16-2060

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

No. 15-cv-12793 (Steeh, J., presiding)

DEFENDANT-APPELLEE'S RESPONSE TO PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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COUNTER-STATEMENT OF FACTS

In the opinion, the panel aptly pointed out that many of the purported "facts" in Appellant LCS's appeal brief - which now form the basis of its petition for *en banc* rehearing - are merely conclusions unsupported by documentary or admissible evidence. LCS puts forth no evidence that it cannot carry out its religious functions at the Pinckney or Whitmore Lake property. LCS puts forth no evidence that it will eventually be forced to close its doors if it remains at the Pinckney or Whitmore Lake property or that the Whitmore Lake property will be re-occupied by the School District as a public school in the future. LCS puts forth no evidence of its financial difficulties or enrollment statistics. And LCS puts forth no evidence as to *why* it suffered financial difficulties or enrollment decreases. (***Opinion***, D. 41-2, Pages 14-16). LCS suggests that the Township discriminated against LCS by allowing the driver testing program but disallowing the special use permit. Since LCS glosses over the relevant facts and makes unsupported conclusions, 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. (***July 22, 2013 Minutes***, R. 11-8, Pg. ID 423-24; ***September 9, 2013 Minutes***, R. 11-9, Pg. ID 427-28). In April 2015, the Church requested that the Township deem the driver certification program a permissible use. (***Letter***, R. 45-2, Pg. ID 1487-1488). 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 and contemplated whether to amend the zoning ordinance to identify the driver certification program as a special use. (*VanMarter Testimony*, R. 43-7, Pg. ID 1310).

LAW AND COUNTER-ARGUMENT

LCS begins its argument relying upon statements made when RLUIPA was passed by the Senate. Yet LCS now attempts to accomplish that which RLUIPA was intended not to do:

> This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay. 146 Cong. Rec. S7774 (daily ed. July, 2000).

To skirt this mandate, LCS argues that the "substantial burden" test includes an arbitrary, capricious or discriminatory inquiry. Yet the same Congressional Record upon which it relies reflects that the intent of RLUIPA was not to create a new definition of substantial burden. *Id.*

I. RELIGIOUS DISCRIMINATION

LCS first argues that the panel's refusal to consider evidence of purported animus or discrimination in the "substantial burden" analysis conflicts with the decisions of other circuits. In this regard, the panel stated:

> Evidence of improper decision-making is more appropriately considered when evaluating whether a governmental action was narrowly tailored to serve a compelling state interest—an inquiry that the court should undertake only after finding that a substantial burden exists. . . .
>
> RLUIPA, moreover, contains a separate prohibition on discrimination in the implementation of land-use regulations, which does not require that the regulation impose a substantial burden. See 42 U.S.C. § 2000cc(b)(1)–(2) (prohibiting governmental entities from "impos[ing] or implement[ing] a land use regulation in a manner that" either "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" or "discriminates against any assembly or institution on the basis of religion or religious denomination"). Finding a substantial burden due to evidence of discrimination would obviate the need for § 2000cc(b)(1)–(2). . . . (***Opinion***, D. 41-2, Pages 11-12).

In the District Court, LCS asserted that allowing the driver certification program but denying the special use permit, amounted to discrimination that violated *the First Amendment*, not *RLUIPA*. (***Response***, R. 43, Pg. ID 1221-1226). In the appeal to this Court, LCS abandoned the First Amendment claim. (***Brief***, D. 25, Pages 1-47; ***Opinion***, D. 41-2, Pages 4-5). Although LCS referred to the alleged discrimination in its analysis of the "compelling government interest" component of the RLUIPA claim (***Brief***, D. 25, Page 39), LCS did not discuss the alleged discrimination in its analysis of the "substantial burden" component of the RLUIPA claim. (***Brief***, D. 25, Pages 25-37).

Generally, arguments not raised in an appellate brief "may not be raised for the first time in a petition for rehearing." *Costo v. United States*, 922 F.2d 302, 302-03 (6th Cir. 1990). This general rule is reflected in Fed. R. App. P. 40(a)(2), "which requires that a party's petition for rehearing 'state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and . . . argue in support of the petition.'" *United States v. Shafer*, 573 F.3d 267, 276 (6th Cir. 2009) (quoting Fed. R. App. P. 40(a)(2)). And "[i]t goes without saying that the panel cannot have 'overlooked or misapprehended' an issue that was not presented to it." *Shafer*, 573 F.3d at 276 (quoting *Easley*, 532 F.3d at 593). "Thus, Rule 40(a)(2) prevents [the Court] from considering arguments raised for the first time in a petition for rehearing under most circumstances." *Shafer*, 573 F.3d at 276.

LCS "does not explain why it failed to advance its current arguments in its appellate brief." *Costo*, 922 F.2d at 303. While the Court "may choose to entertain a new argument on rehearing if 'extraordinary circumstances' are present," *Shafer*, 573 F.3d at 276, LCS has not identified any such circumstances. For these reasons and the reasons outlined below, the Court should decline to entertain the request to reconsider whether discrimination or animus should be a factor in RLUIPA's "substantial burden" analysis.

More importantly, whether consideration of evidence of discrimination in the "substantial burden" analysis is proper has no bearing on this case for one simple reason: there is not a scintilla of evidence from which to infer religious discrimination. LCS seemingly concedes that there is not strong evidence of religious animus but

submits 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 June 30, 2017). 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 LCS's petition—cuts against LCS'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. Finally, the Township's unwillingness to approve LCS's *regular* and *constant* use of the Church's facility cannot be regarded as religious hostility simply because the Township allowed an *occasional* and *infrequent* secular use of the Church's parking lot—a use that neither adds hundreds of individuals nor presents safety concerns with the use of the Church's parking lot. There is no evidence from which to infer that if LCS had been a secular organization or if the intended use had been a secular use, the Township would have approved a special use permit.

LCS submits that evidence of discrimination is relevant to the "substantial burden" analysis. From that premise, LCS contends that the panel's decision here conflicts with authoritative decisions from a few other circuits. The cases cited by LCS all draw upon the Seventh Circuit's decision in *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005). In that case, the Seventh Circuit—like the panel 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:

> No doubt secular applicants for zoning variances often run into similar difficulties with zoning boards that, lacking legal sophistication and unwilling to take legal advice, may end up fearing legal chimeras. On that basis the 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**."

Id. at 900 (bold emphasis added; other emphasis in original). LCS 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 arises that hostility to religion, or more likely to a particular sect, influenced the decision.

Id. The above-cited excerpt simply does not stand for the proposition that if a religious institution can show religious animus, 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 religious hostility arises. And perhaps in that scenario, the religious institution may be able to establish a claim under the "equal terms" and "nondiscrimination" provisions. As the Seventh

Circuit later explained in *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007):

> In [*Saints Constantine & Helen*] the denial was so utterly groundless as to create an inference of religious discrimination,[1] so that the case could equally have been decided under the "less than equal terms" provision of RLUIPA, which does not require a showing of substantial burden.

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

In none of the cases cited by LCS did the courts find that evidence of discrimination or animus, in and of itself, amounted to a substantial burden. In *Petra Presbyterian Church*, *supra,* the Seventh Circuit found that there was not a substantial burden without the need to add the component of religious discrimination. *Id.* at 852. See also *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 100 (1st Cir. 2013), *Saints Constantine & Helen, supra*, 396 F.3d at 901, and *Guru Nanak Sikh Soc'y of*

[1] This comports with the panel's conclusion that "[e]vidence of improper decision-making is more appropriately considered when evaluating whether a governmental action was narrowly-tailored to serve a compelling state interest—an inquiry that the court should undertake only after finding that a substantial burden exists." (***Opinion***, D. 41-2, Page 11).

Yuba City v. County of Sutter, 456 F.3d 978, 981, 990-91 (9th Cir. 2006). In *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2nd Cir. 2007), the Second Circuit noted:

> … where the denial of an institution's application to build will have minimal impact on the institution's religious exercise, it does not constitute a substantial burden, even when the denial is definitive. There must exist a close nexus between the coerced or impeded conduct and the institution's religious exercise for such conduct to be a substantial burden on that religious exercise. *Id.* at 349.

Here, LCS argues that it hopes to ***increase*** its student population by moving to the Township; it has made no argument that it cannot fulfill its mission in its Pinckney property or its current location. The *Westchester* court also considered ready alternatives in addressing the substantial burden requirement of RLUIPA. *Id.* at 352. Here, LCS has ready alternatives; it still owns its Pinckney property and, but for its own decision, could still fulfill its religious mission there.

II. JURISDICTIONAL BOUNDARIES

LCS next argues that the panel held that a local government can effectively exclude a religious institution from its jurisdiction. LCS argues that "rehearing *en banc* is required to harmonize Sixth Circuit jurisprudence with settled law in other circuits." (***Petition***, D. 42, Page 20.) LCS 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).[2] The panel distinguished this decision as follows:

[2] LCS also cites a decision from a state supreme court. See *Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009). A conflicting decision from a state supreme court hardly

> But that case involved a free-exercise challenge to a zoning ordinance that prohibited all churches within the city limits unless an exception was obtained. Under the zoning ordinance, the city had allowed exceptions to 25 Christian churches, but denied an exception to an Islamic Center. The court 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 (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981) (holding that a local government could not constitutionally ban all live entertainment from its borders by relying on the argument that live entertainment was available in neighboring jurisdictions)…
>
> In the present case, unlike in *Islamic Center*, there is no evidence that the Township's zoning ordinance has completely banned religiously-oriented schools from its borders (or banned them unless they can obtain zoning exceptions). (***Opinion***, D. 41-2, Pages 18-19).

And this panel did not miss the critical issue. Its reliance upon and discussion of the Fourth Circuit's decision in *Andon, LLC v. City of Newport*, 813 F.3d 510 (4th Cir. 2016) shows that the facts here do not give rise to an inference of discrimination. To highlight the flaw of LCS's argument, consider a situation where LCS desires to occupy two different buildings, one in Genoa Township and one across the street in the adjacent city of Brighton, a city of 3.56 square miles (see U.S. Census Bureau,https://www.census.gov/quickfacts/table/RHI705210/2610620, last accessed July 7, 2017). Would both communities be required to issue permits to LCS because, according to LCS, no other property in that particular political subdivision met LCS's

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warrants rehearing *en banc*. Moreover, the decision is easily distinguishable. Unlike *Barr*, this is not a case where a local unit of government passed a zoning ordinance that specifically targeted a pastor and "effectively banned" his religious ministry from an entire city. *Id.* at 289, 291.

desires and budget? The Township submits that to answer such a question in the affirmative would effectively give LCS a "free pass," contrary to the purposes of RLUIPA.

CONCLUSION

For the foregoing reasons, the Township respectfully requests that this Honorable Court DENY Appellant's petition for rehearing *en banc*.

Respectfully submitted,

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Dated: July 10, 2017

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2017, I electronically filed the foregoing response with the Clerk of the Court using the e-filing system, which will send notification to the following: *All Attorneys of Record.*

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