No. 25-1131

IN THE

Supreme Court of the United States

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.,
Petitioner,

v.

JOEL FREDERIC, ET UX.,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF OF *AMICUS CURIAE* NATIONAL RELIGIOUS BROADCASTERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

National Religious Broadcasters (NRB) is an international association of Christian communicators united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's 1,035 members reach a weekly audience of approximately 141 million American listeners, viewers, and readers through radio, television, the Internet, and other media.[1]

Since its founding in 1944, NRB has worked to protect, strengthen, and advance Christian communication so the Gospel of Jesus Christ is proclaimed unhindered, including defending its members' First Amendment rights to proclaim Biblical truth. NRB is troubled by rulings like the one below, which threaten religious organizations' ability to defend their religious liberty rights by downplaying or otherwise ignoring the very real burdens posed by government regulations on those rights.

SUMMARY OF ARGUMENT

This case presents the opportunity to clarify the meaning of the term "substantial burden" as set forth in the Religious Land Use and Incarcerated Persons Act (RLUIPA). 42 U.S.C. § 2000cc(a)(1). And there is some temptation to seek to fashion a comprehensive definition of this term that would be of extraordinary

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part. No person or entity other than NRB furnished any monetary contribution for the preparation of this brief.

usefulness to both the bench and the religious freedom bar. However, to correctly resolve the case at bar, there is a much easier option. This Court should hold, consistent with its past precedents, that whenever government "prohibits" religious claimants from taking action motivated by their faith, a substantial burden has been demonstrated.

The Kentucky Supreme Court followed a convoluted test invented by the Sixth Circuit to determine that a burden was not present in this case. The four-part test is riddled with errors, running afoul of multiple rules clearly established by this Court. However, what it leaves out is the most troubling. None of the four parts make it plain that an outright prohibition of the religious action is *always* a substantial burden. In fact, they invite the opposite conclusion.

Other circuits have developed their own varied versions of burden analysis. An overall clarification of the burden standard in free exercise cases is more than warranted. But the starting point of such a clarification should be this: a government prohibition of the religiously-motivated action is *always* a substantial burden.

ARGUMENT

I. INTRODUCTION

Whenever government "prohibits" a religiously-motivated action, this should always result in a finding that there has been a "substantial burden" on the exercise of religion. This outcome is suggested by the very wording of the Free Exercise Clause:

"Congress shall make no law . . . *prohibiting* the free exercise thereof." U.S. Const. amend. I (emphasis added).

This Court has often used the somewhat broader concept of "coercion" to define improper government limitations on free exercise. "Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963). The proposed prohibition rule is consistent with this legal tradition: any prohibition is a form of coercion. While this Court has held that many forms of government pressure on religious adherents constitute a "burden" within this Court's free exercise tests, there has never been a doubt that an outright government prohibition of religiously-motivated action satisfies this element of free exercise analysis.

Here, the Missionaries of Saint John the Baptist Church are motivated by their faith to build a grotto of a particular size in a particular location on donated property adjacent to its existing church. No one questions that this is religiously-motivated action. *See generally* Br.Opp. 1–5*; see also Missionaries of St. John the Baptist, Inc. v. Frederic*, 727 S.W.3d 400, 413 (Ky. 2025). The local zoning ordinance, as interpreted by the Kentucky Court of Appeals and affirmed by the Kentucky Supreme Court, prohibits the Church from building the grotto. That is enough. That's a substantial burden. A government act that merely makes the religious action more expensive or more difficult may require further inquiry, but when your faith says you should and the government says you can't, that is always a substantial burden.

To be sure, the burden analysis is far from the end of any RLUIPA case. The government's action may or may not be justified under the remaining elements of the test. But a flat prohibition on a religious action is always a substantial burden within the meaning of RLUIPA or the related Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, sufficient to shift the legal burden to the government.

II. THE HISTORY OF THE BURDEN STANDARD DEMONSTRATES THAT A GOVERNMENT PROHIBITION ALWAYS SUFFICES.

This Court's seminal case of *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940), appears to be the first to employ the term "burden" as a component of free exercise analysis, foreclosing religious second-guessing by courts.

> But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden *burden* upon the exercise of liberty protected by the Constitution.

Id. at 307 (emphasis added).

However, this Court's more extensive discussion of "burden" in *Braunfeld v. Brown*, 366 U.S. 599 (1961), serves as the likely headwaters of burden analysis in modern free exercise jurisprudence.

Braunfeld dealt with a challenge by Orthodox Jews to Philadelphia's Sunday closing law. Its outcome seems questionable today, but nonetheless its analysis of the required predicate showing for a free exercise challenge is of historical importance.

Orthodox Jewish merchants were not prohibited from closing their stores on Saturday; they did so in compliance with their religious faith. However, they contended that their inability to be open on Sunday instead placed an unconstitutional burden on the exercise of their religious faith.

This Court began its burden analysis saying: "Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation." *Id.* at 603. Chief Justice Warren, in his majority decision, noted that "the statute at bar does not make unlawful any religious practices of appellants." *Id.* at 605. He further explained that there is a difference between laws that "result in some financial sacrifice in order to observe their religious beliefs" and "legislation [that] attempts to make a religious practice itself unlawful." *Id.* at 606. A flat prohibition is a "restriction" or "burden" that must be justified by the government.

Justice Brennan (concurring in part, dissenting in part) similarly emphasized the idea that a complete prohibition obviously constituted an improper burden when distinguishing Sunday closing laws from other laws that had been held to violate the First Amendment. "Admittedly, these [Sunday closing] laws do not compel overt affirmation of a repugnant belief, as in Barnette, nor do they prohibit outright any of appellants' religious practices." *Id.* at 613.

The majority held that the Sunday closing law placed only an "indirect burden" on the Jewish merchants, *id.* at 606. But even this lesser showing did not end the analysis. Showing an "indirect" burden could suffice to trigger the further steps of free exercise analysis.

> Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Id. at 607.

Although the modern compelling interest test was not yet fully developed, *Braunfeld* shows that even the indirect burden demonstrated by the Orthodox Jewish merchants is enough to shift the burden to the government to justify its actions.

Braunfeld followed two important early religious freedom cases which involved direct government prohibitions of the religious activity in question:

Reynolds v. United States, 98 U.S. 145 (1878), and *Prince v. Massachusetts*, 321 U.S. 158 (1944). The *Braunfeld* Court explained that these decisions were justified because "the religious practices themselves conflicted with the public interest." *Braunfeld*, 366 U.S. at 605. This was akin to the modern compelling interest test. There was no suggestion that these criminal prohibitions were not "burdens" on free exercise.

Braunfeld makes it clear is that a law which prohibits a religious exercise is no mere "indirect" burden.

Prior to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), this Court upheld free exercise claims, which required finding a sufficient burden, in multiple cases involving some form of a governmental prohibition of religious activity. *Cantwell v. State of Connecticut*, 310 U.S. 296, 301–02 (1940) (ban on religious soliciting without a government license); *Murdock v. Com. of Pa.*, 319 U.S. 105, 106 (1943) (prohibiting religious canvassing and sales absent payment of a license tax); *Follett v. Town of McCormick, S.C.*, 321 U.S. 573, 575 (1944) (same); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952) ("New York's Article 5—C directly prohibits the free exercise of an ecclesiastical right, the Church's choice of its hierarchy."); *Fowler v. State of Rhode Island*, 345 U.S. 67, 67, 70 (1953) (discriminatory prohibition on speaking in public park).

In a post-*Smith* decision, this Court found that a ban on animal cruelty that was aimed at a religion

constituted a burden because it was a "prohibition." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545 (1993) (citation omitted).

In addition to cases where the religious activity was expressly prohibited, this Court has found an unconstitutional burden when government seeks to coerce actions that violate one's religious beliefs. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626–27 (1943) (requiring students, including Jehovah's Witnesses, to salute the American flag); *Wisconsin v. Yoder*, 406 U.S. 205, 207–09 (1972) (forcing Amish parents to enroll their children in public schools beyond the 8th grade); *Fulton v. City of Philadelphia, Pa.*, 593 U.S. 522, 529–31 (2021) (forcing Catholic adoption organization to violate its beliefs as a condition of mandatory licensing).

Denying unemployment compensation to those who were terminated for faithful adherence to their religious beliefs was repeatedly held to be a substantial burden—and ultimately unconstitutional—in a number of pre-*Smith* cases. *Sherbert v. Verner*, 374 U.S. 398, 400–04 (1963); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18, 720 (1981); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140–41, 146 (1987); *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 833–35 (1989).

Under both RFRA and RLUIPA, this Court has likewise found the burden test to be satisfied by a showing of a government prohibition of the religious action in question. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 426 (2006) (ban on hallucinogenic tea) (RFRA); *Holt v.*

Hobbs, 574 U.S. 352, 356 (2015) (ban on prisoner beards) (RLUIPA); *Ramirez v. Collier*, 595 U.S. 411, 426 (2022) (ban on minister praying aloud and laying hands on death row inmate) (RLUIPA).

This Court's leading RFRA decision also held that a substantial financial penalty for adhering to one's faith regarding furnishing insurance for abortion-related birth control products satisfied the substantial burden standard. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 (2014).

If, as these examples show, lesser or indirect forms of coercion may suffice to satisfy the standard, it is unquestionable that when the government prohibits the religious actions in question a substantial burden has been demonstrated.

III. THE SIXTH CIRCUIT'S BURDEN STANDARDS ARE INDEFENSIBLE.

The Kentucky Supreme Court based its decision in the case at bar on a four-factor test created by the Sixth Circuit for determining whether a "substantial burden" exists under RLUIPA. *Missionaries of St. John the Baptist*, 727 S.W.3d at 413 ("[W]e agree with the Frederics' assertion that the Sixth Circuit's jurisprudence as delineated in *Livingston Christian Schools v. Genoa Charter Twp.*, 858 F.3d 996 (6th Cir. 2017) should be our polestar."). Taking these four "*Livingston* factors" in turn, each proves inconsistent with this Court's precedents.

"The first factor is whether the religious institution has a feasible alternative location from which it can carry on its mission." *Missionaries of St. John the Baptist*, 727 S.W.3d at 414. This approach

has been expressly rejected by this Court. In *Holt*, 574 U.S. at 361–62, this Court held, "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a ½–inch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise."

The Sixth Circuit's approach is akin to the unsuccessful argument made by the State of Texas in *Ramirez*. Texas claimed that the prisoner had the duty to demonstrate there was no less restrictive alternative available. "That gets things backward. Once a plaintiff has made out his initial case under RLUIPA, it is the government that must show its policy 'is the least restrictive means of furthering [a] compelling governmental interest.'" *Ramirez*, 595 U.S. at 432; *see also Hobby Lobby*, 573 U.S. at 721 (rejecting an argument in the RFRA context that the employers could protect their religious beliefs in other ways and concluding, "Even if we were to reach this argument, we would find it unpersuasive"). And this Court explicitly rejected the idea that Montgomery County Schools did not burden parents' free exercise of religion because they could simply provide private schooling or homeschooling to their children. *Mahmoud v. Taylor*, 606 U.S. 522, 560–63 (2025) ("The parents in *Barnette* and *Yoder* were similarly capable of teaching their religious values 'at home,' but that made no difference to the First Amendment analysis in those cases."). So the first *Livingston* factor runs counter to this Court's First Amendment jurisprudence.

The second *Livingston* factor likewise falls short. It asks "[w]hether the religious institution will suffer

substantial delay, uncertainty, and expense due to the imposition of the regulation[.]" *Missionaries of St. John the Baptist,* 727 S.W.3d at 414. This inquiry may have relevance when a court is called upon to weigh financial or administrative burdens that *only* delay the implementation of what the religious institution wishes to accomplish. But this factor is woefully incomplete because it entirely omits the dispositive possibility that the zoning regulation flatly forbids the desired religious use. The delay in this case is more than "substantial"—it is permanent. It is an outright prohibition. And as set out in Section I, *supra*, a prohibition is a substantial burden under this Court's precedents. The analysis should stop there. But the Sixth Circuit's test erroneously omits a rule involving complete prohibitions.

The third *Livingston* factor is whether "a plaintiff has imposed a substantial burden upon itself ... [f]or example when an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes[.]" *Missionaries of St. John the Baptist*, 727 S.W.3d at 414. The Kentucky Court's explanation for this factor relies on one fact—the Church knew that the zoning ordinance did not permit the building as a matter of right. *Id.* at 415. But knowledge does not negate burden.

The parents in *Mahmoud* knew that the rules of the school board did not permit them to opt their children out of the LGBT books. The Amish in *Yoder* knew that Wisconsin law required them to send their children to public school after the eighth grade. The street evangelist in *Murdock* knew that he could not solicit without paying the license tax. Following the

reasoning of the Kentucky court, each of these religious claimants brought their troubles on their own heads because they acted knowing that their actions were illegal. Such prior knowledge is irrelevant to the burden analysis under this Court's precedents.

Here, the Church sought a zoning variance in good faith. It is true that by making this request, it tacitly acknowledged that it knew the ordinance as written did not give it the ability to build the grotto "by right." But this form of attempting to be a good citizen and work within the rules is nothing more than an attempt to exhaust its administrative remedies. The idea that a person forfeits their right to make a constitutional claim if they know that the law forbids their intended conduct turns the exhaustion rule into a bizarre form of a Catch-22.

Finally, the fourth *Livingston* factor, which the Kentucky Court did not attempt to apply, is "whether there is evidence that the municipality's decision-making process was arbitrary, capricious, or discriminatory." *Missionaries of St. John the Baptist*, 727 S.W.3d at 414 (cleaned up).

This factor likewise has nothing to do with assessing whether a burden exists in a RLUIPA case. Taking the Sixth Circuit's rule on its face, it would mean that if a litigant proved that the municipality acted arbitrarily, capriciously, or discriminatorily, then the religious claimant merely would have satisfied the burden element. Thereafter, the municipality would still have a second chance to defend its law as justified under the compelling-interest-via-the-least-restrictive-means standard.

This approach makes no sense. First, this Court has rejected attempts to use this standard as an independent factor in religious freedom analysis. In *Cantwell*, for instance, "[t]he State assert[ed] that if the licensing officer acts arbitrarily, capriciously, or corruptly, his action is subject to judicial correction." *Cantwell*, 310 U.S. at 305. The Court rejected this argument, giving "several sufficient answers." *Id.* at 306.

More fundamentally, if the municipality has acted in an arbitrary, capricious, or discriminatory manner this would constitute a *completed,* independent constitutional violation under either the Fourteenth Amendment's Due Process or Equal Protection Clauses. This Court has acknowledged that states have broad police power to enact local laws provided that they are "not arbitrary, capricious, or selected in bad faith." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 235–36, 241–43 (1984) (citation omitted). If a religious claimant can prove the presence of such factors, this is the end of the matter, not merely the satisfaction of a preliminary step in a RLUIPA case.

The Sixth Circuit's four-factor burden test, on which the Kentucky Supreme Court relied, should be rejected.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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