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 WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF *AMICI CURIAE* OF PROFESSOR DOUGLAS LAYCOCK AND THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI*[1]

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law Emeritus at the University of Virginia and the Alice McKean Young Regents Chair in Law Emeritus at the University of Texas at Austin. He is one of the nation's leading authorities on the law of religious liberty. Professor Laycock argued *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), helped lead the subsequent effort to enact RLUIPA, and argued *Holt* v. *Hobbs*, 574 U.S. 352 (2015), the Court's only decision interpreting "substantial burden" under RLUIPA.

The Becket Fund for Religious Liberty is a nonprofit law firm that protects the free expression of all religious faiths. Becket litigated the first land-use case under RLUIPA, *Haven Shores Community Church* v. *City of Grand Haven*, No. 1:00-cv-175 (W.D. Mich.) (consent decree signed Dec. 21, 2000), and since then has been involved in RLUIPA litigation on behalf of a wide variety of religious institutions and individuals, including as co-counsel with Professor Laycock in *Holt*.

Amici offer this brief, based on decades of practical experience litigating under RLUIPA, RFRA, and the Free Exercise Clause, to aid the Court in correctly interpreting "substantial burden" under RLUIPA.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief offers a few simple points to help the Court accurately interpret the phrase "substantial burden" under RLUIPA.

First, "substantial burden" is not a term of art; it should be given its ordinary meaning. Lower courts have frequently assumed that before RFRA's enactment, "numerous Supreme Court cases" used the phrase "substantial burden," giving it a specialized meaning narrower than the plain words would suggest.

But those courts are wrong. Before *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court used the phrase "substantial burden" only twice—in *Hernandez* v. *Commissioner of Internal Revenue*, 490 U.S. 680 (1989), and *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378 (1990)—both times in dicta without defining it. More often, the Court used a variety of words and phrases to describe the trigger for strict scrutiny: substantial infringement, indirect burden, forbidden burden, impingement, inhibition, deterrent, pressure, and so forth. This varying terminology resists characterization as a term of art and instead points to a common-sense concept that carries an ordinary meaning.

Second, the ordinary meaning of "substantial burden" is something that makes religious exercise significantly more costly or difficult. This is consistent with how the Court employed the phrase (and its variants) before *Smith*. And it works particularly well in the two contexts RLUIPA addresses: land use and prisons.

Third, RLUIPA's structure further informs the meaning of "substantial burden." RLUIPA provides five independent protections for religious land use. It protects not only against (1) substantial burdens, but also against (2) treatment on less than equal terms, (3) discrimination, (4) total exclusion, and (5) unreasonable limits. Each of these provisions helps tell courts what is and isn't relevant to the substantial-burden analysis.

Fourth, the availability of "feasible alternatives" may in some narrow circumstances be relevant to the substantial-burden analysis. But the analysis of alternatives must be sensitive to the realities of the land-use context, properly allocate the burden of proof, and provide appropriate deference to a religious institution's understanding of its religious needs. The Kentucky Supreme Court's analysis failed on all three counts.

Finally, a religious institution's "reasonable expectations" about zoning restrictions are largely irrelevant. RLUIPA allows churches to challenge burdensome land-use restrictions whether those restrictions are anticipated or not.[2]

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[2] We use "church" generically to refer to synagogues, mosques, temples, and other religious institutions.

ARGUMENT

I. "Substantial burden" is not a term of art; it should be given its ordinary, plain-English meaning.

RLUIPA provides for strict scrutiny when the government implements a land-use regulation in a manner that imposes a "substantial burden" on religious exercise. 42 U.S.C. 2000cc(a)(1). Neither RLUIPA nor its sister statute RFRA defines the term "substantial burden." See 42 U.S.C. 2000bb-2, 2000cc-5. So, to interpret it, this Court would normally "turn to the phrase's plain meaning at the time of enactment." *Tanzin* v. *Tanvir*, 592 U.S. 43, 48 (2020) (interpreting RFRA's "appropriate relief" provision).

Lower courts, however, have done something quite different. They have construed "substantial burden" as a "term of art" supposedly imported into RFRA and (later) RLUIPA from this Court's pre-*Smith* free exercise precedents. *Westchester Day Sch.* v. *Village of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007); see also, *e.g.*, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *City of W. Linn*, 111 P.3d 1123, 1128-1129 (Or. 2005) ("substantial burden" is a "term[] of art that the Court previously has interpreted"); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004) (examining "[t]he Supreme Court's definition of 'substantial burden' within its free exercise cases"); *Trinity Assembly of God* v. *People's Couns. for Balt. Cnty.*, 962 A.2d 404, 427 (Md. 2008) ("presum[ing] that Congress intended for the term to" bear its "well-established meaning" from "pre-*Smith* Free Exercise jurisprudence").

The Ninth Circuit, for example, has criticized the effort to interpret "substantial burden" by reference to its "ordinary meaning"; doing so would, in its view, "ignore[]" the "numerous Supreme Court cases * * * applying the Free Exercise Clause" that have "used" this "term of art." *Navajo Nation* v. *United States Forest Serv.*, 535 F.3d 1058, 1074-1075 (9th Cir. 2008), overruled in part by *Apache Stronghold* v. *United States*, 101 F.4th 1036 (9th Cir. 2024) (en banc); see also *Apache Stronghold*, 101 F.4th at 1059-1060 (Congress "adopt[ed]" in RFRA the "meaning" *Smith* gave to "substantially burden").

Courts adopting this term-of-art approach have tended to read this Court's pre-*Smith* precedents narrowly, limiting "substantial burden" to those situations, for example, "where there is governmental action that coerces one into acting contrary to one's religious beliefs." *Greater Bible Way Temple of Jackson* v. *City of Jackson*, 733 N.W.2d 734, 754 (Mich. 2007); see also, *e.g.*, *Midrash Sephardi*, 366 F.3d at 1227 ("pressure that tends to force adherents to forego [sic] religious precepts or * * * that mandates religious conduct"); cf. *Apache Stronghold*, 101 F.4th at 1044 (construing "substantial burden" in RFRA narrowly when the government "dispos[es]" of "real property"); but see *Apache Stronghold* v. *United States*, 145 S. Ct. 1480, 1486 (2025) (Gorsuch, J., dissenting from denial of cert.) ("[T]he Ninth Circuit's interpretation of the phrase 'substantial burden' is difficult to reconcile with" the phrase's "ordinary meaning.").

These courts are proceeding from a faulty premise. Prior to *Smith*, none of this Court's landmark free exercise cases used the term "substantial burden." It does not appear in *Reynolds* v. *United States*, 98 U.S.

145 (1878), *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), *Sherbert* v. *Verner*, 374 U.S. 398 (1963), *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), or *Thomas* v. *Review Board*, 450 U.S. 707 (1981). In fact, the Court's pre-*Smith* precedents used the phrase "substantial burden" only twice—and then only in passing without defining or applying the term.

The first case used the term in dicta. See *Hernandez*, 490 U.S. at 699-700 (declining to decide whether disallowing a tax exemption was a "substantial burden"). The second case quoted *Hernandez*'s dicta, but then ignored that framing and instead asked whether the "burden" of a "generally applicable tax" was "constitutionally significant." *Jimmy Swaggart Ministries*, 493 U.S. at 384, 391-392. Even *Smith* itself didn't elaborate on the phrase, simply stating that the "*Sherbert* test" focuses on whether the government's actions "substantially burden a religious practice"—before declining to apply *Sherbert* to a blanket criminal prohibition. 494 U.S. at 883. And of course, none of these cases involved a land-use regulation.

The bulk of this Court's pre-*Smith* corpus describes the strict-scrutiny trigger with an array of different terms. They include "forbidden burden," *Cantwell*, 310 U.S. at 307, "substantial infringement," "indirect * * * burden," or something that "inhibit[s] or deter[s]," *Sherbert*, 374 U.S. at 403-406, "impinge[ment]," "impact[]," "substantial[] interfer[ence]," or "grave interference," *Yoder*, 406 U.S. at 214, 218, "substantial pressure," *Thomas*, 450 U.S. at 718, "burden," *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983), "governmental burden," *Bowen* v. *Roy*, 476 U.S. 693, 706 (1986), or "pressure," *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 141

(1987). The variety of words and phrases used to describe the same idea does not suggest a term of art; it rather suggests that all these words and phrases were being used in their ordinary plain-English sense. And the ordinary sense is that when the government takes action that makes religious exercise more costly or difficult, that is a burden.

This doesn't mean that the trigger for strict scrutiny in this Court's pre-*Smith* cases was unclear. It simply means the phrase "substantial burden" is a poor candidate for treatment as a "term of art" with an "established" and specialized meaning. *Navajo Nation*, 535 F.3d at 1074; see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322-326 (2012) (describing the "prior-construction canon").

And indeed, Congress already made clear in RLUIPA's sister statute what it sought to import from this Court's jurisprudence. RFRA provides that its "purposes" include "to restore *the compelling interest test* as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b) (emphasis added). "When Congress wants to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 714 (2014). And it did so here—by expressly referencing "the compelling interest test" from prior cases, 42 U.S.C. 2000bb(b)(1), but nothing about "substantial burden" from prior cases.

None of this renders this Court's pre-*Smith* precedents irrelevant in construing "substantial burden"

under RLUIPA. Indeed, RLUIPA's legislative history, to the extent such history is probative, says "substantial burden" "should be interpreted by reference to Supreme Court jurisprudence." 146 Cong. Rec. 16698, 16700 (2000). But that simply means that when this Court uses "substantial burden" and various similar phrases according to their ordinary meaning, courts should do the same with "substantial burden" in RLUIPA. Cf. *Tanzin*, 592 U.S. at 48 (considering "plain meaning" of "appropriate relief" in RFRA).

II. The ordinary meaning of "substantial burden" is something that makes religious exercise significantly more costly or difficult.

When RFRA was enacted, a "burden" was defined as "[t]hat which is borne" or "[a] load," including "[a]n obligatory expense" or that which "restrain[s] freedom of action." *Burden*, 2 Oxford English Dictionary 664 (2d ed. 1989); *Burden*, Random House Webster's Unabridged Dictionary 278 (1997) ("that which is carried; load" or "that which is borne with difficulty"). And "substantial" means "[o]f ample or considerable amount, quantity, or dimensions." *Substantial*, 2 Oxford English Dictionary 66-67 (2d ed. 1989); see also *Substantial*, The American Heritage Dictionary of the English Language 7121 (3d ed. 1992) ("Considerable in importance, value, degree, amount, or extent."). So the government imposes a "substantial burden" on religious exercise when it imposes a "load" or an "obligatory expense," or when it "restrains freedom of action" by a "considerable amount." This common-sense standard captures a wide variety of situations in which the government makes religious exercise significantly more costly or difficult.

That interpretation is consistent with this Court's case law. For example, in *Sherbert*, this Court recognized that being "disqualifi[ed] for benefits" based on religious exercise "clear[ly]" places a "burden"—it "impede[s]" religious exercise, "inhibit[s] or deter[s]" it, and "pressure[s]" the adherent "to forego" it. 374 U.S. at 403-405. Similarly, in *Hobby Lobby*, this Court recognized that the government substantially burdens religious exercise by imposing financial penalties for engaging in it, thereby making it more costly. 573 U.S. at 720. Both decisions, which involved facially neutral rules that interfered with religious exercise, reflect the idea that accommodation regimes (such as RFRA and RLUIPA) do more than just protect against religious discrimination or unequal treatment. They instead treat religious exercise as a liberty interest that the government is ordinarily forbidden to hinder or interfere with. See, *e.g.*, *Yoder*, 406 U.S. at 220; *Sherbert*, 374 U.S. at 404-405.

This Court's application of the substantial-burden standard should also keep in mind the specific prison and land-use contexts that RLUIPA was written to address. Both contexts feature a general baseline of governmental control—over what inmates can do, or over how land may be used—which is what makes religious accommodation so essential. Indeed, the government "control[s] the minute details of most inmates' lives," so without accommodations, there would be many "spiritual practices * * * rendered impossible" in prison. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1333-1334 (2021). So too for land use, "the government * * * occupies the field" in de-

termining how land may be used, and so the "government's unwillingness to affirmatively accommodate religious groups * * * will often be the decisive factor in the ability of groups to have a place of worship consistent with theological requirements." *Id.* at 1338-1339.

Both contexts also make it "easy" for government officials "to mask" hostility toward religion. Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021, 1029 (2012). Prison officials who want to suppress religious practices can hide their hostility behind generalized concerns over inmate safety, order, or administrative feasibility. See, *e.g.*, *Holt*, 574 U.S. at 362-367. And zoning authorities "can reject churches based on unsubstantiated concerns about traffic, parking, noise, or property values" or "vague concerns about the 'character of the neighborhood,' or 'general welfare.'" Laycock & Goodrich, 39 Fordham Urb. L.J. at 1030.

In these contexts, it is often a straightforward matter to demonstrate a substantial burden. When a prison denies permission for a prisoner to grow a beard required by the prisoner's faith, it imposes a substantial burden. *Holt*, 574 U.S. at 361-362. Likewise, when the government denies permission for a church to use or build on its property for a religious purpose, it ordinarily imposes a substantial burden. Pet.Br.21-26. Such a denial makes it significantly more difficult to engage in religious exercise on the church's property. So too, when the government makes it unduly costly or time-consuming to apply for and receive a variance, it imposes a significant cost on religious exercise—and therefore a substantial burden.

Some courts have applied a much narrower understanding of "substantial burden," requiring the religious group to show that the land-use decision "coerces [it] into acting contrary to [its] religious beliefs." *Greater Bible Way*, 733 N.W.2d at 750. While such coercion is sufficient to show a substantial burden, it cannot be deemed necessary in every case. Cf. *Thomas*, 450 U.S. at 717 (whether law "*compel*[*led*] a violation of conscience" was "only the beginning, not the end, of [the] inquiry"). Most land-use decisions do not coerce religious groups into violating their faith; instead, they make religious uses (and thus religious exercise) more costly or difficult—or even impossible. The test the Court employs should reflect these realities.

III. RLUIPA's structure further informs the meaning of "substantial burden."

RLUIPA's broader structure is also important. RLUIPA provides five separate protections for religious land use; the substantial-burden provision is just one of them. The other four provide that the government cannot impose a land-use regulation that: (1) treats a religious assembly "on less than equal terms" with a nonreligious assembly; (2) "discriminates against any assembly or institution on the basis of religion"; (3) "totally excludes religious assemblies from a jurisdiction"; or (4) "unreasonably limits religious assemblies" within a jurisdiction. 42 U.S.C. 2000cc(b).

While some of these provisions may occasionally overlap, they are independent protections that must be given independent meaning. Thus, the meaning of "substantial burden" cannot depend on whether a land-use regulation treats religious assemblies worse

than secular assemblies, discriminates against them, totally excludes them, or unreasonably limits them.

The existence of the "equal terms" provision, for example, means that a substantial burden on religious exercise must be "something different from 'greater burden than imposed on secular institutions.'" *Sts. Constantine & Helen Greek Orthodox Church* v. *City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (Posner, J.). Likewise, the existence of the "discrimination" provision means a substantial burden doesn't require a showing of discrimination. But see Pet.App.25a (considering whether government's "process was * * * discriminatory"). Instead, the substantial-burden provision provides a "backstop" against "subtle forms of discrimination" that may be difficult to prove. *Sts. Constantine*, 396 F.3d at 900. And RLUIPA's prohibition on total exclusion and unreasonable limits of religious uses in a jurisdiction means it makes no sense to say that a substantial burden must make religious exercise "effectively impracticable" within the jurisdiction. *Midrash Sephardi*, 366 F.3d at 1227 (quoting *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003)).

The inclusion of a strict-scrutiny affirmative defense, 42 U.S.C. 2000cc(a)(1), also informs the meaning of "substantial burden." Some courts, when assessing a burden, ask whether the government's action was "arbitrary" or "capricious," Pet.App.24a-25a (quoting *Livingston Christian Schs.* v. *Genoa Charter Twp.*, 858 F.3d 996, 1004 (6th Cir. 2017)). But the rationale for the government's action goes to strict scrutiny—whether the regulation "is in furtherance of a compelling governmental interest" and "is the least restric-

tive means of furthering that compelling governmental interest." 42 U.S.C. 2000cc(a)(1). The government's rationale does not inform whether the burden is substantial.

IV. "Feasible alternatives" may be relevant in narrow circumstances not present here.

Under RLUIPA's ordinary meaning, the availability of "a feasible alternative" may sometimes be relevant to the substantial-burden analysis. Pet.App.22a-25a. But lower courts often misapply the alternatives analysis (as the Kentucky Supreme Court did here) in ways that ignore the realities of the land-use context, misallocate the burden of proof, and impermissibly second-guess a religious organization's own understanding of its religious exercise.

1. If a church has "quick, reliable, and financially feasible alternatives" that meet its religious needs, and if it can meet those needs without significant "delay, uncertainty, and expense," *Westchester Day Sch.*, 504 F.3d at 349, 352, then the imposition of a land-use regulation generally doesn't make the church's religious exercise significantly more costly or difficult.

Consider a hypothetical in which alternatives might be dispositive. Suppose a new church wants to lease a small office building where it can meet for Sunday worship. Cf. *Andon, LLC* v. *City of Newport News*, 813 F.3d 510, 512 (4th Cir. 2016). It identifies three properties that would suit its needs and budget, and it enters a lease for the first property contingent on obtaining a variance. The city denies the variance, but notes that churches are permitted as of right without a variance at the other two properties, which are avail-

able for lease at the same price. Unless some additional fact changes the analysis, denial of the variance does not impose a substantial burden.

2. But real-world facts are rarely so neat. In practice, the analysis of alternatives presents several difficult problems.

The first is the complexity and uncertainty of the zoning context. What lower courts and local governments call "feasible alternatives" are often just possibilities—to buy other properties that may be unavailable or unaffordable, to apply for conditional use permits or zoning variances that may be denied, or to propose new development plans that may generate new opposition from new neighbors. Cities can always defend their actions by "pointing to Eldorado—someplace else, perhaps real and identified, but more likely vague and theoretical, where the church might someday, somehow, be allowed to locate." Laycock & Goodrich, 39 Fordham Urb. L.J. at 1056. But if Eldorado existed, and churches knew how to find it, they would gladly locate there rather than endure years of costly and uncertain RLUIPA litigation.

A second complication is the burden of proof. RLUIPA provides that "the plaintiff shall bear the burden of persuasion" on whether a law "substantially burdens the plaintiff's exercise of religion." 42 U.S.C. 2000cc-2(b). In the typical case, the church discharges this burden by showing that the government has applied a land-use regulation in a way that significantly inhibits the church's use of a specific property for religious exercise. Pet.Br.26-27.

But if the potential existence of an alternative defeats a substantial-burden claim, then courts can force

the church to prove a negative: no suitable alternative exists.

In *International Church of Foursquare Gospel* v. *City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011), for example, the church's realtor "examined each of the 196 parcels" in the city that were rezoned for assembly use, explaining why they were "unsuitable for the needs of a large religious congregation." He also specifically addressed the "several properties suggested by the City," noting that only one (a lumber yard) "was even listed for sale and it was under contract," while the others—"a Kraft factory, a shopping center, and a mobile home park"—were unsuitable due to their "size, configuration, safety issues, and current uses." *Ibid.* Yet the district court still held that this evidence failed to prove "that there were no other sites that were objectively reasonable alternatives for the Church in the City." *Id.* at 1067-1068.

International Church involved a sophisticated and well-resourced church with a well-litigated claim. But most churches don't have the means to analyze hundreds of potential properties and prove their inadequacy. Nor should they be expected to do so. It should be enough to carry the initial burden of persuasion to show that the government is hindering their religious use of a specific property. *Sts. Constantine*, 396 F.3d at 899 (church need not "show that there was no other parcel of land on which it could build its church"). If the government wants to undercut that showing by pointing to alternative locations it thinks would meet the church's needs, it can offer that evidence. But it must do so early enough in the zoning process or the

litigation that the church has an opportunity to explore that alternative and, if necessary, offer evidence in rebuttal.

A third complication is the church's own understanding of its religious exercise. This complication manifests in various ways. Some churches reject alternative locations because they have a religious attachment to a particular location—such as a church that wants to be located downtown so it can minister to the homeless, cf. *Harbor Missionary Church Corp.* v. *City of San Buenaventura*, 642 F. App'x 726, 729 (9th Cir. 2016), or a mosque that needs a "central location" so its members can pray together "five times a day," *United States* v. *City of Troy*, 592 F. Supp. 3d 591, 609 (E.D. Mich. 2022). Other churches reject alternatives because they wouldn't meet physical needs—for example, enabling the entire congregation to gather at once, rather than splitting across multiple services.

This Court has long held that "it is not within the judicial function" to question whether a religious adherent "correctly perceived the commands" of his religious faith. *Thomas*, 450 U.S. at 716. In the land-use context, this means that courts should respect "an honest conviction" about a church's locational needs. *Hobby Lobby*, 573 U.S. at 725.

But when assessing alternatives under RLUIPA, lower courts often do the opposite—second-guessing a church's determination of what location or facility is needed to carry out its religious exercise. Cf. *Midrash Sephardi*, 366 F.3d at 1227 (finding it a mere "inconvenience" that relocating an Orthodox synagogue would require congregants to "walk farther," causing "congregants who are ill, young or very old * * * to stop attending services altogether").

3. Here, the Kentucky Supreme Court held that denying Petitioner's request to build the grotto was a "mere inconvenience," because Petitioner "has not asserted that it could not construct a smaller grotto or shrine on the property it already owned." Pet.App.25a. This analysis runs into all three problems described above.

First, it second-guesses the nature of Petitioner's religious exercise. Petitioner seeks to build the grotto "as a place of quiet, repose, and reflection" where parishioners can pray before and after Mass. Pet.Br.38 (quoting J.A.17 at 30:15). It is designed as "a sacred, elaborate garden" built into the wooded hillside behind the church—modeled after the Marian grotto built into a mountainside cave in Lourdes, France. J.A.8. The size, layout, design, and location are all intended to facilitate quiet reflection and prayer—a point Respondents never disputed.

Nevertheless, the Kentucky Supreme Court held that "a smaller grotto or shrine," squeezed between the outside brick wall of the church, the parking lot, and Amsterdam Road, with its sidewalk, utility poles, and fire hydrant, would serve the same religious function. Pet.App.25a; see also Pet.Br.37 (photos). No testimony or evidence supports this conclusion; it is pure speculation. It is also belied by the fact that Petitioner acquired the hillside property specifically to host the grotto and spent years developing its design and seeking regulatory approval. Pet.Br.39. Absent evidence of insincerity, a church's assertions about the physical space needed for its religious exercise are entitled to reasonable deference. The Kentucky Supreme Court in this case gave no deference whatsoever.

Second, the Kentucky Supreme Court's ruling creates an unreasonable burden of proof. Petitioner carried its burden by showing that the denial of permission to build the grotto prevented it from using its property for religious exercise. Pet.Br.27. If Respondents wanted to undercut that showing by identifying ready alternatives, they could have attempted to do so at the Board hearing or in the Circuit Court. But they didn't.

Instead, the first time they suggested building a smaller grotto elsewhere was in their bottom-side brief in the Kentucky Supreme Court. Pet.Br.34-35. This means "petitioner never had occasion to address the purported feasibility of a significantly smaller 'alternative' directly through testimony." Pet.Br.34. Nor did it have any reason to anticipate and rebut alternatives it never contemplated. RLUIPA doesn't require churches to predict every possible way their opponents might try to second-guess their religious needs.

Third, the Kentucky Supreme Court's ruling ignores the uncertainties of the land-use context. For the first time in the Kentucky Supreme Court, Respondents speculated that "there are *likely* ways to reconfigure the project so as to keep the construction within the existing footprint of the use, and to make the scope of the project smaller, in a manner that does not run afoul of Kentucky law prohibiting the expansion of a non-conforming use." J.A.118 (emphasis added). That stops short of conceding that a smaller grotto near the road is legally permissible. Likewise, Respondents say that Petitioner "*failed to show* that it *couldn't* build a grotto on its current lot"—stopping short of conceding that Petitioner could. BIO.28 (emphasis added). In

other words, even if a small roadside grotto were religiously adequate, there is no guarantee the city would allow it, neighbors wouldn't sue over it, or Kentucky courts wouldn't find another ground on which to prohibit it. Cf. Laycock & Goodrich, 39 Fordham Urb. L.J. at 1067-1071 (describing the fifteen-year legal odyssey of *Congregation Etz Chaim* v. *City of Los Angeles*).

V. "Reasonable expectations" have no independent relevance.

The Kentucky Supreme Court was also wrong to find no substantial burden on the ground that Petitioner "had every reason to know" the grotto would be prohibited. Pet.App.27a.

1. What a church knows about the zoning restrictions may have some limited (or at least theoretical) relevance in a carefully conducted analysis of alternative sites. For example, if a church is choosing among three equally suitable office spaces, as in the hypothetical above (at p.13-14), it may be relevant that the church knows that one property requires a variance while the others don't. However, even in this hypothetical, what does most of the work is the existence of ready alternatives, not the church's knowledge about the variance requirement.

In most cases, the church's expectations about zoning restrictions are irrelevant. RLUIPA asks a simple question: did the government "impose or implement a land use regulation in a manner that imposes a substantial burden" on religious exercise? 42 U.S.C. 2000cc(a)(1). Whether or not a church knows that a land-use regulation already prohibits its intended use, the issue is whether that regulation imposes a substantial burden. It is still the government that imposes

or implements the regulation. Likewise, the fact that a prisoner already knows the prison forbids beards doesn't mean he imposed the burden on himself. *Holt*, 574 U.S. at 359. RLUIPA allows churches (and prisoners) to challenge burdensome regulations even when it is already clear their religious exercise is prohibited.

2. The Kentucky Supreme Court's analysis of expectations is particularly strange in this case. The court said Petitioner "had every reason to know * * * that building the grotto was not permitted by the ordinance." Pet.App.27a. But the grotto *was* permitted—first by the Board, which approved the application, and then by the Circuit Court, which affirmed. Pet.Br.44-45. It was only on appeal, after neighbors brought a lawsuit, that the Kentucky courts interpreted the ordinance differently. The best understanding of RLUIPA is that a church's expectations about zoning restrictions have no independent relevance. But surely RLUIPA doesn't require churches to foresee that neighbors will sue over a use the government permits and eventually convince the state supreme court to adopt the wrong side of a circuit split.

CONCLUSION

The Court should make clear that "substantial burden" in RLUIPA must be given its ordinary meaning; that the ordinary meaning is government action that makes religious exercise significantly more costly or difficult; and that the denial of permission to build Petitioner's grotto was a substantial burden here.

Respectfully submitted.

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NOVEMBER 2026