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**COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO.: 2024-SC-0006**

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

APPELLANT

v. 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

**JOEL FREDERIC AND ELIZABETH
FREDERIC**

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IN SUPPORT OF APPELLANT
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Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013) 6

Living Water Church of God v. Charter Twp. Meridian, 258 F. App'x 729 (6th Cir. 2007)..... 4

Thai Mediation Ass'n of Ala., Inc. v. City of Mobile, 980 F.3d 821 (11th Cir. 2020) 6

Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338 (2d Cir. 2007)..... 7

Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J.) 5, 6

II. **RLUIPA'S SUBSTANTIAL BURDEN CLAUSE REQUIRES STRICT SCRUTINY OF CLAIMS OF COMPELLING GOVERNMENTAL INTEREST.** 7

42 U.S.C. § 2000cc(a)(1) 7

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)..... 8

Carson v. Makin, 596 U.S. 767 (2022)..... 8

City of Boerne v. Flores, 521 U.S. 507 (1997)..... 7

Fulton v. City of Philadelphia, 593 U.S. 522 (2021)..... 7, 8

Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 431 (2006)..... 8

Holt v. Hobbs, 574 U.S. 352 (2015)..... 8

Tandon v. Newsom, 593 U.S. 61 (2021) 8

Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J.) 8

III. **AS APPLIED HERE, THE ZONING ORDINANCE VIOLATES RLUIPA'S EQUAL TERMS CLAUSE.** 9

42 U.S.C. § 2000cc(b)(1) 9

Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011) 10

Chabad of Nova, Inc. v. City of Cooper City, 533 F. Supp. 2d
1220 (S.D. Fla. 2008) 10

Konikov v. Orange County, 410 F.3d 1317 (11th Cir. 2005) 10

Lighthouse Inst. For Evangelism, Inc. v. City of Long Beach, 510
F.3d 253 (3d Cir. 2007) (Jordan, J., concurring in part and
dissenting in part)..... 10

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th
Cir. 2004)..... 10

Park Hills, Ky., Zoning Ordinance art. X § 10.4 (1974) 10

CONCLUSION..... 11

PURPOSE OF THE BRIEF AND INTRODUCTION

Daniel J. Cameron served as the 51st Attorney General of the Commonwealth of Kentucky from 2020 until 2024. Mr. Cameron championed religious liberty as Attorney General and now submits this amicus brief to urge the Kentucky Supreme Court to follow the lead of the majority of United States Circuit Courts that have found that laws preventing religious exercise – here, zoning laws preventing Catholic priests from building a grotto – constitute a substantial burden on the free exercise of religious under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).

The Court of Appeals’ ruling is based on the flawed and superannuated view that RLUIPA applies only to laws that directly violate religious beliefs or otherwise impose penalties or deny benefits for practicing religion – and that laws that are not inherently inconsistent with one’s religious beliefs receive less scrutiny under RLUIPA even when they prevent religious exercise. That view is inconsistent with both the plain text of RLUIPA and numerous cases confirming the law’s expansive protections. This ruling is also out of step with the views and values of the Commonwealth of Kentucky. The Supreme Court should reject this narrow reading of RLUIPA and permit construction of the grotto.

ARGUMENT

This should not have been a hard case. The City of Park Hills Board of Adjustment granted the Missionaries of St. John the Baptist (the “Missionaries”) a conditional use permit to build a grotto on a parcel of land adjacent to the existing church structure, which has served as an active place of worship since 1950. The

church is located on a street (Amsterdam Road) that was once designated as an arterial street, and still meets the definition of an arterial street, even if not formally designated as such. The Board granted a variance and issued a conditional use permit, finding no adverse reasons to reject the variance. To the contrary, the Board found that the grotto would contribute to the general well-being of the community. The Kenton Circuit Court affirmed the Board. These initial decisions upheld RLUIPA's promise of "expansive protection for religious liberty." *Holt v. Hobbs*, 574 U.S. 352, 358 (2015).

This story should have ended here, but unfortunately, the Court of Appeals reversed, applying analysis that contradicts RLUIPA's plain text and the statute's purpose. At that time it narrowly construed RLUIPA, the Court of Appeals adopted an expansive view of the zoning laws that prevented construction of the grotto. Perhaps nothing highlights the folly of the decision below more than its discussion of whether constructing the grotto "is more akin to [a] parking lot," "the construction of restrooms," expanding "weekly auctions," or "manufacturing butter." *Frederic v. City of Park Hills Bd. of Adjustment*, No. 2022-CA-0867-MR, 2023 WL 8286391, at *5 (Ky. Ct. App. Dec. 1, 2023). The Court of Appeals' decision flies in the face of RLUIPA, which exists to prevent these types of absurdities. Under RLUIPA, when local land use laws collide with religious exercise, the land use laws must yield. Indeed, in enacting RLUIPA, "Congress found the record of religious discrimination particularly clear and compelling in the land use context, where churches are sometimes disfavored by local zoning boards because (among other things) church members are

said to generate too much traffic or congestion or noise.” *Yellowbear v. Lampert*, 741 F.3d 48, 52 (10th Cir. 2014) (Gorsuch, J.). This Court should correct the Court of Appeals’s error and clarify the rules that apply under RLUIPA.

Mr. Cameron endorses and joins in the arguments of Appellant and submits additional observations on what constitutes substantial burdens under RLUIPA and the strict scrutiny that land use regulations burdening religious expression must face.

I. WHOLLY PREVENTING RELIGIOUS EXERCISE IMPOSES A SUBSTANTIAL BURDEN UNDER RLUIPA.

Under RLUIPA’s Substantial Burden Clause, “[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution” unless the government shows it is furthering a compelling governmental interest by the least restrictive means. 42 U.S.C. § 2000cc(a)(1). The land use regulations here fail because they substantially burden free exercise and are not the least restrictive means available to the City of Park Hills.

The Court of Appeals first strayed from RLUIPA’s text and purpose when it reasoned that “courts [are] far more reluctant to find a violation” in situations like this, denying permission for the grotto, “where compliance with the challenged regulation makes the practice of one’s religion *more difficult or expensive*, but the regulation is not inherently inconsistent with the litigant’s beliefs.” *Frederic*, 2023 WL 8236391, at *6-7 (emphasis added) (citing *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004)). According to the Court of Appeals, a governmental decision that makes religious exercise “more difficult or

expensive” is permissible, and courts should be “reluctant” to question a local zoning body’s authority to limit free exercise. That alone is clear reversible error that defies RLUIPA’s text, as both increasingly difficulty and expense can constitute a substantial burden. *See Catholic Healthcare Int’l, Inc. v. Genoa Charter Twp.*, 82 F.4th 442, 449-51 (6th Cir. 2023).

The Missionaries have already suffered those burdens, as they have no alternative site on which to build the grotto, Appellant’s Opening Br. at 33, and denial would cause them substantial delay, expense, and uncertainty, *id.*; *see also Catholic Healthcare Int’l, Inc.*, 82 F.4th at 453-44 (Clay, J., concurring) (distinguishing *Living Water Church of God v. Charter Twp. Meridian*, 258 F. App’x 729 (6th Cir. 2007), because, unlike in *Living Water*, the land use regulation at issue would “prevent[] [the Church] from installing the religious display on the property at all”). *See also Int’l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011) (stating that a complete denial of a religious institution’s application is likely a substantial burden “when the religious institution has no ready alternatives, or where the alternatives require substantial ‘delay, uncertainty, and expense,’ a complete denial of the [religious institution’s] application might be indicative of a substantial burden”). The plain text of RLUIPA protects “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *Id.* at § 2000cc-5(7)(A). “The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise.” *Id.* at § 2000cc-5(7)(B).

The Missionaries have been prevented from building a grotto they believe is God's will for them to construct. Appellants' Opening Br. at 14. The fact that they are not being forced to defy other beliefs or defile a place of worship does not make their RLUIPA claim any less substantial. RLUIPA thus does not give the Missionaries any less protection because they already have a house of worship on their land, because they were not compelled to build the grotto to remain practicing Christians, or because one potentially expresses their faith differently inside a church than at a shrine. *Yellowbear*, 741 F.3d at 54 ("Congress has made plain that [courts] lack any license to decide the relative value of a particular exercise of religion."). As the Supreme Court explained when interpreting another provision of RLUIPA that applies to prisoners, "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise . . . not whether the RLUIPA claimant is able to engage in other forms of religious exercise." *Holt*, 574 U.S. at 361–62 (2015).

But the error continued. This case does not simply present a circumstance where a zoning regulation would make religious exercise more difficult or expensive, but rather, where the regulation serves to fully curtail the desired religious exercise, full stop. Contrary to the findings of the Court of Appeals, this is the most severe type of substantial burden. "[A] burden on a religious exercise rises to the level of being 'substantial' when (at the very least) the government (1) requires the plaintiff to participate in an activity prohibited by sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious

belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief – for example by presenting an illusory or Hobson’s choice.” *Id.* at 55. The Court of Appeals acknowledged the first and third categories but apparently gave less credence to the second category, even though each category – whether by action, inaction, or coercion – causes the party to abandon their religious activity and is therefore by definition substantial.

The Kentucky Supreme Court should join the majority of federal circuit courts that have found preventing participation in a religious activity is a substantial burden under RLUIPA. *See, e.g., Id.; Haight v. Thompson*, 763 F.3d 554, 564-65 (6th Cir. 2014) (explaining the “greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)”; *Korte v. Sebelius*, 735 F.3d 654, 682–83 (7th Cir. 2013) (instances where the government “render[s] a religious exercise . . . effectively impracticable” may constitute a substantial burden); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996) (“den[ying] a person reasonable opportunity to engage in those activities that are fundamental to a person’s religion” can constitute a substantial burden); *Thai Mediation Ass’n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 831 (11th Cir. 2020) (“complete prevent[ion]” is a “clear[] case” of substantial burden); *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 555–56 (4th Cir. 2013) (explaining that limiting actionable burdens to only government actions that “pressur[e] plaintiff to violate its beliefs would be tantamount to eliminating . . . substantial burden protection”); *Davis v. Wigen*, 82 F.4th 204, 212 (3d Cir. 2023) (“There can hardly be a more substantial

burden on a religious practice or exercise than its outright prohibition.”); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) (substantial burden is not limited to the “dilemma of choosing between religious precepts and government benefits”).

Guidance from this Court is necessary to provide Kentucky’s lower courts with direction on how to interpret RLUIPA’s substantial burden in a manner consistent with statutory text, purpose, and this Commonwealth’s commitment to free exercise.

II. RLUIPA’S SUBSTANTIAL BURDEN CLAUSE REQUIRES STRICT SCRUTINY OF CLAIMS OF COMPELLING GOVERNMENTAL INTEREST.

Because the Court of Appeals did not find the Missionaries were substantially burdened, it did not reach the issues of whether the land use regulations furthered a compelling governmental interest and whether those interests were interests were implemented by the least restrictive means. Nonetheless, if this case is remanded to the lower court (or the Board), the Court should use this occasion to clarify some of the finer points of the strict scrutiny inquiry required by RLUIPA’s Substantial Burden Clause.

RLUIPA requires the application of strict scrutiny, under which the government bears the burden of proving both that its regulations serve a “compelling” governmental interest and that its regulations are “the least restrictive means.” *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021); 42 U.S.C. § 2000cc(a)(1). Strict scrutiny is “the most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This “exceptionally demanding” test requires the government to “show that it lacks other means of achieving its desired

goal without imposing a substantial burden on the exercise of religion by the objecting party.” *Holt*, 574 U.S. at 364–65. And “[t]hat standard is not watered down; it really means what it says.” *Tandon v. Newsom*, 593 U.S. 61, 65 (2021) (quotation marks omitted). Accordingly, when strict scrutiny applies, a state law “rare[ly]” survives. *Carson v. Makin*, 596 U.S. 767, 781(2022).

To satisfy the first prong of strict scrutiny, the government must show that its compelling interest is served by denying the conditional use permit *in the specific case* at hand. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014). Strict scrutiny demands a “precise analysis” and does not permit the government to justify itself through “broadly formulated interests.” *Fulton*, 593 U.S. at 541. Asserting broad interests “at a high level of generality” such as traffic, lighting, parking, and aesthetics will not suffice. *Id.* “The question, then, is not whether the [Board] has a compelling interest in enforcing its [zoning code] policies generally, but whether it has such an interest in denying [a variance] to [the Missionaries].” *Id.*

On remand, if the Missionaries are not granted a variance, the Board must explain why its asserted interests require denial of the variance and why other less restrictive means will not suffice. “Rather than rely on ‘broadly formulated interests,’ courts must ‘scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.’” *Id.* (quoting *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)). Put simply, “the government must prove the compellingness of its interest in the context of the burden on [the Missionaries].” *Yellowbear*, 741 F.3d at 57.

Here, that analysis would require explanation of why the Missionaries cannot build the grotto, even when Amsterdam Road meets the characteristics of an arterial road even if not expressly designed, and why a conditional use permit is also required in that instance. That analysis may also require proving why, given that a church already exists on the site, a grotto cannot now be added. The government likely cannot meet its strict scrutiny showing of a compelling governmental interest that requires such burdens on the Missionaries. Notably, when a zoning body like the City's Board is willing to grant a variance and conditional use permit, this Commonwealth's courts should be reluctant to second-guess those determinations in a way that undermines free exercise that the Board has already determined promotes the public interest in its community.

**III. AS APPLIED HERE, THE ZONING ORDINANCE VIOLATES
RLUIPA'S EQUAL TERMS CLAUSE.**

The text of the instant ordinance presents an independent basis for reversal. Under RLUIPA, the City may not "impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1).

Those elements are met here: Not all conditional uses in the Missionaries' zoning district must be located on an arterial street. Rather, the Park Hills zoning ordinance requires "churches and *other buildings for the purpose of religious worship*" to be constructed on an arterial street, but it does not impose that requirement on any number of other secular uses, like community recreation centers, libraries, schools, country clubs, public parks, or cemeteries, although all of the above could

foreseeably create vehicular traffic. Park Hills, Ky., Zoning Ordinance art. X § 10.4 (1974). Those secular uses are all listed as conditional uses in the zoning district, and they do *not* require construction on an arterial street. *Id.*

There is no apparent reason to subject religious institutions worse than comparable secular ones. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-31 (11th Cir. 2004) (finding “private clubs and lodges are similarly situated to churches” for RLUIPA analysis); *Chabad of Nova, Inc. v. City of Cooper City*, 533 F. Supp. 2d 1220, 1222-23 (S.D. Fla. 2008) (finding public assembly centers, recreation centers, and schools to be similarly situated). But even if the City had an alleged rationale for this disfavored treatment, the City’s motives for treating a religious institution unequally are irrelevant under RLUIPA. *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1170-71 (9th Cir. 2011). RLUIPA’s Equal Terms Clause does not provide an interest-balancing test “to see if the government can excuse the equal terms violation.” *Id.* at 1171; *Lighthouse Inst. For Evangelism, Inc. v. City of Long Beach*, 510 F.3d 253, 293 (3d Cir. 2007) (Jordan, J., concurring in part and dissenting in part) (centering the inquiry on a city’s zoning objectives would give it “a ready tool for rendering [the Equal Terms provision] practically meaningless”). Simply put, the government cannot favor nonreligious attractions or activities over religious institutions without violating RLUIPA. *Centro Familiar*, 651 F.3d. at 1170; *see also Konikov v. Orange County*, 410 F.3d 1317, 1329 (11th Cir. 2005) (finding a county impermissibly targeted religious assemblies “[b]y

applying different standards for religious gatherings and nonreligious gatherings having the same impact”).

CONCLUSION

Mr. Cameron joins in support of Appellant and requests that the Court of Appeals decision be vacated and reversed and this Court hold that the Missionaries were substantially burdened under RLUIPA.

Dated: October 18, 2024

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WORD COUNT CERTIFICATION

This brief complied with the word limit of RAP 31(G)(1) because, excluding the parts of the document exempted by RAP 15(D) and RAP 31(G)(5), this brief contains 2,749 words.

/s/ Roger Byron

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CERTIFICATE OF SERVICE

The undersigned certify that on this 18th day of October, 2024, a true and accurate copy of the AMICUS CURIAE BRIEF OF MR. DANIEL CAMERON IN SUPPORT OF APPELLANT MISSIONARIES OF SAINT JOHN THE BAPTIST, INC. was served upon the following:

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via electronic mail at the e-mail addresses listed, via the Court's e-filing system, and via first class U.S. mail, postage prepaid to the addresses listed; and upon the Honorable Patricia M. Summe, Chief Circuit Judge, Kenton County, via first class mail, postage prepaid, at the Kenton County Justice Center, 230 Madison Ave., Sixth Floor, Covington, KY 41011; and upon the Kentucky Court of Appeals, Honorable Judges Acree, Dixon (Retired), and Taylor, via first class U.S. mail, postage prepaid, at 669 Chamberlin Ave., Suite B, Frankfort, KY 40601.

Dated: October 18, 2024

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