No. 25-1131

IN THE

Supreme Court of the United States

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.,

Petitioner.

v.

JOEL FREDERIC AND ELIZABETH FREDERIC,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Kentucky Supreme Court held that prohibiting a group of Catholics from erecting a shrine to the Virgin Mary on their own land does not impose a substantial burden because they could build a smaller shrine elsewhere and because they were aware of the prohibitory ordinance before applying to the zoning board. It also held that an ordinance that facially favors country clubs and rec centers over houses of worship does not violate the Equal Terms Provision. Both holdings lie on the extreme end of longstanding fractures among lower courts over RLUIPA's land-use provisions.

Although respondents claim that petitioner would not prevail under any standard adopted by lower courts, they acknowledge that the Third Circuit recently issued an on-point decision adopting petitioner's arguments on the first question presented. *Anash v. Borough of Kingston*, 184 F.4th 214, 236-37 (2026). And respondents are forced to rewrite the decision below to justify it under existing standards—claiming, for example, that the Kentucky Supreme Court discerned a "traffic-based line" in the challenged ordinance when it said no such thing.

Finally, respondents' vehicle concerns are baseless. Their "adequate and independent state ground" is really an alternative *federal* ground for affirmance. And their invited-error objection confuses an argument made in the alternative with affirmative endorsement.

I. THE COURT SHOULD GRANT REVIEW ON THE SUBSTANTIAL-BURDEN QUESTION

A. Respondents offer no persuasive defense of the Kentucky Supreme Court's substantial-burden holding, which relied on the "alternative" of constructing a smaller grotto elsewhere and on petitioner's awareness of the prohibitory ordinance when it applied for a permit. Pet. App. 25a-27a.

With respect to the purported alternative, respondents say (BIO 25) that "whether the claimant could engage in the same exercise" without "running afoul of the regulation" is relevant to whether the regulation is a substantial burden (quotation omitted). But as petitioner explained, RLUIPA is property-specific: It defines the use of real property for religious purposes as itself a "religious exercise of the person or entity that uses or intends to use *the property* for that purpose." 42 U.S.C. § 2000cc-5(7)(B) (emphasis added). Completely prohibiting the use of property for a specific religious activity is a substantial burden on that statutorily defined religious exercise, even if the owner could acquire other land for that activity.

As the Third Circuit has explained, "through RLUIPA's land-use substantial burden provision, Congress codified a basic principle: except when the implementation of a land use regulation satisfies strict scrutiny, the choice of where the exercise of religion can take place should be left to persons with rights of access to and use of real property—not to zoning codes and landmarking laws promulgated by governments." *Anash*, 184 F.4th at 244. Respondents offer no answer to that point, which accords with the settled principle that "the exercise of [one's] liberty of expression" may not be "abridged on the plea that it

may be exercised in some other place," *Schneider v. State*, 308 U.S. 147, 163 (1939).

Even if alternative locations could sometimes dispel a substantial burden, that is clearly not true here. Petitioner believes, based on the circumstances of the Virgin's apparition at Lourdes, that "it is God's will to build this shrine * * * on its property next to Our Lady of Lourdes Church" and that it has "no feasible alternative location from which it can carry on this particular mission." Supp. App. 10a-11a. The Kentucky Supreme Court did not dispute those statements of religious faith, observing only that petitioner "has not asserted that it could not construct a smaller grotto or shrine on the property it already owned." Pet. App. 25a. But when it comes to religious structures, building a smaller version is simply not the same exercise of religion. A chapel is not the same thing as a cathedral. And this Court has long cautioned against permitting the government, or a reviewing court, to second-guess how a religious adherent defines his own religious exercise. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714-16 (1981).

Further, petitioner submitted unrebutted evidence that expanding within the existing plot would have required excavating the parking lot, and the ordinance's own setback requirements would confine any structure to the middle of that lot. Supp. App. 15a. Tearing up the church parking lot would obviously be a substantial burden under any standard.

As for the Kentucky Supreme Court's other rationale, respondents argue (BIO 23-24) that a restriction is not "impose[d]" by the "government" within the meaning of RLUIPA, 42 U.S.C. § 2000cc(a)(1), if the government enacted the

restriction before the RLUIPA claimant acquired the property. In no other legal context would that reasoning be accepted. A legal prohibition enacted by the government is "imposed" by the government even if a citizen is aware of it before acting.

At any rate, respondents agree (BIO 24) that it is irrelevant "whether the organization knew about a given regulation when it asked for a variance." Yet that is exactly what the Kentucky Supreme Court held. Pet. App. 27a. Respondents' claim (BIO 12) that the court relied on what petitioner knew when it "leased" the property is found nowhere in the opinion.

2. It is widely acknowledged that appellate courts have adopted inconsistent standards for a substantial burden. Pet. 18-27; *see also, e.g.*, *Anash*, 184 F.4th at 236 n.17. Respondents do not deny the longstanding conflict. Instead, they argue (BIO 11-23) that all courts give weight to the same two considerations as the decision below.

That is incorrect. Most clearly, the Third Circuit's recent precedential decision in *Anash*, *supra*, rejected both considerations. In an opinion written by Judge Phipps and joined by Judge Mascott, the court reversed the denial of a preliminary injunction against enforcement of a commercial-zoning ordinance to block the use of buildings for religious purposes. 184 F.4th at 224. The court held that RLUIPA "has no provisions for scrutinizing the actions or expectations of persons seeking to exercise religion," *id.* at 239 n.21, and that a plaintiff does "not need to disprove the feasibility of alternative locations" to show a substantial burden, *id.* at 245. In a holding directly on point, the Third Circuit concluded that "in all but the most dire circumstances, a land use regulation that prevents

access to or use of real property for religious exercise will contravene RLUIPA—regardless of the presence of feasible alternative locations for the religious exercise." *Id.* at 244. The court acknowledged the circuit conflict, *id.* at 244 n.31, and Judge Restrepo dissented on that basis, *id.* at 251-52.

Respondents claim (BIO 22-23) that the Third Circuit's statutory interpretation would not bind future panels given the preliminary-injunction posture, but their own authority indicates the opposite: "If the first panel does not stop at the question of likelihood of success and instead addresses the merits, the later panel . . . should regard itself as bound by the prior panel opinion." *Pitt News v. Pappert*, 379 F.3d 96, 105 (3d Cir. 2004) (Alito, J.); *cf. Nat'l Insts. of Health v. Am. Pub. Health Assn.*, 145 S. Ct. 2658, 2663 (2025) (Gorsuch, J., concurring in part and dissenting in part) ("[R]egardless of a decision's procedural posture, its reasoning—its *ratio decidendi*—carries precedential weight in future cases.") (quotation omitted). *Anash*'s statutory interpretation (as opposed to its application of that interpretation to the facts) was not limited to a "likelihood" standard. *See* 184 F.4th at 235-45.

Anash aside, both the Second and Ninth Circuits have rejected the proposition that the "alternative" of constructing a structure in a different area forecloses a substantial burden where size and practical constraints render the location material to the exercise of religion. *See* Pet. 26-27. Respondents cite (BIO 13-15) decisions from those circuits considering alternative locations. But in the one cited decision finding no substantial burden, the change in location was not material to the religious practice. *See New Harvest*

Christian Fellowship v. City of Salinas, 29 F.4th 596, 605 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 567 (2023). Respondents have identified no case involving a burden remotely similar to the burden here—forcing a religious community to build a smaller shrine in a different location. Moreover, the Second Circuit has explained a RLUIPA claimant need not negate every conceivable alternative, but only those "quick, reliable, and financially feasible alternatives" that "meet its religious needs." *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007). A smaller shrine in the church parking lot does not satisfy that standard.

With respect to the Kentucky Supreme Court's other justification, respondents cite no case endorsing the view that merely submitting a land-use application with foreknowledge of a prohibition makes the injury "self-imposed." And respondents do not contend that the Second and Ninth Circuits hold that foreknowledge of the ban before acquiring property would alone foreclose a substantial burden.

C. Respondents raise two purported vehicle problems on the first question presented, but they are both illusory.

1. Respondents claim (BIO 27) that petitioner invited the error by arguing in favor of the Sixth Circuit's *Livingston* standard below. That is mistaken.

In its Kentucky Supreme Court merits brief, petitioner argued *in the alternative* that it could satisfy the tests adopted by every circuit, including the Sixth Circuit. Supp. App. 1a-4a. But its primary argument was the same argument it raises here: "Denial of [Petitioner's] permit would have acted as a complete

prohibition of its religious exercise." Supp. App. 4a (capitalization altered). And after a comprehensive textual analysis, Supp. App. 4a-5a, petitioner cited the same Second Circuit decision that it cites here as supplying a favorable standard, Supp. App. 5a-6a (citing *Westchester Day Sch.*, 504 F.3d at 349), as well as a Third Circuit decision explaining that "[t]here can hardly be a more substantial burden on a religious practice or exercise than its outright prohibition," *Davis v. Wigen*, 82 F.4th 204, 212 (3d Cir. 2023) (cited Supp. App. 5a); *see also* Supp. App. 6a-9a (citing Sixth and Ninth Circuit decisions in the RLUIPA prisoner context).

Only in its tertiary argument did petitioner state that it could also prevail under the *Livingston* factors, without claiming that *Livingston* articulates the proper standard. Supp. App. 9a-10a. While respondents quote (BIO 8) the word "agree[d]" in the opinion below in a manner that suggests that the Kentucky Supreme Court was agreeing with petitioner about the *Livingston* standard, the court actually stated that it "agreed *with the Frederics'* assertion that the * * * *Livingston* [standard] * * * should be our polestar," Pet. App. 22a (emphasis added).

Respondents also point (BIO 27) to a statement from petitioner's motion for discretionary review below (equivalent to a certiorari petition) that *Livingston* was a "more appropriate" standard than the standard applied by the court of appeals. But the Kentucky Supreme Court did not deem that statement to have forfeited petitioner's merits arguments—and respondents did not so argue below. That forfeited state-law procedural objection has no bearing on this Court's review.

2. Respondents claim (BIO 27-28) that the decision below is supported by an "adequate and independent state ground." That is not correct.

An adequate and independent state ground must "independently and adequately support[] the judgment." *Michigan v. Long*, 463 U.S. 1032, 1038 (1983) (quotation omitted). Respondents point (BIO 27) to the court of appeals' holding that the Board lacked statutory authority to grant the conditional-use permit. The Kentucky Supreme Court declined to uphold the lower court's decision on that basis, and with good reason: If RLUIPA prohibits denial of the permit, that overrides state law and entitles petitioner to judgment.

Respondents, however, claim that the state-law holding necessarily means that the Substantial Burden Provision does not apply here. Section 2000cc(a)(2) limits that provision to burdens that affect interstate commerce, relate to a federally funded program, or are "imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." According to respondents, because the Board lacked discretion to grant the permit under state law, the "individualized assessments" requirement is not met.

Even if valid, that argument would not supply an adequate and independent state ground for the judgment. Rather, it would be an alternative *federal* ground to affirm the judgment, albeit predicated on a state-law holding. That poses no barrier to this Court's review. The Kentucky Supreme Court did not

address the argument below, perhaps because respondents made the argument only cursorily in their merits brief. Supp. App. 13a. Were this Court to reverse solely on the substantial-burden question, the Kentucky Supreme Court could decide on remand whether to reach that alternative argument.

Regardless, the argument is meritless. The conditional-use permit scheme applied here requires individualized assessments; such an assessment was performed when petitioner was initially awarded the permit. Pet. App. 9a. Although the court of appeals construed Section 10.4 of the ordinance to deny the board discretion to grant a permit for religious structures next to non-arterial streets, Section 2000cc(a)(2)(C) is satisfied by the "implementation" of *either* "a land use regulation *or system of land use regulations*" that entails individual assessments (emphasis added). The "system of land use regulations" at issue here involves individualized assessments. As the Second Circuit has explained, "[b]ecause almost all land use regimes implicate such individualized review, almost all 'impos[itions]' or 'implementation[s]' of land use regimes, 42 U.S.C. § 2000cc(a)(2)(C), will satisfy this predicate." *Chabad Lubavitch of Litchfield Cnty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 193 (2d Cir. 2014) (internal citation and quotation marks omitted), *cert. denied*, 574 U.S. 963 (2015). Moreover, Section 10.4 itself requires individualized assessments of what qualifies as "buildings for the purpose of religious worship" and "arterial streets," the latter of which was disputed here, Pet. App. 74a.

Independently, the building of the grotto—a significant construction project—with the assistance of an

Ohio designer, *see* App. 62a, affects interstate commerce, making the "individualized assessments" provision unnecessary. 42 U.S.C. § 2000cc(a)(2)(B).

In short, the meaning of the Substantial Burden Provision was squarely decided below in a way that deepens a longstanding conflict—now joined by the Third Circuit. The Court should grant review to resolve it.

II. THE COURT SHOULD GRANT REVIEW ON THE EQUAL-TERMS QUESTION

A. The Equal Terms Provision states that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). That means what it says. Unlike the Substantial Burden Provision, the Equal Terms Provision does not let the government justify differential treatment even under strict scrutiny. Although respondents complain that petitioner has not articulated a standard (BIO 34), the standard is clear in the statutory text: Religious institutions can be subject to neutral criteria but cannot be singled out because of their religious character. The ordinance here violates that prohibition on its face.

Even under the prevailing lower-court view that the provision is violated only if a "similarly situated" nonreligious entity is treated more favorably, *see* Pet. 32, the decision below is indefensible. The Kentucky Supreme Court offered no explanation for why the many secular entities that the ordinance exempts from the arterial-street requirement are differently situated from houses of worship. Although respondents string together various snippets from the opinion

below to suggest that the Kentucky Supreme Court concluded that the ordinance draws a "traffic-based line" (BIO 34-35), the opinion says nothing of the sort. It defies common sense to think that churches, synagogues, and shrines pose more traffic problems than public schools, golf courses, rec centers, libraries, and country clubs.

In reality, the Kentucky Supreme Court held that RLUIPA permits the ordinance merely because some nonreligious uses are also subject to the arterial-street requirement and because some religious uses (parochial schools) are not. That approach has no mooring in the statutory text and is less protective than every other appellate court's approach to the question.

B. Respondents assert (BIO 29) that "[n]ine of the ten circuits" to address the Equal Terms Provision agree on a non-religious comparator approach, but concede (BIO 30) wide variation in what that standard means, including on questions as fundamental as which party bears the burden. Although respondents cite jurists who see these divisions as insignificant, Judges Sykes, Jordan, and Thapar have flagged their importance.

C. No vehicle problem disfavors review of the second question presented. Respondents argue (BIO 35) that petitioner first fully raised the argument in the Kentucky Supreme Court. But that court resolved it on the merits. Pet. App. 17a-19a, 27a-29a. There are no facts to develop because the unequal treatment is clear on the face of the ordinance, and the meaning of the ordinance was addressed by three levels of Kentucky courts (as the petition correctly states, Pet. 36). *See* Pet. App. 28a-29a, 45a-46a, 59a. If the Court concludes any state-law questions are relevant under the

standard it adopts, it could remand on those questions.

At minimum, if the Court concludes that additional analysis from the Kentucky Supreme Court is necessary, it should grant, vacate, and remand for further consideration. The Court should not let stand a decision that on its face misapplies the Equal Terms Provision in a manner that no other court has endorsed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

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APPENDIX A

COMMONWEALTH OF KENTUCKY
SUPREME COURT

CASE NO.: 2024-SC-0006

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.

Appellant

v.

JOEL FREDERIC AND ELIZABETH FREDERIC

Appellees

Appeal from Kenton Circuit Court
Honorable Patricia M. Summe, Chief Circuit Judge
Case No. 21-CI-00766
Court of Appeals Case No. 2022-CA-0867

OPENING BRIEF OF APPELLANT MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.

* * *

b. The Board's Denial of Saint John's Permit to Construct a Shrine Would Have Constituted a Substantial Burden

The religious exercise in this case is constructing a shrine (in the form of a grotto) in accordance with the church's namesake—Our Lady of Lourdes on church property. Denying Saint John's ability to construct its shrine, as Appellees suggest, would act as a complete prohibition of Saint John's religious exercise under

RLUIPA. Because it would "effectively bar" Saint John's religious exercise, it necessarily constitutes a "substantial burden." *See Haight*, 763 F.3d at 559 ("The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice).").[5]

It is, therefore, "strange" to think about whether the Board's denial would merely "burden[], substantially or otherwise, this aspect of [Saint John's] requests" because it would "effectively bar" Saint John's exercise. *Id.* at 564-65. Nonetheless, the Board's denial of Saint John's Permit would also satisfy the "lesser restriction" of a substantial burden, contrary to the findings of the Court of Appeals in this case.

Other than finding that a complete bar of a religious exercise is sufficient (but not necessary) to constitute a substantial burden, courts have used various tests to determine whether state or local action constitutes a substantial burden on religious exercise. Because "RLUIPA does not define 'substantial burden,' and the term has not been delineated by the Supreme Court of the United States[,] . . . what constitutes a 'substantial burden' on religious exercise under RLUIPA has confounded federal courts[.]" *New Life Evangelistic Center. v. City of St. Louis*, 564 S.W.3d 665, 683 (Mo. Ct. App. 2018) (citing *Roman Catholic Bishop v. City of Springfield*, 724 F.3d 78, 94-95 (1st Cir. 2013)).

Federal courts focus on the facts of each particular religious adherent to evaluate substantial burdens on religious exercise. In general, courts have found a substantial burden if state or local action either (1)

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[5] To clarify, a "complete bar" is sufficient but not necessary to constitute a substantial burden, and Saint John does not contend otherwise.

directly coerces or puts substantial pressure on the religious institution to change its behavior; or (2) causes substantial delay, uncertainty, and expense.[6] Saint John satisfies the substantial burden standard regardless of which test this Court applies.[7]

As detailed below, the Board's denial of Saint John's Permit would completely bar Saint John's religious exercise. In the alternative, denial of Saint John's Permit would (1) directly coerce or put substantial pressure on Saint John to change its behavior; and (2) cause substantial delay, uncertainty, and expense.

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[6] Courts that have mentioned the coercion or substantial pressure tests include the Second, Third, Fourth, Fifth, Sixth, Eleventh, and D.C. Circuits. *See, e.g.*, *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007); *Davis v. Wigen*, 82 F.4th 204, 211-12 (3d Cir. 2023); *Pendleton v. Jividen*, 96 F.4th 652, 656 (4th Cir. 2024); *Lozano v. Collier*, 98 F.4th 614, 621 (5th Cir. 2024); *Mustin v. Wainwright*, No. 23-3671, 2024 U.S. App. LEXIS 21896, at *10 (6th Cir. Aug. 27, 2024); *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 830-31 (11th Cir. 2020); *Priests for Life v. United States Dep't of Health and Hum. Servs.*, 808 F.3d 1, 6 (D.C. Cir. 2015). The Second and Sixth Circuits have mentioned some form of the "substantial delay, uncertainty, and expense" test. *See, e.g.*, *Westchester Day School*, 504 F.3d at 349; *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1004 (6th Cir. 2017).

[7] The Seventh Circuit also created the "effectively impracticable" test, but abandoned this test after the Supreme Court of the United States issued its opinions in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) and *Holt v. Hobbs*, 574 U.S. 352 (2015). *See Jones v. Carter*, 915 F.3d 1147, 1149 (7th Cir. 2019) ("We recognized . . . that *Holt* and *Hobby Lobby* 'articulate[d] a standard much easier to satisfy' than our former search for something rendering the religious exercise 'effectively impracticable.'"). Nonetheless, Saint John satisfies this test because the Board's Permit denial would have constituted a complete prohibition of religious exercise as articulated below.

i. Denial of Saint John's Permit Would Have Acted as a Complete Prohibition of its Religious Exercise, Constituting a Substantial Burden

A complete prohibition of Saint John's shrine would be the ultimate substantial burden on religious exercise. RLUIPA does not define the term "substantial burden." *See* 42 U.S.C. § 2000cc-5. When a provision lacks a definition, courts generally employ tools of "[s]tatutory construction [which] 'begins with the language of the statute.'" *Leming v. Secretary of Health and Hum. Servs.*, 98 F.4th 1107, 1111 (Fed. Cir. 2024) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). "In matters of statutory construction[,] the duty of [a court] is to give effect to the intent of Congress, and in doing so [a court's] first reference is of course to the literal meaning of words employed." *Flora v. United States*, 357 U.S. 63, 65 (1958). "In interpreting RLUIPA, [courts] must construe its text 'in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'" *Johnson v. Baker*, 23 F.4th 1209, 1214 (9th Cir. 2022) (quoting 42 U.S.C. § 2000cc-3(g)).

The term "burden" is generally defined as (1) "[a] duty or responsibility"; (2) "[s]omething that is oppressive"; or (3) "[a] restriction on the use or value of land." *Burden*, BLACK'S LAW DICTIONARY 190 (7th ed. 1999). "'Substantial,' in turn, is defined as 'considerable in quantity' or 'significantly great.'" *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (quoting *Substantial*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1170 (10th ed. 2002)). Therefore, the plain, unambiguous meaning of the text shows that a substantial burden is a "significantly great restriction" on an institution's religious exercise

"whether or not compelled by, or central to, a system of religious belief." *See* 42 U.S.C. § 2000cc-5(7)(A).

Here, Saint John's religious exercise is constructing its shrine—the "Our Lady of Lourdes" grotto—on its property next to Our Lady of Lourdes Church. The Board's denial of the Permit would have resulted in Saint John's inability to build its shrine, as conceded by the Frederics and as determined by the Kentucky Court of Appeals. *See Frederic v. City of Park Hills Bd. of Adjustment*, No. 2022-CA-0867, 2023 Ky. App. LEXIS 100, at *10 (Ky. App. Dec. 1, 2023) (stating that the church is "prohibited" under the zoning ordinance from "[c]onstruction of a grotto — large or small — in the rear of the church property" then (incorrectly) determining that RLUIPA does not "prohibit[] the Board from *preventing the construction of the grotto*" (emphasis added)). Applying the literal meaning of RLUIPA's plain text, a complete prohibition of religious exercise is necessarily a "significantly great" burden on that exercise.

Case law supports a finding that a complete prohibition is a substantial burden. The United States Court of Appeals for the Third Circuit recently stated that "[t]here can hardly be a more substantial burden on a religious practice or exercise than its outright prohibition." *Davis v. Wigen*, 82 F.4th 204, 212 (3d Cir. 2023); *see also Meyer v. Teslik*, 411 F. Supp. 2d 983, 989 (W.D. Wis. 2006) ("It is difficult to imagine a burden more substantial than banning an individual from engaging in a specific religious practice"). *Cf. Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) ("When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light

of the denial the renovation *simply cannot proceed*." (emphasis added)).

The court in *Johnson v. Baker* illustrates how a near-total ban constitutes a substantial burden on religious exercise. 23 F.4th 1209 (9th Cir. 2022). In *Johnson*, the religious person was a prisoner within the Nevada Department of Corrections. 23 F.4th at 1212.[8] The prisoner contended that his religious exercise was the use of *scented* oil during daily prayers. *Id.* at 1213. The state prevented the prisoner from using scented oil daily because the oil was only available in the prison chapel, and the prison did not allow scented oil in individual cells. *Id.* The state insisted its regulation was valid because the prisoner could use scented oil once a week and use unscented baby oil during the rest of his prayers. *Id.* at 1212-13. Unpersuaded, the district court found that the state's prohibition acted as an "outright ban" on the prisoner's religious exercise. *Id.* at 1213. The state appealed. *Id.* at 1214.

The Ninth Circuit explained that "RLUIPA guarantees an 'expansive protection for religious liberty.'" *Id.* at 1214 (quoting *Holt*, 574 U.S. at 358). And the state "grossly missed the mark" by contending "that the use of scented oil for [the prisoner's] prayers [was] not *really that important to his worship practice*—[and] just a mere preference." *Id.* at 1215. The court then correctly found that "[o]f course, when a regulation 'outright bans' religious exercise, it amounts to a substantial burden." *Id.* at 1215 (quoting *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008)).

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[8] RLUIPA protects against substantial burdens on religious exercise regarding prisoner inmates as well as land-use matters. *See* 42 U.S.C. §§ 2000cc to 2000cc-5.

The Ninth Circuit stated that "importantly, the 'availability of alternative means of practicing religion' has no bearing on the 'substantial burden' inquiry." *Id.* at 1216 (quoting *Holt*, 574 U.S. at 361). It was irrelevant that the state allowed the prisoner to use *unscented* prayer oil for all of his prayers. *Id.* The state "regulation constitute[d] a 'substantial burden' on [the prisoner's] *particular religious exercise*," because the state action "limit[ed] his use of *scented* oil . . . to a paltry one out of 35 prayers per week." *Id.* (emphasis added).

Similarly, in *Haight v. Thompson*, the United States Court of Appeals for the Sixth Circuit found that barring access to a religious exercise intrinsically constituted a substantial burden under RLUIPA. 763 F.3d 554, 565 (6th Cir. 2014). In *Haight*, five death-row inmates filed suit under RLUIPA for a variety of religious-based reasons. 763 F.3d at 558. The relevant issue on appeal was whether RLUIPA gives inmates "a right to buffalo meat and other traditional foods for a faith-based once-a-year powwow." *Id.* at 558-59.

Importantly, the court stated that under the circumstances of that case "it [was] strange to think . . . in terms of the prison burdening, substantially or otherwise, this aspect of the inmates' ceremonial requests. For the prison *barred access to the foods altogether*." *Id.* at 565 (emphasis added). "The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Id.* It was irrelevant that the state allowed prisoners "to have some traditional foods . . . but not others[.]" *Id.* "When prison officials 'place[] substantial pressure on an adherent to modify his behavior and to violate his beliefs,' or 'effectively bar' his sincere faith-based conduct, they necessarily place a substantial

burden on it." *Id.* (citations omitted). The prison's denial of the inmates' specific food request effectively barred their religious exercise and required them to "'modify [their] behavior' by performing less-than-complete powwows with less-than-complete meals." *Id.*

Here, like *Haight*, it is "strange" to think about this "burdening, substantially or otherwise, this aspect of [Saint John's] requests" because the Board's denial of the Permit would "effectively bar" Saint John's religious exercise. 763 F.3d at 565. Yet, it is undisputed that it is Saint John's sincere faith-based conduct to construct the "Our Lady of Lourdes" shrine next to Our Lady of Lourdes Church, and denial of the Permit would "effectively bar" this exercise.[9]

Further, the proposed local action in this case is even more onerous than *Johnson v. Baker*, 23 F.4th 1209 (9th Cir. 2022). Unlike the prisoner's ability in *Johnson* to use scented oil a "paltry" one time per week, the Board's denial of Saint John's land use Permit in this case would have constituted a complete prohibition. It is the equivalent of prohibiting altogether the prisoner's use of scented oil in *Johnson*, not just restricting the prisoner's use to one time per week. And "[o]f course," state action that "'outright bans' religious exercise, . . . amounts to a substantial burden." *Johnson*, 23 F.4th at 1215.

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[9] *See also In re Young*, 82 F.3d 1407 (8th Cir. 1996) (finding a substantial burden under RFRA when a trustee of a bankrupt church attempted to recover donations because it would "effectively prevent the debtors from tithing" for that year even though in that case "tithing [was a] religiously motivated, but not religiously compelled, practice"), *reinstated by* 141 F.3d 854 (8th Cir. 1998).

Because denial of the Permit would constitute a complete prohibition of Saint John's religious exercise, this Court should find that it necessarily constitutes a "substantial" burden, which would have required the Board to satisfy strict scrutiny for a denial of the Permit. The ability or inability to engage in other forms of religious exercise does not change this analysis. The plain text of RLUIPA and various court opinions support this conclusion. Alternatively, the Board's denial of Saint John's Permit would also constitute a substantial burden according to standards employed by various federal courts. Specifically, the Board's denial of Saint John's Permit would (1) coerce and put substantial pressure on Saint John to change its behavior; and (2) cause substantial delay, uncertainty, and expense, as demonstrated below.

ii. Denial of Saint John's Permit Would Have Amounted to Coercion and Inflicted Substantial Pressure on Saint John

The Board's denial of Saint John's Permit would amount to coercion and substantial pressure on Saint John to modify its behavior. Then-Judge Gorsuch of the United States Court of Appeals for the Tenth Circuit illustrated something akin to coercion and substantial pressure in *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014).

* * *

iii. Denial of Saint John's Permit Would Have Caused Substantial Delay, Uncertainty, and Expense

Another test that some courts employ is the "substantial delay, uncertainty, and expense" test. Perhaps most relevant in this case is the United States Court of Appeals for the Sixth Circuit's variation. Relevant factors include (1) "whether the religious

institution has a feasible alternative location from which it can carry on its mission"; (2) "whether the religious institution will suffer 'substantial delay, uncertainty, and expense' due to the imposition of the regulation"; and (3) whether the institution "has imposed a burden upon itself." *Livingston Christian Schs. v. Genoa Charter Township*, 858 F.3d 996, 1004 (6th Cir. 2017).

An opinion published in 2023 illustrates the Sixth Circuit's interpretation of its own test. In *Catholic Healthcare International, Inc. v. Genoa Charter Township*, the religious organization's "mission [was] to further the work of Saint Padre Pio—the patron saint of healing." 82 F.4th 442, 445 (6th Cir. 2023). Catholic Healthcare International, Inc. (the "Church") informed the Genoa Charter Township (the "Township") via email that it planned to create an outdoor prayer trail on the Church's own property. *Id.* at 444-45. The Township responded by stating that it would treat the Church's request as the construction of a building, requiring a permit application and approval. *Id.* at 445. The Church asked the Township to allow it to proceed without a permit, but the Township refused. *Id.*

* * *

During the apparition, the Blessed Virgin Mary requested Saint Bernadette "to tell the priests to build a chapel" next to the grotto. CATHOLIC NEWS AGENCY, *supra* note 1. Likewise, the priests of Saint John believe it is God's will to build this shrine—a smaller replica of the French grotto—on its property next to Our Lady of Lourdes Church. *See* r. at 230.

All of the Sixth Circuit factors support a finding of a substantial burden in this case. Saint John has no

feasible alternative location from which it can carry on this particular mission, and neither party has stated otherwise. *Cf.* r. 223-26. Saint John's property is unique because it contains the church building next to the site of the proposed shrine. *See* Times of Celebrations, Lourdes Sanctuaire (2012), https://www.dom.edu/sites/default/files/pdfs/RCAS_Adm-Aid/StAbroad_Sanctuary_LadyLourdes_depliant_saison.pdf (showing the proximity of the grotto in Lourdes, France to the Basilica, which is a special type of church in Catholicism).

The Board's denial would have also caused Saint John to suffer substantial delay, uncertainty, and expense. The Board knew that Saint John originally planned to construct a larger grotto, and Saint John voluntarily submitted approval for a smaller version. Flash Drive, Ex. 6, at 01:32:25-01:32:45 (indicating that the board member was "relieved that it is a smaller version of what was first mentioned," and that the shrine "fits so well with the Community"); *see also id.* at 00:31:50-00:33:56 (discussing the reduction in size).

* * *

APPENDIX B

KENTUCKY SUPREME COURT

CASE NO. 2024-SC-0006
Electronically Filed

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.

Appellants

v.

JOEL AND ELIZABETH FREDERIC,

Appellees

CITY OF PARK HILLS BOARD OF ADJUSTMENT, CHARLES MEYERS, MARK KOENIG, ROBERT SWEET, CATHLEEN MATCHINGA, AND THOMAS MICHAEL In their official capacities as members of the City of Park Hills Board of Adjustment; AND JORDAN ODOR, SHEILA BURKE TRUST, SHEILA E. BURKE, in her capacity as Trustee

Appellees Below

On Appeal From The Kenton Circuit Court,
Case No. 21-CI-766
Court of Appeals Case 2022-CA-0867

APPELLEES BRIEF OF JOEL AND ELIZABETH FREDERIC

* * *

What evidence did Appellant adduce to meet their burden to demonstrate a "prima facie ... violation of section 2000cc of this title?" The answer was none –

and that was despite a full and fair opportunity to adduce such evidence, first in their application materials, then at the Board of Adjustments Hearing, and finally before the Circuit Court.

Instead, Appellant failed to present "prima facie evidence" that the requirements that trigger the substantial burden requirement was met. They presented no proof that any zoning activities of the City of Park Hills receives federal financial assistance. 42 U.S.C. § 2000cc(a)(2)(A) ("in a program or activity that receives Federal financial assistance").

They presented no evidence that zoning activities of the City of Park Hills would affect commerce. 42 U.S.C. § 2000cc(a)(2)(B) ("affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes").

And Appellant presented no evidence that there is in place individual assessments of the proposed uses for use variances for the property involved. 42 U.S.C. § 2000cc(a)(2)(C) ("system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved").

To the contrary, Kentucky law explicitly prohibits use variances for anyone – which was the entire basis of the Frederics' appeal. KRS 100.247; *Louisville & Jefferson County Planning Comm'n v. Schmidt*, 83 S.W.3d 449, 451 (Ky. 2001). In that sense, then, at least as a matter of record proof in this matter, it is clear that RLUIPA does not apply. That, of course, is fatal, at least as concerning this appeal.

* * *

APPENDIX C

COMMONWEALTH OF KENTUCKY
SUPREME COURT

CASE NO. 2024-SC-0006

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.

Appellant

v.

JOEL FREDERIC AND ELIZABETH FREDERIC

Appellees

APPEAL FROM THE COURT OF APPEALS
CASE NO. 2022-CA-0867

REPLY BRIEF OF APPELLANT MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.

* * *

According to the Court of Appeals, the church accessory cannot be built on Saint John's property because Amsterdam Road is not an arterial street.[3]

The Frederics ignore this holding, contending that Saint John can build its grotto "so long as it occurs within [its] existing legal nonconforming footprint." Appellees' Brief at 20. The Frederics say they have no desire to "restrict" Saint John from building within its "footprint," but that Saint John just cannot "increase

[3] This prohibition amounts to a substantial burden.

its footprint into neighboring residential property" because of "traffic." Appellees' Brief at 19. That makes no sense.

Assuming the Frederics are correct (despite the Court of Appeals' holding), they are asserting that Saint John can build its grotto in its parking lot—a few feet away from its current proposed location. *See* TR 137-40 (depicting Saint John's property covered with parking spaces and schematics for the grotto in relation to the property). Even if permitted, building the grotto in the parking lot would place the grotto even *closer* to the Frederics' home. And if, as the Frederics suggest, the Board required Saint John to dig up its parking lot or shrink its grotto for a *third* time when Saint John's current proposed construction site is an undeveloped hillside a *few feet* away, that would amount to a substantial burden. *See Westchester v. Mamaroneck*, 417 F. Supp. 2d 477, 548 (S.D.N.Y. 2006) (permit denial was substantial burden when adherent worked for about two years "to address the [board's] concerns" and had already offered to make changes to its project).

* * *