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 COMMONWEALTH OF KENTUCKY
 KENTUCKY SUPREME COURT
 CASE NO. 2023-SC-0235

BILL DUNN, McCracken County
 Property Valuation Administrator

APPELLANT

V.

THE SOLOMON FOUNDATION, INC.

APPELLEE

**REPLY BRIEF FOR APPELLANT BILL DUNN, McCracken County
 Property Valuation Administrator**

Appeal from Kentucky Court of Appeals 2022-CA-0399 and
 McCracken Circuit Court Civil Action No. 21-CI-00191

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2024, this Reply Brief for Appellant was electronically filed with the Clerk of the Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Ave., Frankfort, KY 40601. True and correct copies have been served by U.S. mail and/or electronically on the following parties: Katie Bing, Clerk, KY Supreme Court, State Capitol Room 235, 750 Capital Ave., Frankfort, KY 40601-3415; Kate Morgan, Clerk, KY Court of Appeals, 669 Chamberlin Ave., Ste. B, Frankfort, KY 40601; Hon. Joseph Roark, Judge, McCracken Circuit Court, 300 Clarence Gaines St., Paducah, KY 42003; KY Board of Tax Appeals, c/o Chair Frederick Higdon, 500 Mero St., Frankfort, KY 40601; Hon. Mark A. Loyd, Hon. Rose Bailey, and Hon. Marie Stephanie Bruns, 101 South Fifth St., Ste. 3500, Louisville, KY 40202; Hon. Bethany Atkins Rice, Hon. Douglas M. Dowell, Hon. Richard Bertelson III, Office of Legal Services for Revenue, P.O. Box 423, Frankfort, KY 40602-0423; Hon. Cade Foster, McCracken County Attorney, 300 Clarence Gaines St., Paducah, KY 42003; and counsel for amicus curiae, R. Kent Westberry, Bridget M. Bush, Landrum & Shouse, LLP, 220 West Main St., Ste. 1900, Louisville, KY 40202-1395; Robert B. Craig, Jeremy Hayden, Taft Stettinius & Hollister, LLP, 50 East RiverCenter Blvd., Ste. 850, Covington, KY 41011-1682; Matthew F. Kuhn, Sarah N. Christensen, Jenna M. Lorence, Office of the Attorney General, 700 Capital Ave., Ste. 118, Frankfort, KY 40601.

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CERTIFICATE OF WORD COUNT

This document complies with the word limit of RAP 31(G)(3), because excluding the parts of the document exempted by RAP 15(D) and RAP 31(G)(5), this document contains 1,886 words.

/s/ Glenn D. Denton

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INTRODUCTION

Appellee, The Solomon Foundation, Inc. (hereinafter “TSF”), is a non-profit, financial corporation. First, as TSF asked it to do, (App. Op. at 9), the Kentucky Court of Appeals ruled that TSF is not an institution of purely public charity. (App. Op. at 9). This first issue has not been preserved, appealed, or argued further herein by TSF. Thus, it is admitted and need not be addressed.

Second, while TSF may be a proponent of religion, it is not an institution of religion, contrary to the finding of the Kentucky Court of Appeals. (App. Op. at 11). This tax case causes this Court to consider whether it wishes to interpret Section 170 of the Kentucky Constitution more expansively as advocated by TSF, or more restrictively as advocated by Appellant, McCracken County PVA (hereinafter “McCracken County PVA”). The Court is thus placed in a similarly decisive and analytical position to where it was in *Mordecai F. Ham Evangelistic Ass’n vs. Matthews*, 189 S.W.2d 524 (Ky. 1945). The Court is poised, as it was in *Mordecai*, to complete the statement: “in reality the corporation is [_____]” *Id.* at 527.

Third, while it is undisputed that TSF owns the land, it is also undisputed that TSF does not occupy the land. Others do. Accordingly, this places the Court back into the 2009 analytical position commenced in *Freeman v. St. Andrew Orthodox Church, Inc.*, 294 S.W.3d 425 (Ky. 2009), in interpreting the “owned and occupied” language found in Section 170. (App. Op. at 18.)

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes that oral arguments would be helpful.

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I. STATEMENT OF THE CASE

McCracken County PVA and TSF have amply provided the facts and procedural history relevant herein for this tax appeal denying TSF an exemption from its 2019 *ad valorem* property tax bill for 1200 Jefferson Street, Paducah, McCracken County, Kentucky.

II. STANDARD OF REVIEW

McCracken County PVA adopts and incorporates herein its position on the standard of review as contained in its Brief of Appellant.

III. ARGUMENT

A. TSF’s own brief provides all the persuasion, indicia, and facts needed for the Court to be persuaded that although TSF may be religious, it is not an institution of religion.

On November 5, 2018, TSF submitted an application for exemption from its 2019 *ad valorem* property tax bill as both a religious organization and as an institution of purely public charity, thus, causing McCracken County PVA Bill Dunn to make a determination as to what TSF actually is.¹

Type of Exemption (check)	<input type="checkbox"/> Public Property	<input type="checkbox"/> Institution of Education	<input checked="" type="checkbox"/> Religious
	<input type="checkbox"/> Place of Burial	<input checked="" type="checkbox"/> Institution of Purely Public Charity	

McCracken County PVA denied the application for exemption and this litigation ensued. Ever since, the McCracken County Board of Assessment Appeals, Kentucky Board of Tax

¹ Correspondence from Bill Dunn to TSF counsel, dated December 18, 2018, and attached hereto as Appendix A.

² Application for Exemption from Property Taxation, dated October 30, 2018, signed by Sarah Roberts, Senior Vice President of Operations, and attached hereto as Appendix B.

Appeals, McCracken Circuit Court and Kentucky Court of Appeals have wrestled with TSF's application.

The "institution of religion" issue has been placed before the Court under many different labels. Here is a non-exhaustive list of how TSF describes itself:

- "Church extension fund" Appellee Br.³ at 2.
- "Classified by the I.R.S. as a public charity" Appellee Br. at 3.
- "Integrated auxiliary of a church" Appellee Br. at 3.
- "lessor, entered into a triple-net-lease⁴ ..." Appellee Br. at 4.
- "proponent of religion" Appellee Br. at 8, citing App. Op. at 17-18.
- "religious" Appellee Br. at 8, citing App. Op. at 17-18.

McCracken County PVA acknowledges that there may be other labels that TSF has applied to itself. However, McCracken County PVA draws the Court's attention to TSF's omitted label. TSF never describes itself as a church. TSF begins descriptions of itself as a Colorado nonprofit corporation⁵, then quickly de-emphasizes its business lines and just as quickly emphasizes its religious characteristics. Here is an example from TSF's brief:

"Whether Solomon's religious activities incidentally provide "returns" to so-called "investors"⁶ (presumably paying interest on loans) has no

³ "Appellee Br. at (#)" refers to Brief of Appellee, The Solomon Foundation, filed on February 13, 2024.

⁴ "Solomon, as lessor, 'entered a triple-net-lease for [Church Property] with The Crossing [which is a church] as lessee.'" Appellee Br. at 4-5. The actual Lease made Tenant responsible for the payment of real estate taxes in numbered paragraph 8 of the Lease. A fact confirmed by the KBTA in its Final Order in the Findings of Fact in its eighth bullet point, which is attached hereto as Appendix C.

⁵ Application for Exemption from Property Taxation, dated October 30, 2018, signed by Sarah Roberts, Senior Vice President of Operations, and attached hereto as Appendix B.

⁶ Appellant has reviewed Appellee's website, which it listed in its initial application for tax exemption. Appellant is unfamiliar with the terminology used herein: "incidentally provide returns" and "so-called investors."

bearing on whether Solomon is religious.” Appellee Br. at 18 (emphasis added).

Assuming arguendo that it may have no bearing on whether TSF is religious, it has extreme relevance to whether TSF is an institution of religion. As TSF so well describes on pages 16 and 17 of its own brief, it is an organization that issues securities, funds loans, conducts gift-leaseback transactions, pays off loans, and funds operations. Is this with the meaning intended by the Framers in Section 170 of the Kentucky Constitution? Distinctions may be drawn by this Court, and there is precedent for drawing a distinction. *Mordecai F. Ham Evangelistic Ass’n vs. Matthews*, supra.⁷

TSF correctly points out that prior to the 1990 amendment, Section 170 restricted the exemption to “places actually used for religious worship” and “parsonages or residences owned by a religious society, and occupied as a home, or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion,” with additional size limitation for the exempt property. Ky. Const. section 170; 1980; ch. 113 section 1, approved November, 1981. However, McCracken County PVA disagrees with TSF that the intention of the amendment was to “obviously expand the scope of the exemption.” Appellee Br. at 22. McCracken County PVA further disagrees that the “modern text of Section 170” (Appellee Br. at 22) was intended to make the exemption available to non-profit financial organizations, ... no matter how religious they may be.

TSF’s dislike of *Ark Encounter, LLC vs. Parkinson*, 152 F.Supp.3d 880 (E.D. Ky. 2016) is understandable.⁸ The language used in Section 5 of the Kentucky Constitution

⁷ Attached hereto as Appendix D.

⁸ Attached hereto as Appendix E.

(“place of worship”) is not preferable to its position. Further, Judge Van Tatenhove’s opinion outlines an analytical path of considering other constitutional sections. “[T]here are other contexts in which the phrase ‘a place of worship’ appears that can provide some guidance as well, such as that of entities receiving tax exemptions under section 170 of Kentucky’s constitution.” *Id.* at 923. TSF does not want this Court to consider Section 170 in conjunction with other constitutional sections, nor any prior constitutional choice of language or legislative history. However, TSF and its *Amici Curiae* cannot pick and choose when context is important and when to apply the ordinary, plain meaning.

Furthermore, the *amicus curiae* brief provided by the Kentucky Attorney General’s office asks this Court to adopt an even broader interpretation of “institutions of religion” by referencing an interpretation of “religious entity” which includes “any entity whose mission is marked by clear or obvious religious characteristics”. Br. for the Commonwealth of Kentucky, as *Amicus Curiae* Supporting Appellee at 11 (citing *St. Joseph Catholic Orphan Soc’y v. Edwards*, 449 S.W.3d 727, 740 (Ky. 2014)). Similarly, the Kentucky Council of Churches’ *amicus curiae* brief wishes to expand the definition of religious institutions to include agencies providing “spiritual nourishment.” Br. of Kentucky Council of Churches, as *Amicus Curiae* Supporting Appellee at 13. Presumably, such an interpretation could incorporate entities that have a tie to religion or spirituality and open the door for commercial entities that provide “spiritual nourishment” to avoid *ad valorem* taxation. Chick-fil-A, Hobby Lobby, spa facilities, yoga studios, gyms, shops, restaurants, and other businesses are arguably places that exhibit religious characteristics and could be considered “institutions of religion” under this analysis.⁹

⁹ By making this comparison, McCracken County PVA is not alleging that any of these entities have attempted to avoid *ad valorem* taxation as institutions of religion. The

Simply, from the perspective of the McCracken County PVA with the Application for Tax Exemption from Property Taxation sitting on his desk, TSF should be denied its request for tax exemption. As McCracken County PVA wrote on December 18, 2018, “This is especially clear when one of the stated core values of The Solomon Foundation is to ... help our investors get a great return on their investments.”¹⁰

B. The language “owned and occupied” must be clarified.

This Court must return to *Freeman vs. St. Andrew Orthodox Church, Inc.* 294 S.W.3d 425 (Ky. 2009), and then may wish to consider the unpublished (and not binding authority) Kentucky Court of Appeals’ opinion in *Grand Lodge of Kentucky Free & Accepted Masons v. City of Taylor Mill*, No. 2015-CA-001617-R, 2017 WL 541077 (Ky. App. Feb. 10, 2017). McCracken County PVA disagrees with the Court of Appeals that “*Freeman* does not provide much guidance on the precise question here, which involves two institutions of religion. We cannot just assume that because *Freeman* involved a single religious institution as an owner and occupier that such must always be the case.” App. Op. at 19. The beginning point has to be the admitted fact that TSF does not occupy. Others occupy the property.

TSF cites to the plural noun “institutions” to imply that the same institution need not both own and occupy the property to be exempt. However, the plurality of “institutions” can more likely be inferred to describe the expansion of the types of entities that qualify for the exemption rather than the number of entities. The 1990 amendment removed the language referring to “places actually used for worship” and parsonages.

statement merely illustrates that too broad of an interpretation of “institutions of religion” could provide a flood of tax exemption opportunities in the future.

¹⁰ Correspondence from Bill Dunn to TSF counsel, dated December 18, 2018, and attached hereto as Appendix A.

However, the 1990 language still contains limits. To qualify for a property tax exemption, it must be “owned and occupied.” Again, TSF does not occupy the property.

The Kentucky Attorney General and TSF also rely on arguments that if the drafters had wanted to utilize a “same” or “sameness requirement” to “owned and occupied,” the drafters could have done so. Br. for the Commonwealth of Kentucky, as *Amicus Curiae* Supporting Appellees at p. 15 and Appellee’s Br. p. 23. McCracken County PVA counters that if the drafters had wanted individuality, the drafters would have explicitly done so. For instance, rather than “owned and occupied”, the drafters could have written “owned **or** occupied by institutions of religion”. The Kentucky Attorney General’s *amicus curiae* brief provides another iteration interpreting the “owned and occupied” language as an individualistic provision with two separate requirements: “(1) owned by **an** institution of religion and (2) occupied by **an** institution of religion.” Br. for the Commonwealth of Kentucky, as *Amicus Curiae* Supporting Appellee at 16. The drafters could also have styled the phrase “institutions of **religions**” to incorporate more than one institution of religion occupying and owning a space. However, the drafters did not pen these provisions. This omission is quite telling.

These facts are not in dispute. TSF owns the property. The Crossing and Restoration Church do not own the property. The Restoration Church occupies the property. TSF leased the property to The Crossing and then The Crossing leased to Restoration Church. TSF does not occupy the property, yet it is the only one that applied for tax exemption. The Crossing and Restoration Church are not parties to this litigation.

Again, from the perspective of the McCracken County PVA with the Application for Tax Exemption from Property Taxation sitting on his desk, TSF does not qualify for tax exemption.

IV. CONCLUSION

For the reasons discussed herein, (1) the Order from the McCracken Circuit Court and the Opinion of the Kentucky Court of Appeals should be reversed in full, (2) the Final Order of the Kentucky Board of Tax Appeals, dated February 16, 2021, should be affirmed as to its finding that the property is not “owned and occupied” and reversed as to its finding that TSF is an institution of religion, and (3) direction given to the McCracken County PVA to deny TSF’s application for exemption from property taxation.

Respectfully submitted,

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