposed a substantial burden on LCS.

Living Water Church of God was a thriving, "growing Christian congregation[.]" *Living Water*, 258 F. App'x at 730. LCS, by contrast, is facing "dissolution." Appellee's Brief, D. 34, Page ID # 14 (citing Declaration of Scott

Panning, RE 43-2, Page ID # 1246, 1249). Accordingly, a burden that may have been insubstantial to Living Water Church of God could nonetheless be substantial to LCS. *See World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 537 (7th Cir. 2009) ("burden is relative to the weakness of the burdened"). Put another way, a burden is not "substantial" in the abstract, but in relation to the religious institution at issue. *Id.* That the church in *Living Water* may have been able to continue operating in its existing facility does not mean that LCS could afford to do so. And as explained *supra*, it could not.

The Township also argues that *Westchester Day School v. Village of Mamaroneck* is inapposite because there no "ready alternative" existed.[2] 504 F.3d 338, 352 (2d Cir. 2007). So too here. Neither the Pinckney Property nor the Whitmore Lake Property were readily available alternatives that would "meet [LCS's] same needs." *Id.* And *Westchester*'s observation that a different result would have obtained had the school sought to expand merely to "enhance the overall experience of its students" actually proves LCS's point. *Id.* at 347. In *Westchester*, as here, the school believed that "its effectiveness in providing the education [its religion]

[2] The Township cites *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004), for this point. Yet the *San Jose* court found the burden insubstantial not because the plaintiff had a readily available alternative, but because the burden imposed was minimal: "The City's ordinance imposes no restriction whatsoever on College's religious exercise; it merely requires College to submit a *complete* application, as is required of all applicants." *Id.*

mandates has been significantly hindered as a consequence" of its "inadequate" facilities. *Id.* at 345. Preventing a school from obtaining adequate facilities thus imposes a substantial burden in the Second Circuit, and in the Sixth Circuit too. *See Living Water*, 258 F. App'x at 741 (burden would have been substantial if Living Water Church of God had demonstrated "that it cannot carry out its church missions and ministries due to the Township's denial" (citing *Westchester*)). Because the Township's denial forced LCS to continue operating with inadequate facilities, the Township imposed a substantial burden.

D. LCS Had No Readily Available Alternative, and the Township's Argument to the Contrary Is Unavailing.

The District Court erroneously concluded that LCS had ready alternatives "in the form of both the Pinckney and Whitmore Lake locations," notwithstanding record evidence to the contrary. Order Granting Township's Motion for Summary Judgment, RE 47, Page ID # 1510. Not only does the record evidence demonstrate the lack of ready alternatives, it also shows that the Township failed to meet its burden of establishing that there was no genuine issue of material fact. *See Street*, 886 F.2d at 1476-81. Remand is required.

First, the Pinckney Property was not a readily available alternative to the BNC Property. There is clear record evidence that the Pinckney Property "prevent[s] a tuition-based school such as LCS from maintaining a stable enrollment[.]" Declaration of Ted Nast, RE 43-3, Page ID # 1254. And as even

the Township acknowledges, "the School reached a consensus that remaining in the Pinckney facility on a long-term basis would result in dissolution of the School due to lack of enrollment and income." Appellee's Brief, D. 34, Page ID # 14. This is enough for the Pinckney Property not to be a ready available alternative because a municipality substantially burdens religious exercise when it denies a religious school "facilities which [the school] deems adequate to carry on its religious instruction." *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 291 (4th Cir. 2000). But LCS does not deem the Pinckney Property "adequate." Quite the contrary: LCS believes that remaining in Pinckney "would end in dissolution." Declaration of Scott Panning, RE 43-2, Page ID # 1246.

And if that is not enough, testimony from non-party Light of the World Academy ("LOTWA") provides further evidence of the Pinckney Property's unsuitability for religious school operations. According to the President of its Board of Directors, LOTWA had operated for years as a private, tuition-based school in the Pinckney area. Transcript of Deposition of Laura Burwell, RE 43-5, Page ID # 1271. Once LOTWA relocated to the Pinckney Property, though, its tuition-based model became infeasible. *Id.*, Page ID # 1273-1274 (LOTWA had "a difficult time keeping our enrollment numbers up at a tuition-based school" at the Pinckney Property.). LOTWA managed to "maintain a student population that was shrinking" only once it became a publicly-funded charter school. *Id.* LCS, however,

cannot adopt a public charter school model because doing so would require it to forsake its religious mission of providing a Christian education to children in Livingston County. *See* LCS Articles of Incorporation, RE 4-3, Page ID # 144. LCS thus cannot operate at the Pinckney Property.

The Township contends that the Pinckney Property was a readily available alternative because it "remained available when the School filed the original complaint on August 7, 2015." Appellee's Brief, D. 34, Page ID # 51. This is contrary to settled law. Mere ownership of other land and buildings does not eliminate an otherwise substantial burden. *See Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013). In *Bethel*, the county argued that "Bethel's burden is not substantial because the organization already owns one facility and rents another[.]" *Id.* at 558. The existence of other property did not warrant summary judgment, though, because "Bethel has presented considerable evidence that its current facilities inadequately serve its needs." *Id.* So too here. Because LCS has presented "considerable evidence" that the Pinckney Property "inadequately serve[d] its needs," a question of fact exists regarding whether the Pinckney Property is a ready alternative.

The Township also dwells at length on its claim that the Pinckney Property was a readily available alternative because LCS had operated there with a "much higher enrollment." Appellee's Brief, D. 34, Page ID # 63. But the Pinckney

Property is not unsuitable because LCS has a smaller enrollment than it used to: The Pinckney Property is unsuitable because it caused LCS to shrink and would ultimately cause LCS to go out of business. The record could not be clearer that LCS's shrinking enrollment is a direct consequence of operating at the inadequate Pinckney Property. Declaration of Ted Nast, RE 43-3, Page ID # 1254-1255 (Problems with the Pinckney Property "prevent a tuition-based school such as LCS from maintaining a stable enrollment and offering the necessary long-term programs to fulfill its religious-based educational objectives."). For this reason, returning to Pinckney was not a readily available alternative.[3]

Nor could LCS operate at the Whitmore Lake Property, which it is currently occupying as a temporary, stop-gap measure. As explained in our opening brief, the Whitmore Lake Property is inadequate to LCS's current needs, and LCS may be forced out at any moment.[4] *See* Appellant's Brief, D. 25, Page ID # 31-32.

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[3] LCS is not complaining about, as the Township terms them, "self-created burdens." Appellee Brief, D. 34, Page ID # 52. LCS has never argued that the Pinckney Property was unavailable because LOTWA was occupying it, but instead that LOTWA's switch from a tuition-based model to a public charter model at the Pinckney Facility shows that it is unsuitable for use by LCS for religious instruction purposes.

[4] The Township's suggestion that LCS relocate to Pinckney or Whitmore Lake is without merit, just as it would be if the Township suggested that LCS is free to relocate to Brighton, Flint, Detroit, or Grand Rapids. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) ("[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.") (internal quotation omitted); *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 300 (5th Cir. 1988) ("And a city may not (continued…)

The Township erroneously claims that LCS is asking for "special status" under RLUIPA that would "allow the School to relocate to wherever it pleases." Appellee's Brief, D. 34, Page ID # 56. This is not so. LCS is simply seeking to continue to exist in order to further its sincere religious mission of serving the local community.

LCS has provided well "more than [a] scintilla of evidence" that neither the Pinckney Property nor the Whitmore Lake Property was a ready alternative. *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011) (quoting *Anderson*, 477 U.S. at 252) (reversing grant of summary judgment to city because deposition testimony that potential sites were not suitable for church operations raised question of fact as to whether church had ready alternative). Because no more is "required to defeat summary judgment," *id.*, the District Court's judgment should be reversed.

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escape the constitutional protection afforded against its actions by protesting that those who seek an activity it forbids may find it elsewhere."). The relevant consideration is, and ought to be, whether the Township substantially burdens LCS *here* in this community, not whether there are alternatives available beyond the jurisdiction of the Township. *See Barr v. City of Sinton*, 295 S.W.3d 287, 298 (Tex. 2009) (zoning ordinance that "effectively banned [a] ministry from the city" substantially burdened the ministry). At the very least, there is a genuine issue of material fact as to whether any viable alternative locations within the Township's jurisdiction exist.

II. Other Circuits' Approaches to the Substantial Burden Test Likewise Demonstrate that the Burden Here Is Substantial.

Persuasive authority from other circuit courts of appeal underscores that the threshold for a substantial burden is not high and that the burden imposed by the Township on LCS is substantial. Moreover, other courts have taken into account signs of bad faith by the government in imposing burdens on religious exercise, in determining whether those burdens are substantial.

The Seventh Circuit has concluded, consistent with *Living Water*, that being barred from scaling up is not by itself a substantial burden. *See Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006); *Living Water*, 258 F. App'x at 741 (discussed *supra*). Similarly, the Eleventh Circuit held that "walking a few extra blocks" is "burdensome," but not substantially so. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004). And both the Seventh and Ninth Circuits have determined that the requirement of submitting a completed application for a special use permit does not impose a substantial burden. *See San Jose*, 360 F.3d 1024; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003).

But when other circuits grapple with facts even remotely similar to those in this case, they find the burdens to be substantial. For example, in *Sts. Constantine And Helen Greek Orthodox Church, Inc. v. City of New Berlin*, the Seventh Circuit emphasized the fact that, as here, the "City's Director of Planning was satisfied . . .

and recommended that the Planning Commission approve" a church proposal. 396 F.3d 895, 898 (7th Cir. 2005). *See also Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 982-83 (9th Cir. 2006) (emphasizing that professional city planners "issued a report recommending" that a permit be granted). These courts were skeptical of decisions in which non-professional voting bodies disregarded, without explanation, the opinions of their own experts.

The Seventh Circuit justified this concern about bad faith by pointing out that "the 'substantial burden' provision backstops the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Sts. Constantine*, 396 F.3d at 900. *See also Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 87, 97 (1st Cir. 2013) (same comparison). In other words, courts are inclined to find a substantial burden where there appears to be bad faith.

This Court now faces a Township that not only disregarded the recommendations of its experts for the first time in living memory, Transcript of Deposition of Kelly VanMarter, RE 43-7, Page ID # 1305, 1318 ("Are you aware of any other application that the Planning Commission recommended approval with or without conditions and you likewise recommended approval with or without conditions that the Township Board ultimately denied? A. No."), but also conjured justifica-

tions for its outright denial of the Application after it had already voted on it. *See* Appellant's Brief, D. 25, Page ID # 14-17. Further, as part of this post-hoc rationalization, the Township cited the use of the BNC parking lot for an unapproved secular driving school as a justification for denying the Application while at the same time assuring that driving school that no action would be taken to curtail its unapproved but secular use of the property. *See* Transcript of Deposition of Kelly VanMarter, RE 43-7, Page ID # 1305, 1309-1310; s*ee also* Appellant's Brief, D. 25, Page ID # 39. If the Township were actually concerned about the effects of the driving school's noncompliant use of the BNC lot, it would have taken affirmative steps to curtail that use. But it did not. Instead, it forswore any future action. This kind of arbitrary behavior raises the "inference . . . that hostility to religion . . . influenced the decision." *Sts. Constatine,* 396 F.3d at 900.

The Ninth Circuit, in *Guru Nanak*, takes a similar approach, finding a substantial burden "based on" the fact that, as here, "Guru Nanak readily agreed to every mitigation measure suggested by the Planning Division." 456 F.3d at 989. That court pointed out that a denial looks less legitimate when a locality "neither related why any of such mitigation conditions were inadequate nor suggested additional conditions that would render satisfactory [an institution's] application." *Id.* at 991. The fact that the "denial was based on citizens' voiced fears that the result-

ing noise and traffic would interfere with the existing neighborhood" was of no consequence. *Id.* at 982.

As in *Guru Nanak*, LCS readily agreed to the conditions and modifications recommended by LSL Planning, Tetra Tech, and ultimately the Township's own Planning Commission. *See* Appellant's Brief, D. 25, Page ID # 14-16. The Township offered no explanation for why these conditions were inadequate, citing instead to the same kind of vague concerns that did not move the Ninth Circuit. *See* Genoa Board Meeting Minutes, August 3, 2015, RE 43-18, Page ID # 1410-1412 (citing historical complaints from community members regarding BNC).

Thus, courts in analogous cases—where a town's decision conflicted with its experts' opinions and where a municipality refused to allow the religious institution to mitigate any perceived complaints—have found the burdens imposed to be substantial. This Court should find likewise and reverse.

CONCLUSION

The Township imposed a substantial burden on LCS's religious exercise in violation of RLUIPA. The District Court granted summary judgment, though, because it misapplied this Court's only decision applying the "substantial burden" standard, and it ignored persuasive authority from other Circuits. This Court should reverse and remand for further proceedings.

Respectfully submitted,

/s/ Robert K. Kelner
Robert K. Kelner
Andrew Leff
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001-4956
Telephone: (202) 662-6000
Facsimile: (202) 662-6291
rkelner@cov.com

Hiram S. Sasser, III
Stephanie N. Phillips
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, TX 75075
Telephone: (972) 941-4444
Facsimile: (972) 941-4457
hsasser@firstliberty.org

Counsel for Plaintiff-Appellant Livingston Christian Schools

January 18, 2017

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,940 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

/s/ Robert K. Kelner
Robert K. Kelner
Counsel for Plaintiff-Appellant
Livingston Christian Schools

January 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2017, I caused the foregoing Brief to be filed with the Clerk of the U.S. Court of Appeals for the Sixth Circuit using the appellate CM/ECF system and to be served upon counsel for all parties via the CM/ECF system.

/s/ Robert K. Kelner
Robert K. Kelner
Counsel for Plaintiff-Appellant
Livingston Christian School