

No. 25-1131

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**In the Supreme Court of the United States**

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MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.,  
PETITIONER

*v.*

JOEL FREDERIC, ET UX.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF KENTUCKY*

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**BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

The substantial-burden provision of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) states that a covered government may not “impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person” unless it satisfies strict scrutiny. 42 U.S.C. § 2000cc(a)(1). And RLUIPA’s equal-terms provision states that a government may not “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.” *Id.* § 2000cc(b)(1).

Petitioner leased the Residential Tract next to the Church Tract it owned, intending to build a grotto. Petitioner knew the zoning ordinance didn’t allow a grotto on the Residential Tract, because it’s not adjacent to an arterial street. Petitioner thus secured a variance from the local zoning board. The Kentucky Supreme Court later held that the board lacked authority to grant that variance. Petitioner has never shown that it couldn’t build a slightly smaller grotto on the Church Tract, as the ordinance would allow.

The questions presented are:

1. Whether denying Petitioner’s variance violates RLUIPA’s substantial-burden provision, when the zoning board wasn’t authorized to grant the variance, Petitioner failed to show it lacked alternative locations to build the grotto, and Petitioner acquired the parcel knowing a grotto wasn’t allowed there.
2. Whether the zoning ordinance’s arterial-street requirement violates RLUIPA’s equal-terms provision, when it applies equally to religious entities and similarly situated nonreligious entities.

**PARTIES TO THE PROCEEDING AND  
RELATED PROCEEDINGS**

Petitioner's lists of the parties to the proceeding and directly related proceedings are complete and correct.

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## INTRODUCTION

The Court should deny the petition. The Kentucky Supreme Court's decision is correct and doesn't implicate any certworthy conflict among the courts of appeals and state high courts. And there are serious vehicle problems—including that Petitioner *asked* the Kentucky Supreme Court to adopt the substantial-burden test it now challenges, and that Petitioner raised its equal-terms argument for the first time before the Kentucky Supreme Court and only conclusorily, depriving that court and this one of any meaningful record for the fact-intensive arguments it now makes. This case isn't certworthy, and even if the questions presented were, this wouldn't be the case in which to address them.

This case arises from a zoning dispute in Park Hills, Kentucky. Petitioner, Missionaries of Saint John the Baptist, Inc., owns a church in a residential neighborhood. Under Park Hills' residential zoning, the church on that Church Tract is a prior nonconforming use. Petitioner leased an adjacent parcel—the Residential Tract—intending to build a grotto. Petitioner knew that would violate Park Hills' zoning ordinance, which prohibits many types of structures in residential neighborhoods unless they are located on an arterial street (and neither the Church Tract nor the Residential Tract is). Petitioner has never shown it couldn't build a grotto on the Church Tract, where, the Kentucky Supreme Court has held, it would be permissible as part of the church's prior nonconforming use. App. 25a.

Instead, Petitioner asked the Park Hills Board of Adjustment (Board) for a variance so it could build the grotto on the Residential Tract. The Board granted

the variance, over the objection of Respondents, neighborhood residents Joel and Elizabeth Frederic, who were concerned about increased community traffic. The Frederics challenged the Board's decision in state court, arguing that the Board lacked authority to issue the variance. Kentucky's appellate courts agreed.

The questions presented arise from Petitioner's late-raised arguments under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). At summary judgment, and without having developed a record, Petitioner asserted for the first time that it would substantially burden its religious exercise, contravening RLUIPA, if the Board denied its variance. And it argued before the Kentucky Supreme Court, for the first time, that the ordinance violated RLUIPA's equal-terms provision by treating churches less favorably than nonreligious buildings. That court correctly rejected those arguments, and its ruling doesn't implicate any certworthy conflict. This Court should deny review.

**1.** The substantial-burden question doesn't warrant review.

This case doesn't implicate any split on RLUIPA's substantial-burden provision. Petitioner cannot show that any other appellate court would have decided this case differently. Substantial-burden precedents from the courts of appeals and state high courts align with the Kentucky Supreme Court's decision. In addressing substantial-burden claims, those courts routinely consider, among other factors, whether a religious organization had reasonable alternative means to observe a religious practice and whether the organization imposed a burden on itself by acquiring land it knew wasn't zoned for the religious exercise. The Ken-

tucky Supreme Court relied on those factors here. Any minor variations in how courts articulate their tests aren't outcome-determinative here.

The Kentucky Supreme Court's decision is correct. The alternative-means and self-imposed-burden factors are relevant to the substantial-burden analysis and flow from RLUIPA's text and structure. And the Kentucky Supreme Court correctly applied those factors, holding that Petitioner failed to meet its burden under RLUIPA because it produced no evidence that it couldn't build a grotto on the Church Tract and because Petitioner imposed any burden on itself by leasing the Residential Tract knowing it couldn't build a grotto there.

There are serious vehicle issues, too. Although Petitioner contends the Kentucky Supreme Court shouldn't have considered the factors it analyzed, Petitioner invited the error it now claims by *asking* the court to adopt that test. And the substantial-burden provision doesn't apply anyway. That provision would apply only if, as relevant here, the Board were "permit[ted]" to grant the variance. 42 U.S.C. § 2000cc(a)(2)(C). The state courts' determination that the Board lacked that authority makes RLUIPA's substantial-burden provision inapplicable. That also means the substantial-burden holding rests on adequate and independent state grounds—a jurisdictional bar to this Court's review.

**2.** The equal-terms question also doesn't warrant review.

This case doesn't implicate any certworthy conflict on RLUIPA's equal-terms provision. Nine of the ten circuits that have weighed in have held that a regulation violates the equal-terms provision only if it treats

a religious institution less favorably than a similarly situated nonreligious comparator. This case doesn't turn on any minor variations in how courts articulate or apply that similarly-situated-comparator test. The Kentucky Supreme Court didn't address those differences, and its decision aligns with the prevailing approach reflected in other courts' precedents. As for the one outlier—the Eleventh Circuit—Petitioner concedes that court is wrong. There's no point in granting review to correct a position neither party defends and that the Eleventh Circuit may well correct on its own.

The Kentucky Supreme Court correctly rejected Petitioner's equal-terms argument because Park Hills' zoning ordinance treats churches and similarly situated nonreligious institutions equally. The ordinance requires churches to be on arterial streets to be eligible for conditional-use permits, and it imposes the same requirement on all similarly situated comparators, like higher-education institutions, hospitals, nursing homes, and police and fire stations. Petitioner complains that the Kentucky high court wasn't clearer in making express findings in its similarly-situated-comparator analysis. But the court's economical treatment likely resulted from Petitioner's failure to raise the issue until merits briefing before that court.

That also makes this case a bad vehicle, because this issue was barely addressed below. There is thus no record on the equal-terms question. This Court would have little opportunity to provide meaningful guidance on an inherently fact-oriented test without any record.

Respondents don't dispute that RLUIPA confers important rights that protect religious liberty and exercise. But the Kentucky Supreme Court carefully

considered Petitioner’s claim and correctly held that Park Hills’ zoning ordinance, which serves important community values, doesn’t substantially burden or discriminate against Petitioner’s exercise. This case involves nothing like the facts of *Apache Stronghold v. United States*, 145 S. Ct. 1480 (2025) (Gorsuch, J., dissenting from the denial of certiorari), or the alleged denial of First Amendment rights in *Grand v. City of University Heights*, No. 25-965 (U.S.). The Court should deny review.

## STATEMENT

### A. Legal background

RLUIPA “targets two areas of state and local action:” “land-use regulation” and “restrictions on the religious exercise of institutionalized persons.” *Sossamon v. Texas*, 563 U.S. 277, 281 (2011). Two land-use provisions are relevant.

*First*, the substantial-burden provision prohibits a government from “impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden” on a person’s “religious exercise,” unless the government satisfies strict scrutiny. 42 U.S.C. § 2000cc(a)(1). That provision applies to a “limited category of governmental actions.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 (2014). It applies when the substantial burden arises in “a program or activity” receiving federal funds; “affects” interstate commerce; or “is imposed in the implementation of a land use regulation ... that permit[s] the government to make[] individualized assessments” of “the property involved.” 42 U.S.C. § 2000cc(a)(2).

*Second*, RLUIPA’s equal-terms provision prohibits a government from “impos[ing] or implement[ing] 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.” *Id.* § 2000cc(b)(1).

A RLUIPA violation can be raised “as a claim or defense.” *Id.* § 2000cc-2(a). The party raising RLUIPA must “produce[] prima facie evidence to support” the claim. *Id.* § 2000cc-2(b). Then, the opposing party “bear[s] the burden of persuasion” on most elements. *Id.* But the claimant “bear[s] the burden of persuasion on whether” a regulation “substantially burdens [its] exercise of religion.” *Id.*

## **B. Factual and procedural background**

1. Petitioner owns a church in a residential zone in Park Hills, Kentucky (the Church Tract). App. 33a. Under Park Hills’ zoning ordinance, certain buildings—including “[c]hurches and other buildings for the purpose of religious worship,” higher-education institutions, hospitals, nursing homes, and police and fire stations—are permitted as “conditional uses” in residential zones only if they are “adjacent to an arterial street.” App. 74a-75a. An arterial street is a “[p]ublic thoroughfare[]” serving “the major movement of traffic within and through the community.” App. 5a n.5. Although the Church Tract isn’t adjacent to an arterial street, it enjoys a grandfathered “non-conforming use” because a church has operated there since before the ordinance’s adoption. App. 4a, 33a.

After acquiring the Church Tract, Petitioner leased an adjoining property (the Residential Tract), intending to construct an “outdoor grotto”—including a shrine, walking path, and plaza—near the church. App. 4a. The Residential Tract also isn’t located on an arterial street and enjoys no grandfathered nonconforming use. *Id.* Thus, in 2021, Petitioner applied to



the Board for “a conditional use permit and setback variances” to construct the grotto on the Residential Tract, acknowledging that doing so “is not directly permitted by the current local zoning ordinance.” App. 4a-5a.

State and local laws make clear that the Board lacked authority to grant the permit or variance. Park Hills’ zoning ordinance empowers the Board to grant conditional-use permits only if it determines “[t]hat the proposed building ... will comply with” the zoning ordinance. App. 70a. And a Kentucky statute provides that a zoning board “shall not possess the power to grant a variance to permit a use of any land, building, or structure which is not permitted by the zoning ordinance.” Ky. Rev. Stat. Ann. § 100.247. Thus, because the zoning ordinance doesn’t allow religious-worship buildings in residential zones if they aren’t on arterial streets, the Board lacked authority to grant Petitioner’s requested permit and variance.

The Board nonetheless voted 4–1 to grant them. App. 8a. The dissenting Board member objected because “the church was not located on an arterial street.” *Id.*

**2.** The Frederics, who live across from the Church Tract and are concerned about neighborhood traffic, sued Petitioner and the Board in state court. App. 10a, 98a-112a. They explained that the Board “exceeded its statutory authority” because the Residential Tract isn’t “adjacent to an arterial street.” App. 110a. The Frederics sought an injunction requiring the Board to comply with state and local law. App. 111a-112a.

The parties cross-moved for summary judgment. App. 11a. Petitioner raised a RLUIPA defense “for the

first time.” App. 12a. Its “only argument” under RLUIPA “was that there was no compelling reason to prevent the grotto’s construction and that the issue was ‘beyond the scope of government regulation.’” *Id.* (quoting App. 92a-93a). The court granted Petitioner summary judgment on state-law grounds, without addressing RLUIPA. App. 56a-61a.

3. The Kentucky Court of Appeals reversed. App. 40a-55a. The court held that the Board “acted in excess of its statutory authority in granting the requested conditional use and variances.” App. 43a. The court also rejected Petitioner’s RLUIPA argument, explaining that the zoning ordinance “imposes no substantial burden on [Petitioner’s] religious exercise.” App. 55a. The court didn’t address RLUIPA’s equal-terms provision because, other than block-quoting it alongside other provisions, Petitioner never mentioned it. Petitioner’s Ky. Ct. App. Br. 17-21.

4. Petitioner sought review from the Kentucky Supreme Court, which affirmed, unanimously rejecting Petitioner’s RLUIPA arguments. App. 1a-39a.

a. Petitioner’s motion for discretionary review asked the court to “determin[e]” whether, “under RLUIPA, the factors outlined in *Livingston Christian Schools v. Genoa Charter Township*, 858 F.3d 996, 1003 (6th Cir. 2017) is the correct standard in evaluating” a substantial-burden claim. Mot. for Discretionary Review 5. Petitioner argued that the *Livingston* standard was “more appropriate” than the test the lower court applied. *Id.* at 9.

The court “agree[d]” that *Livingston* “should be [its] polestar” for substantial-burden claims. App. 22a. The court thus adopted from *Livingston* “several factors to be considered in determining

whether a substantial burden claim exists.” App. 24a. Those factors include “whether the religious institution has a feasible alternative location” for its religious exercise and whether the institution “imposed a burden upon itself” by, for example, “obtain[ing] an interest in land without a reasonable expectation of being able to use that land for religious purposes.” *Id.*

Applying *Livingston*, the court rejected Petitioner’s substantial-burden argument. App. 25a-27a. *First*, Petitioner failed to carry its burden under RLUIPA because it made only “conclusory statements that it has no other feasible alternative location for construction of the grotto” and “ha[d] not asserted that it could not construct a smaller grotto or shrine” on the Church Tract, which would not “run[] afoul” of the zoning ordinance. App. 25a. *Second*, Petitioner “imposed a burden on itself” by leasing the Residential Tract knowing that building a grotto there was “not directly permitted by the current local zoning ordinance.” App. 27a (emphasis omitted).

**b.** For the first time in its opening brief (at 43-45), Petitioner also raised a cursory RLUIPA equal-terms argument. (Petitioner’s motion for review didn’t mention the equal-terms provision.) The court briefly addressed and rejected the argument. App. 27a-29a. The zoning ordinance didn’t violate the equal-terms provision by requiring that churches be located on an arterial street to be eligible for conditional-use permits, the court reasoned, because it imposed the same condition on similarly situated nonreligious institutions, like “[i]nstitutions for higher education, hospitals, sanitariums, convalescent homes, nursing homes, police stations, and fire stations.” App. 29a.

c. Justice Thompson dissented on state-law grounds but “agree[d]” that RLUIPA “was not violated.” App. 31a.

## **REASONS FOR DENYING THE PETITION**

### **I. Petitioner’s substantial-burden question doesn’t warrant review.**

Petitioner’s substantial-burden question doesn’t merit review.

*First*, this case implicates no conflict in the lower courts. The courts of appeals and state high courts interpret RLUIPA’s substantial-burden provision consistently, applying the same factors the Kentucky Supreme Court applied below at Petitioner’s own urging. Minor variations in articulating the standard aren’t outcome-determinative here.

*Second*, the Kentucky Supreme Court’s decision is correct. The court held that Petitioner failed to carry its burden because it didn’t show that it lacked alternative locations for the grotto and because it leased the Residential Tract knowing the grotto wasn’t permitted. Those factors are relevant to the substantial-burden analysis, as RLUIPA’s text shows and courts have consistently held, and the court correctly found them dispositive here.

*Third*, this case is a poor vehicle. Petitioner invited the error it now alleges by *requesting* the standard the court adopted below. And given Kentucky courts’ interpretation of state law, RLUIPA’s substantial-burden provision doesn’t apply here, so the judgment below rests on adequate and independent state grounds.

**A. There is no outcome-determinative split.**

This case doesn't implicate any conflict among the courts of appeals and state high courts on RLUIPA's substantial-burden provision. The Kentucky Supreme Court held that Petitioner's religious exercise wasn't substantially burdened because Petitioner failed to show that it was unable to construct a grotto in an alternative location and because it self-imposed any burden. *See* Pet. 8-9. All the courts Petitioner cites resolve substantial-burden claims based on one or both of those factors. Minor variations in articulation of the standard would produce no different outcome here.

**1. The courts of appeals and state high courts interpret the substantial-burden provision consistently.**

**a.** Start with the Sixth Circuit's interpretation in *Livingston*, which the Kentucky Supreme Court adopted here.

**i.** Drawing on other circuits' "persuasive[]" caselaw, *Livingston* "identified several factors" that "are helpful in determining whether a land-use regulation has imposed a substantial burden." 858 F.3d at 1003-04. Those factors include "whether the religious institution has a feasible alternative location from which it can carry on its mission"; "[w]hether the institution will suffer 'substantial delay, uncertainty, and expense'" because of the regulation; and whether the institution "has imposed a burden upon itself" by "obtain[ing] an interest in land without a reasonable expectation of being able to use that land for religious purposes." *Id.* at 1004.

*Livingston* held that a town's denial of a zoning permit to a religious school didn't impose a substantial burden, based primarily on the alternative-means and

self-imposed-burden factors. *Id.* at 1005-09. The school wanted to relocate, and operating at the new location required a special-use permit, which the town denied. *Id.* at 999. Weeks later, the religious school leased its original property to a different school, temporarily preventing it from returning. *Id.* The court held that the school had failed to show its religious exercise had been substantially burdened because it had “put forth only conclusory evidence that the [original] property is inadequate.” *Id.* at 1006, 1011. And because the school decided to lease out its original location “only after the special-use permit ... was denied,” the court reasoned that the school “impose[d]” any burden “upon itself.” *Id.* at 1009.

**ii.** The Kentucky Supreme Court adopted *Livingston* as its “polestar.” App. 22a. As in *Livingston*, the court resolved the substantial-burden issue on the alternative-means and self-imposed-burden factors. App. 25a-27a. It held that Petitioner made only “conclusory statements that it has no other feasible alternative locations” for the grotto and never “asserted that it could not construct a smaller grotto or shrine on the property it already owned.” App. 25a. Petitioner also “imposed a burden upon itself” because it leased the Residential Tract knowing that building the grotto was “*not directly permitted by the current local zoning ordinance.*” App. 27a.

**b.** Decisions from other courts of appeals align with *Livingston* and the Kentucky Supreme Court’s decision. Other courts routinely resolve substantial-burden cases on the alternative-means and self-imposed-burden factors.

**i.** The Ninth Circuit assesses substantial-burden claims based on the “totality of the circum-

stances,” considering the same factors the Kentucky Supreme Court identified here, including “whether Plaintiffs have ready alternatives” for the religious practice; “whether those alternatives would require ‘substantial uncertainty[,] delay, or expense’”; and “whether Plaintiffs imposed the burden on themselves.” *Spirit of Aloha Temple v. County of Maui*, 132 F.4th 1148, 1156 (9th Cir. 2025).

*New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596 (9th Cir. 2022), underscores the similarity between the Ninth Circuit’s substantial-burden precedent and *Livingston*. There, a church purchased a two-story building on Salinas’s Main Street, hoping “to host worship services on the first floor,” even though the church knew that “such a use would be inconsistent” with Main Street’s commercial zoning. 29 F.4th at 599-600. The city denied a conditional-use permit but “recommended that [the church] submit a modified application” with a commercial use “facing Main Street while building the sanctuary toward the back.” *Id.* at 600. The court held that the church’s substantial-burden claim failed “for three primary reasons, none of which alone is necessarily dispositive.” *Id.* at 602. *First*, the church had alternative means to “hold religious assemblies” at that building, because it could “reconfigure the first floor” or hold services on the second floor. *Id.* at 602-03. *Second*, the church had failed to show “that it was precluded from using other sites within the City.” *Id.* at 603. *Finally*, the church’s burden was “at least partly of its own making” because it “purchased a building that it knew ... was subject to unique zoning restrictions.” *Id.* at 604.

The Ninth Circuit noted that the facts in *New Harvest* “stand[] in contrast” to cases where that court

concluded that a religious entity faced a substantial burden. *Id.* at 602-03. For instance, the religious organization in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 989 (9th Cir. 2006), “had ‘readily agreed to every mitigation measure’ the government had proposed but was nonetheless denied [a] conditional use permit,” leaving it with no alternative means “to build [its] Sikh temple.” *New Harvest*, 29 F.4th at 602-03. And in *International Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011), a city denied a church a conditional-use permit to operate in an industrial zone. The court held that there was a “triable issue” on the church’s burden, where it “offered evidence ... that no other suitable site exists in the City to house the Church’s expanded operations.” *Id.*

*ii.* The Second Circuit’s substantial-burden precedent also considers whether a religious institution has alternative means to observe a precept and whether it imposed the burden on itself. In *Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic District Commission*, 768 F.3d 183, 187 (2d Cir. 2014), a town denied Chabad’s application to modify a building in the historic district. In remanding Chabad’s substantial-burden claim, the Second Circuit instructed the district court “to consider ... whether feasible alternatives existed” and whether Chabad “reasonably believed it would be permitted to undertake its proposed modifications when it purchased the property.” *Id.* at 196.

Other Second Circuit decisions show that the alternative-means factor is often central to the analysis. For example, in *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007), the court held that, when a government denies a religious



institution’s zoning request, its “religious exercise has not been substantially burdened” if it “has a ready alternative—be it an entirely different plan to meet the same needs or the opportunity to try again in line with the zoning board’s recommendations.” There, the court was “persuaded” that a religious school “had satisfied its burden” after a village denied its proposed expansion, because the school showed it had “no quick, reliable, or economically feasible alternatives.” *Id.* Similarly, in *Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir. 2012), the court reiterated that “[a] denial of a building application is likely not a substantial burden if it leaves open the possibility” an alternative proposal will be accepted. But the court held that a church had been substantially burdened by a town’s denial of an expansion plan because the town’s “purported willingness to consider a modified plan was wholly disingenuous,” leaving no realistic alternative. *Id.*

*iii.* The Eleventh Circuit applies similar factors, as *Thai Meditation Ass’n of Alabama v. City of Mobile*, 980 F.3d 821, 831-32 (11th Cir. 2020), shows. There, the city denied an organization’s application to construct a Buddhist meditation center. *Id.* at 825-26. Favorably citing decisions from the First, Second, Fourth, Seventh, and Ninth Circuits, the court enumerated several factors for the district court to consider on remand, including “the extent to which the City’s decision ... effectively deprives the plaintiffs of any viable means by which to engage” in the relevant religious exercise, whether the plaintiffs could “submit modified applications that might satisfy the City’s objections,” and whether the plaintiffs “had a reasonable expectation of using [their] property for

religious exercise[] or whether the burden is instead self-imposed.” *Id.* at 831-32 & nn.5-12.

Other Eleventh Circuit caselaw also emphasizes the alternative-means factor. For example, in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004), the court held that an ordinance prioritizing commercial uses in a business district, and prohibiting certain non-commercial uses like religious assemblies, didn’t substantially burden synagogues’ religious exercise. That was because “the congregations ha[d] the alternative of ... operat[ing] only a few blocks” away. *Id.* And the synagogues “failed” to meet their RLUIPA burden because the court could “[n]ot say,” on that record, “that walking a few extra blocks is ‘substantial.’” *Id.*

*iv.* The Seventh Circuit’s substantial-burden precedent also considers the alternative-means and self-imposed-burden factors.

In *Edgewood High School of the Sacred Heart, Inc. v. City of Madison*, 95 F.4th 1080, 1088 (7th Cir. 2024), the court agreed with the “other circuits” that have “found no substantial burden” where “adequate alternative locations were available.” There, a Catholic school claimed a city violated RLUIPA by denying its permit to install lights for nighttime sports. *Id.* at 1084-85. Assuming that hosting night games “constitutes religious activity,” the court held that the school’s substantial-burden claim failed because nearby “alternative venues ... remain[ed] available to host nighttime events.” *Id.* at 1088-89.

The court relied on the alternative-means and self-imposed-burden factors in rejecting a church’s substantial-burden claim in *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851

(7th Cir. 2007). There, a congregation was considering buying a warehouse in an industrial zone, hoping to have the property rezoned and converted into a church. *Id.* at 847. A village board recommended denying the rezoning application, but the congregation “went ahead and bought the warehouse.” *Id.* at 848. The court held that the denial didn’t violate RLUIPA. *Id.* at 851. “When there is plenty of land on which religious organizations can build churches,” the court reasoned, “the fact that they are not permitted to build everywhere does not create a substantial burden.” *Id.* Further, the congregation imposed any burden on itself by “purchas[ing] the property outright after it knew” its application “would be denied.” *Id.*

*v.* The Fourth Circuit also emphasizes the alternative-means and self-imposed-burden factors. It has explained that a regulation that merely “limit[s] [a] building’s size” generally doesn’t impose a substantial burden if it would “still allow a religious institution to construct” an alternative building for its intended purpose. *Alive Church of the Nazarene, Inc. v. Prince William County*, 59 F.4th 92, 106 (4th Cir. 2023). And a substantial-burden claim will “fail if the burden was ‘self-imposed.’” *Id.*

*Alive Church* rejected a substantial-burden claim because any “hardship was not imposed by governmental action” but was instead “self-imposed.” *Id.* There, a church obtained property in an agricultural district. *Id.* at 99-100. But it was permitted to construct a church pursuant to a special-use permit (SUP), which required it to incur certain agricultural-zone-specific construction costs like implementing “stormwater management strategies.” *Id.* The court reasoned that any burden was self-imposed because the church “did not have a reasonable expectation of

religious land use without complying with its SUP.” *Id.* at 107. In fact, the church had purchased that “property *because* its prior owners had obtained a SUP.” *Id.* at 99.

**vi.** The First Circuit has declined to “adopt any abstract test” for RLUIPA substantial-burden claims, instead taking “a functional approach to the facts of a particular case.” *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 95 (1st Cir. 2013). But the court’s reasoning in *Roman Catholic Bishop* shows that whether an organization has a feasible alternative means to observe a religious precept is relevant to the analysis. There, a church decided to close and needed to choose among several religiously acceptable options “for dealing with religious symbols” when a church “goes out of service.” *Id.* at 84. Soon after, Springfield’s city council designated the church a “single-parcel historic district,” which required the church to “submit any plans to alter the exterior” to a historical commission. *Id.* at 99. The court held that the church’s substantial-burden claim failed because it hadn’t shown that having to submit plans to the historical commission “in fact will result in the denial of any request that [the church] may make.” *Id.* Put differently, because the church hadn’t proven that the historical commission would disallow any alterations, the church failed to show that it lacked feasible means for exercising its religion while still complying with the historic-district regulation.

**c.** The three state high court decisions Petitioner cites (Pet. 19-21) are consistent with the federal appellate caselaw. In those courts, substantial-burden claims turn on the alternative-means and self-imposed-burden factors.

For example, the Maryland Supreme Court has held that a government “imposes a substantial burden” under RLUIPA “only if it leaves the aggrieved religious institution without a reasonable means to observe a particular religious precept.” *Trinity Assembly of God of Baltimore City, Inc. v. People’s Counsel for Baltimore County*, 962 A.2d 404, 429 (Md. 2008). In *Trinity*, a church claimed that a zoning board violated RLUIPA when it denied the church’s request for a variance to construct a large sign, which the church claimed it needed to “attract additional parishioners in accordance with its missionary ministry.” *Id.* at 416. The court reasoned that disallowing the variance didn’t substantially burden the church’s religious exercise because the church had many other “ways of publicizing its activities and evangelizing.” *Id.* at 430. “The standards articulated by the Ninth and Eleventh Circuits provide[d] useful beacons,” the court explained, and the court found its holding “consistent” with the “federal and other state courts applying” RLUIPA. *Id.* at 428-31.

The Michigan Supreme Court relied on similar reasoning, and found “persuasive” decisions from “[s]everal federal circuit courts of appeal,” when it rejected a substantial-burden claim in *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 747 (Mich. 2007). There, a church wanted to build apartments on property zoned single-family residential. *Id.* at 737-38. The city denied the church’s rezoning request. *Id.* at 738. Assuming that building apartments “constitute[d] a ‘religious exercise,’” the court held that the church’s exercise hadn’t been substantially burdened because the city was “not forbidding [it] from building an apartment complex” but was “simply regulating where the apartment

complex can be built.” *Id.* at 750. The court also noted that any burden was self-imposed because the church “was aware when it purchased the property that it was zoned single-family residential.” *Id.* at 750 n.24.

Finally, in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005), the Oregon Supreme Court held that denying a permit to build a new meeting house didn’t substantially burden a church’s religious exercise. That was because “[t]he city gave specific reasons for denying the first application, and nothing in the record indicates that the city would not approve a revised application that met its concerns.” *Id.* Put differently, the church had viable alternatives because “it would be possible” to both comply with zoning laws and build a meeting house. *Id.* And the Oregon Supreme Court “f[ou]nd instructive” and “agree[d] with the reasoning” of the “lower federal courts [to] have decided” similar RLUIPA cases. *Id.* at 1129-30.

## **2. Any minor variations in how courts articulate the standard make no difference here.**

**a.** This case doesn’t implicate any split. The courts of appeals and state high courts interpret RLUIPA’s substantial-burden provision consistently, emphasizing the same two factors the Kentucky Supreme Court relied on. That court reasoned that Petitioner hadn’t met its burden of showing “that it ha[d] no other feasible locations” for its grotto, and that Petitioner “imposed [any] burden upon itself” by leasing land where it knew a grotto wasn’t allowed. App. 25a, 27a. The First, Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits, along with the

Maryland, Michigan, and Oregon high courts, have all applied those factors in resolving substantial-burden claims. *Supra* pp. 11-20. This case would come out the same way in all those courts.

**b.** Petitioner highlights different verbal formulations courts have used to articulate the substantial-burden test. But those variations in wording all encompass the same factors the Kentucky Supreme Court applied below. And Petitioner’s arguments only underscore that differences in phrasing make no difference to the outcome here.

**i.** Petitioner identifies just two courts—the Ninth and Second Circuits—where it says its substantial-burden claim would have succeeded. Pet. 26-27. But Petitioner ignores those courts’ recent explanations making clear they apply the same factors as the Kentucky Supreme Court. *Supra* pp. 12-15. All three courts consider whether religious organizations “have ready alternatives” for their practice and whether they “imposed a burden upon” themselves. *Spirit of Aloha*, 132 F.4th at 1156; *New Harvest*, 29 F.4th at 602; *Chabad Lubavitch*, 768 F.3d at 187. Different *outcomes* among the cases turn on different *facts*.

**ii.** The verbal variation Petitioner identifies only underscores that this case wouldn’t come out differently anywhere else.

Petitioner says the First Circuit is more “willing[] to consider ‘discrimination’ as evidence of a substantial burden” than other circuits. Pet. 19. But the Board here *granted* petitioner’s variance before the courts held it lacked authority, App. 8a, so there’s no evidence or allegation of discrimination. Petitioner’s claim would have failed in the First Circuit.

Petitioner says the Fourth Circuit’s formulation of the alternative-means factor is too strict because a RLUIPA claim “would fail” even if zoning would “force a church or mosque to be the size of a studio apartment.” Pet. 21. Nothing in the Fourth Circuit’s caselaw supports that contention. But even if Petitioner were correct, that would merely show that its argument would fail in the Fourth Circuit, too.

Petitioner also contends that the Michigan Supreme Court “reject[ed]” one component of the substantial-burden test the Sixth Circuit later adopted in *Livingston*, which considers whether a religious organization experienced “delay, uncertainty, and expense.” Pet. 18-19; *compare Greater Bible Way*, 733 N.W.2d at 750 n.23, *with Livingston*, 858 F.3d at 1004. But any discrepancy only makes *Livingston* (which the Kentucky Supreme Court adopted, at Petitioner’s invitation) *more* favorable to Petitioner than Michigan’s test.

c. Petitioner may claim conflict with the post-petition decision in *Anash, Inc. v. Borough of Kingston*, No. 25-1097, 2026 WL 2196426 (3d Cir. July 30, 2026). There, a divided Third Circuit panel reversed the denial of a religious organization’s requested preliminary injunction. *Id.* at \*23. The dissent noted that the majority’s substantial-burden analysis “contravenes a cohesive body of law among” other circuits, which look to the same “two factors” the Kentucky Supreme Court relied on here. *Id.* at \*23-24. But *Anash* creates no certworthy conflict. Because the panel considered only the likelihood of success on the merits, *id.* at \*11-16, its “legal analysis ... is not binding on [a] later panel,” *Pitt News v. Pappert*, 379 F.3d 96, 104-05 (3d Cir. 2004) (Alito, J.), meaning “[a] circuit split is thus not yet a foregone conclusion,” *Louisiana Forestry*



*Ass’n Inc. v. Secretary of Labor*, 745 F.3d 653, 675 n.17 (3d Cir. 2014). Future panels are unlikely to follow *Anash*’s outlier analysis—and even if they did, en banc review likely would bring the Third Circuit in line with the consensus.

**B. The Kentucky Supreme Court’s decision is correct.**

The Kentucky Supreme Court’s ruling is correct. Whether a religious organization has imposed a burden on itself and whether it has alternative means to observe a particular practice are relevant considerations under RLUIPA’s land-use provisions, as the law’s text and structure show. And, applying those factors, the court correctly concluded that Petitioner had not met its burden of proving that denying its requested variance and conditional-use permit substantially burdened its religious exercise.

1. a. The Kentucky Supreme Court held that a relevant factor is “whether ‘a plaintiff imposed a substantial burden upon itself’” by, for example, “obtain[ing] an interest in land without a reasonable expectation of being able to use that land for religious purposes.” App. 24a. That follows from RLUIPA’s text, which protects religious organizations from substantial burdens only that the “government” has “impose[d].” 42 U.S.C. § 2000cc(a)(1). Thus, RLUIPA requires courts to ask “who is responsible for the impediment—the government, or the religious organization?” *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore County*, 915 F.3d 256, 261 (4th Cir. 2019). When someone acquires property knowing it cannot be used for a specific purpose, *the acquiror* imposes the burden on herself. That’s why, for example, a property owner’s “investment-backed expectations”

are relevant in regulatory-takings doctrine. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). An alternative is acquiring an appropriately zoned parcel. A church’s inability to do that doesn’t mean *the government* is burdening its exercise of religion (rather than, say, its resources or other landowners).

To be sure, self-imposing a burden isn’t “necessarily dispositive.” *New Harvest*, 29 F.4th at 602. But it’s relevant, and is “more significant” when combined with a religious organization’s “wholesale failure of proof concerning available alternatives.” *Id.* at 604.

**b.** Petitioner contends that, under the Kentucky Supreme Court’s reasoning, “state and local governments could impose all manner of burdens on religious exercise so long as they give adequate notice.” Pet. 16. But Park Hills’ straightforward zoning ordinance (adopted decades ago, App. 59a) doesn’t implicate the parade of horrors Petitioner’s hypothetical suggests. And the question isn’t whether the organization knew about a given regulation when it asked for a variance; it’s whether the organization had reason to know about the regulation when it acquired the land. If so, any burden “is at least partly of its own making” depending on whether alternatives were available. *New Harvest*, 29 F.4th at 604. But Petitioner made no showing about alternatives. *See* App. 25a.

**2. a.** The Kentucky Supreme Court also correctly held that “whether the religious institution has a feasible alternative” for its religious exercise is relevant to the substantial-burden analysis. App. 24a. That factor likewise follows from RLUIPA’s text and structure. The statute requires “prima facie evidence” and provides that the claimant “shall bear the burden

of persuasion on whether the law” “substantially burdens [its] exercise of religion.” 42 U.S.C. § 2000cc-2(b). Congress thus contemplated that a RLUIPA claimant might fail to show that an asserted burden is substantial. And one relevant consideration, when a claimant contends that a regulation substantially burdens religious exercise, is whether the claimant could engage in the same exercise without “running afoul” of the regulation. App. 25a. If so, the regulation might not impose a substantial burden, depending on how burdensome alternatives are. That’s why courts consider the “totality of the circumstances” and reject bright-line rules. *Spirit of Aloha*, 132 F.4th at 1156; see *Thai Meditation*, 980 F.3d at 831; *Chabad Lubavitch*, 768 F.3d at 195-96.

**b.** Petitioner’s counterarguments fail.

Petitioner relies (Pet. 12-14) primarily on *Holt v. Hobbs*, 574 U.S. 352 (2015), arguing that courts shouldn’t examine whether a RLUIPA claimant has alternative means of observing a religious practice. But *Holt* doesn’t help Petitioner. There, the Court held that a prison rule requiring a Muslim inmate to shave his beard substantially burdened his religious exercise. *Id.* at 361-62. The fact that the prisoner “had been provided a prayer rug” and could observe other precepts made no difference because the substantial-burden inquiry doesn’t ask “whether the RLUIPA claimant is able to engage in *other forms* of religious exercise.” *Id.* (emphasis added). But *Holt* didn’t address whether it would be relevant if a claimant had alternative means of observing the *same form* of religious exercise. And the land-use analysis doesn’t ask whether an organization can engage in *other forms* of exercise. Rather, the test asks whether the regulation “leaves the aggrieved religious institution without a

reasonable means to observe *a particular religious precept*.” *Trinity*, 962 A.2d at 429 (emphasis added). Petitioner can construct a grotto “adjacent to the church,” Pet. 5, on the Church Tract. The claimed burden concerns only its preferred scale—not whether the exercise itself may occur. *Holt* doesn’t speak to that.

Petitioner is also wrong that Congress didn’t intend courts to apply the alternative-means factor because it requires courts “to decide matters of religious doctrine.” Pet. 13. Asking RLUIPA claimants to address whether they have feasible alternatives doesn’t turn courts into “arbiters of scriptural interpretation.” *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981). And Congress requires RLUIPA claimants to produce evidence and meet their burden of persuasion that their religious practice has been substantially burdened, 42 U.S.C. § 2000cc-2(b)—necessitating at least some inquiry into *how substantial* a burden is.

**3.** Applying those factors—as Petitioner requested—the Kentucky Supreme Court correctly concluded that Petitioner failed to meet its burden to prove that the denial of a variance and conditional-use permit substantially burdened its religious exercise. Petitioner made only “conclusory statements” that “it has no other feasible alternative locations” for the grotto, and Petitioner acquired an interest in the property decades after the zoning ordinance was adopted and thus was on notice that it couldn’t construct the grotto. App. 25a-27a, 59a. Indeed, Petitioner untimely raised RLUIPA in trial court and failed to submit evidence. *Supra* pp. 7-9. This Court shouldn’t intervene to review the finding that Petitioner didn’t carry its burden.

### C. This case is a poor vehicle.

This case is also a poor vehicle for addressing the substantial-burden question. Petitioner cannot point to any court that would decide its case differently. There are other serious vehicle issues, too.

1. Petitioner claims the Kentucky Supreme Court based its decision on “two legally irrelevant considerations” from the Sixth Circuit’s *Livingston* decision. Pet. 11-17. But Petitioner *asked* that court to adopt *Livingston* without qualification, contending that *Livingston* supplied the “correct standard” “more appropriate in this case” than the standard the lower court applied. Mot. for Discretionary Review 5, 9; *see* Petitioner’s Ky. S. Ct. Opening Br. 28-38. The Kentucky Supreme Court then adopted that rule. App. 22a. Petitioner doesn’t like that court’s fact-bound application of *Livingston*. But this Court doesn’t sit to review a judgment resting on a legal rule “that petitioner accepted” below “and indeed itself requested.” *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (cert. dismissed as improvidently granted).

2. What’s more, Kentucky law and Park Hills’ zoning ordinance make RLUIPA’s substantial-burden provision inapplicable, meaning the state-court judgment rests on adequate and independent state grounds. The substantial-burden provision “applies” only if, as relevant here, “the substantial burden is imposed in the implementation of a land use regulation ... that permit[s] the government to make[] individualized assessments of the proposed uses for the property involved.” 42 U.S.C. § 2000cc(a)(2)(C). But the Kentucky courts held that state and local laws didn’t “permit” the board to make the “individualized assessment[]” that it made. *Id.*; *see* App. 17a. That

holding makes the substantial-burden provision inapplicable. Thus, the state-court judgment is correct no matter what constitutes a “substantial burden” under RLUIPA. The Kentucky Supreme Court’s “plain statement” endorsing the Court of Appeals’ ruling that the Board had no authority to issue a conditional-use permit or variance is thus an “adequate and independent state ground[],” leaving this Court without jurisdiction to “render an advisory opinion” on RLUIPA. *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983).

To be sure, the Kentucky Supreme Court likely didn’t appreciate that the Court of Appeals’ interpretation of state law, which it concluded “must stand,” App. 17a, made RLUIPA’s substantial-burden provision inapplicable. But its statements about Kentucky law are “plain,” *Long*, 463 U.S. at 1041, meaning the judgment below rests on an adequate and independent state ground this Court cannot disturb.

3. The facts here (including Petitioner’s failure to develop a record) also make this case a poor vehicle. The Court recently denied review in a substantial-burden case under the Religious Freedom Restoration Act, RLUIPA’s “sister statute,” where the asserted burden was permanent destruction of “the Apaches’ historical place of worship, preventing them from ever again engaging in religious exercise” there. *Apache Stronghold*, 145 S. Ct. at 1480, 1486 (Gorsuch, J., dissenting from the denial of certiorari). This zoning dispute over Park Hills traffic, where a religious organization failed to show that it couldn’t build a grotto on its current lot, is a far cry from *Apache Stronghold*. Nor is this case like *Grand v. City of University Heights*, No. 25-965. Petitioner simply failed to carry its burden to establish a substantial burden of its religious exercise under factors applied nationwide.

## **II. Petitioner’s equal-terms question doesn’t warrant review.**

Petitioner’s equal-terms question doesn’t merit review either. Except for one court of appeals (which Petitioner agrees is wrong), the circuits have offered similar interpretations of that provision, and this case doesn’t implicate any minor differences. The Kentucky Supreme Court correctly held that Park Hills’ zoning ordinance doesn’t violate the equal-terms provision because it treats churches the same as other similarly situated institutions; all must be on arterial streets to qualify for conditional-use permits. And this case would be a poor vehicle because Petitioner’s failure to raise the issue until Kentucky Supreme Court review has deprived the courts of any factual record for determining similarly situatedness.

### **A. This case doesn’t implicate a certworthy split.**

This case doesn’t implicate any certworthy conflict. Nine of the ten circuits that have weighed in on the equal-terms provision—the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits—apply similar interpretations consistent with the Kentucky Supreme Court’s decision. Petitioner agrees that the sole outlier—the Eleventh Circuit—is wrong. The Court shouldn’t grant cert to reject a view no party defends and that the Eleventh Circuit may clarify or revisit.

1. Petitioner acknowledges that nine circuits hold that the government violates the equal-terms provision only if it treats “a nonreligious comparator” more favorably than a “similarly situated” religious organization. Pet. 32-34. The Kentucky Supreme Court’s decision aligns with that understanding.

a. Courts have articulated various formulations of the similarly-situated-comparator test, acknowledging that they are all “about the same.” *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011). And religious institutions have prevailed on equal-terms claims despite any variations.

The First and Third Circuits hold that “a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose.” *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007) (emphasis omitted). The Third Circuit thus held in *Lighthouse* that a church was entitled to summary judgment because an ordinance prohibited churches in commercial zones while allowing similarly situated and equally non-commercial “assembly hall[s].” *Id.* at 272-73. The First Circuit has explained that it looks to whether religious and nonreligious “comparators” are “similarly situated with respect to the purpose of the underlying regulation,” while recognizing that other circuits’ formulations “all generally require” the same thing. *Signs for Jesus v. Town of Pembroke*, 977 F.3d 93, 109 (1st Cir. 2020).

The Sixth, Seventh, and Ninth Circuits slightly “shift [the] focus” of their relevant-comparator analysis from “regulatory purpose” to “[r]egulatory criteria.” *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc). Those courts conduct the equal-terms-comparator analysis “with regard to the legitimate zoning criteria” in an ordinance. *Tree of Life Christian Schools v. City of Upper Arlington*, 905 F.3d 357, 369



(6th Cir. 2018). And the Ninth Circuit has explained that “accepted zoning criteria” include, among other things, “parking [and] vehicular traffic.” *Centro Familiar*, 651 F.3d at 1172-73. *Centro Familiar* thus held that a city violated the equal-terms provision by allowing “[m]embership organizations (except religious organizations)” to locate within an “entertainment district” as of right, while requiring “similarly situated” religious membership organizations to obtain permits. *Id.* at 1166-67, 1175.

There is “little real contrast in basic approach or result” between looking to regulatory purpose versus looking to regulatory criteria. *River of Life*, 611 F.3d at 374 (Cudahy, J., concurring). All circuits that have considered what constitutes “a valid comparator under RLUIPA’s equal-terms provision” have “come to essentially the same result,” meaning a court “need not concern” itself with minor variations. *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 669-70 (2d Cir. 2010). Indeed, those variations often “make[] no practical difference.” *Centro Familiar*, 651 F.3d at 1173.

Other circuits don’t distinguish between regulatory purpose and criteria. The Fifth Circuit, for example, considers whether a religious assembly “is treated as well as every other nonreligious assembly ... that is ‘similarly situated’ with respect to the stated purpose or criterion” “behind the regulation at issue.” *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 292-93 (5th Cir. 2012) (emphasis added). The Fourth Circuit holds “that a comparator ... must be similarly situated *with regard to the regulation at issue.*” *Canaan Christian Church v. Montgomery County*, 29 F.4th 182, 196 (4th Cir. 2022). And the Tenth Circuit holds that an equal-terms claim

turns on whether the government treats a religious assembly “less favorably” than “a similarly situated nonreligious assembly.” *Rocky Mountain Christian Church v. Board of County Commissioners*, 613 F.3d 1229, 1236 (10th Cir. 2010).

**b.** The Fifth and Ninth Circuits, while applying the same substantive equal-terms standard as all circuits except the Eleventh, take a slightly different approach to RLUIPA’s burden shifting. As noted (at 6), RLUIPA requires a claimant to “produce[] prima facie evidence to support” any claim, before the “burden of persuasion” shifts to its opponent (except on the substantial-burden inquiry). 42 U.S.C. § 2000cc-2(b). The Ninth and Fifth Circuits hold that, “in a facial challenge,” a claimant meets its prima facie burden by “put[ting] forward sufficient evidence that the regulation makes an express distinction between religious and nonreligious assemblies.” *New Harvest*, 29 F.4th at 606. The burden then shifts to the other party to “show that any nonreligious assembly” treated more favorably “is not similarly situated to a religious assembly.” *Id.*; see *Opulent Life Church*, 697 F.3d at 291. Other courts hold that an equal-terms claimant must identify a similarly situated nonreligious comparator treated more favorably as part of its prima facie burden. *E.g.*, *Tree of Life*, 905 F.3d at 370.

**c.** The Kentucky Supreme Court’s decision aligns with the equal-terms precedents from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits. The court rejected Petitioner’s argument that Park Hills’ ordinance “put churches” “on less than equal terms with” nonreligious institutions by requiring churches to be “on an arterial street” to qualify for conditional-use permits in residential zones. App. 29a. That’s because the ordinance

requires buildings similarly situated to churches, including “[i]nstitutions for higher education, hospitals, sanitariums, convalescent homes, nursing homes, police stations, and fire stations,” to “also be on an arterial street.” *Id.*

Nor does the Kentucky Supreme Court’s decision implicate any question about who bears the burden. The court didn’t address who bore the burden and concluded that Petitioner’s claim failed no matter who bore it. Nor did the court address whether the similarly-situated-comparator analysis should look to the regulation’s “purpose” or “criteria.” Again, Petitioner created no record by raising the claim late and, in any event, neither question makes any difference. The ordinance’s purpose is the same as the relevant textual criterion: facilitating “movements of traffic within and through” a residential community, App. 5a n.5 (defining “arterial street”), and the court concluded that Petitioner was treated no worse than entities similarly situated as to traffic.

2. The Eleventh Circuit alone purports to apply strict scrutiny to regulations treating religious and nonreligious assemblies differently. *See Midrash*, 366 F.3d at 1231-32. But that outlier position—which Petitioner concedes “defies the plain language of the statute,” Pet. 35—doesn’t make this case certworthy. The parties agree that the Eleventh Circuit’s test is wrong, and there’s no point granting review when Petitioner’s case wouldn’t come out differently anywhere else. *Supra* pp. 29-33. And the Court could review a future Eleventh Circuit case if that court doesn’t align itself with the circuit consensus.

**B. The Kentucky Supreme Court’s decision is correct.**

The Kentucky Supreme Court correctly concluded that Park Hills’ zoning ordinance doesn’t violate RLUIPA’s equal-terms provision. As nine courts of appeals have held, an ordinance violates the equal-terms provision only if it “treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose,” *Lighthouse Institute*, 510 F.3d at 266 (emphasis omitted), or “criteria,” *River of Life*, 611 F.3d at 371. *Supra* pp. 30-32. Although Petitioner doesn’t explain what equal-terms test it thinks the Court should adopt—a vehicle concern—it apparently concedes (Pet. 30) that a similarly situated comparator is necessary.

The Park Hills ordinance is valid because its arterial-street requirement treats religious institutions equally with nonreligious institutions that are similarly situated with respect to residential-neighborhood traffic concerns. The arterial-street requirement, the Kentucky Supreme Court explained, provides for orderly “movements of traffic within” residential communities. App. 5a n.5. And “[t]he most common reason raised in opposition” to constructing the grotto “was that traffic and parking in the neighborhood, which were already a problem, would be exacerbated.” App. 8a. The court thus correctly concluded that churches are similarly situated to buildings like “[i]nstitutions for higher education,” “hospitals,” or “[p]olice and fire stations” with respect to traffic concerns. App. 28a-29a. All those institutions generate a high volume of overall traffic, concentrated traffic at certain times of the week, or traffic at late hours—impacts arterial streets accommodate. The court also

correctly concluded that churches are *not* similarly situated to the categories of building excluded from the arterial-street requirement, like “[n]ursery school[s],” “[c]emeteries,” or “playgrounds,” which generate minimal or intermittent traffic. *Id.* The decades-old ordinance thus draws a rational traffic-based line, which courts recognize is a legitimate zoning criterion. *See Centro Familiar*, 651 F.3d at 1172-73. Petitioner may disagree, but factbound disagreement doesn’t warrant second-guessing the Kentucky Supreme Court’s determinations about Park Hills’ traffic flow.

Petitioner complains that the Kentucky Supreme Court didn’t make express “finding[s]” on those points and didn’t issue a more detailed decision. Pet. 35. Petitioner invited that approach by failing to raise its equal-terms argument until it had secured Kentucky Supreme Court review on only the substantial-burden question—and thus failing to permit any fact development—and then making only a conclusory argument. *Supra* p. 9. There is no error in the court’s response.

### **C. This case is a poor vehicle.**

This case is also a bad vehicle. Petitioner claims “three levels of state courts” have addressed the equal-terms issue. Pet. 36. Not so. Petitioner raised an undeveloped equal-terms argument for the first time before the Kentucky Supreme Court. The Fredericks immediately objected, noting that, had petitioner raised it sooner, “the parties may have presented evidence ... so that [the Kentucky Supreme Court] has something to review.” Respondents’ Ky. S. Ct. Br. 30. That should have been fatal given that RLUIPA requires a claimant to make out a *prima facie* case, 42 U.S.C. § 2000cc-2(b). And the record didn’t get developed before the Kentucky Supreme Court either. A

case without a record doesn't give this Court an opportunity to provide meaningful guidance about a fact-oriented similarly-situated-comparator test.

### CONCLUSION

The Court should deny the petition. Neither question presented is certworthy. The Kentucky Supreme Court's decision is correct on both issues and aligns with the decisions of practically all other courts of appeals and state high courts. Indeed, Petitioner *asked* the Kentucky Supreme Court to adopt the substantial-burden framework that it applied below. And Petitioner raised an (undeveloped) equal-terms argument for the first time before the Kentucky Supreme Court. There is no reason to intervene.

Respectfully submitted.

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