COMMONWEALTH OF KENTUC
SUPREME COURT
CASE NO. 2024-SC-0006

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC. — APPELLANT

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

JOEL FREDERIC AND ELIZABETH FREDERIC — APPELLEES

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

Respectfully submitted,

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Certificate of Service on the following page

CERTIFICATE OF SERVICE

I certify that on April 8, 2025, copies of the Reply Brief of Appellant Missionaries of Saint John the Baptist, Inc. were served as follows: Hon. Patricia Summe, Circuit Judge, 230 Madison Ave., Covington, KY 41011 (U.S. Mail); Hon. Kate Morgan, Court of Appeals Clerk, 669 Chamberlin Ave., Suite B, Frankfort, KY 40601 (U.S. Mail); Hon. Christopher Wiest, counsel for Appellees, 450 E. Rivercenter Blvd., Ste. 1280, Covington, KY 41011 (email and U.S. Mail); and Hon. Daniel R. Braun, counsel for City of Park Hills, 767 Hurstborne Ln., Edgewood, KY 41017 (email and U.S. Mail).

The undersigned certifies further that on April 8, 2025, a true and accurate copy of the foregoing Reply Brief was also served *via* email and *via* the Court's e-filing system upon the following *amicus curiae* counsel:

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CITATIONS TO THE RECORD

The Missionaries of Saint John the Baptist, Inc. ("Saint John") will cite the paper record as "TR [page number]," and the video record as "VR 04/15/2021, [time stamp]."

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

Constructing Saint John's religious grotto in this location is Saint John's religious exercise. The Court of Appeals' ruling prohibits Saint John's religious mission. The Board—and now the Frederics—concede that there is no compelling government interest in preventing this shrine in this location. Each of the Frederics' arguments to the contrary regarding preservation, scope, substantial burden, and RLUIPA's unequal terms provision fails. This Court should rule for Saint John.

I. Saint John preserved its RLUIPA argument.

The Frederics incorrectly assert that Saint John waived its argument because RLUIPA is not in Saint John's Answer. Appellees' Brief at 6. They fail to acknowledge that CR 15.02 states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The Frederics did not object in the trial court, TR 223-26, "on the ground that [RLUIPA was] not within the issues made by the pleadings," CR 15.02. Instead, they addressed Saint John's RLUIPA argument on the merits in both lower courts. TR 223-26; Frederics' COA Brief at 8-10, *Frederic v. City of Park Hills Bd. of Adjustment*, No. 2022-CA-0867, 2023 Ky. App. LEXIS 100 (Ky. App. Dec. 1, 2023) ("Frederics' COA Brief").

And Saint John presented RLUIPA to both lower courts. TR 203-04; City of Park Hills Brief at 17-21, *Frederic*, 2023 Ky. App. LEXIS 100 ("City COA Brief").[1] The Court of Appeals ruled on RLUIPA. *Frederic*, 2023 Ky. App. LEXIS 100, at *15-17. Saint John's motion for discretionary review regarded RLUIPA. *See* Mot. at 5-6; Appellant's Brief at 10 (preservation statement). This issue was developed before each court, and the Frederics had ample opportunity to challenge it. *Cf. Gasaway v. Commonwealth*, 671 S.W.3d 298, 312 (Ky. 2023) ("fact that an issue was made known to the trial court is paramount").

The parties repeatedly argued RLUIPA based on implied consent. The issue was adequately preserved and not waived.

II. This case easily falls within RLUIPA's scope.

The Frederics concede that RLUIPA preempts "local zoning decision[s]," but argue that RLUIPA was not "triggered" here. Appellees' Brief at 10-11. The Frederics are wrong.

RLUIPA's substantial burden test triggers "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

[1] A party need not "invoke a particular statute before [a] zoning board." *First Korean Church v. Cheltenham Twp.*, No. 05-6389, 2012 U.S. Dist. LEXIS 25968, at *30-31 (E.D. Pa. Feb. 29, 2012) (analyzing RLUIPA); VR 04/15/2021, 01:32:49-01:33:31 (discussing "religious freedoms and rights").

proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2)(C). The Frederics concede that the Board's action involved the implementation of a "land use regulation." *See* Appellees' Brief at 13 n.3. But the Frederics incorrectly contend that the Board did not make an "individualized assessment" of Saint John's property.

Saint John proposed to build the "Our Lady of Lourdes grotto" next to its church named "Our Lady of Lourdes Church." *See* Appellant's Brief at 13-14, 18, 25 n.10, 33. Saint John applied for a conditional use permit and setback variance, which the Board assessed based on Saint John's individual property and location. TR 117-148; VR 04/15/2021, 00:13:15-01:54:19. And "[i]n evaluating RLUIPA claims, courts have repeatedly found that special use permit and variance applications depend on individualized assessments." *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 498-99 (S.D.N.Y. 2010). Assessment of a zoning permit application such as this—regardless of the outcome of the Board's decision—triggers RLUIPA's protection against substantial burdens.

The Frederics appear to contend that the Board was unable to even consider Saint John's application. Appellees' Brief at 12-13. That is wrong. The board has "power to hear and decide on applications for variances," KRS 100.241, and conditional use permits, KRS 100.237. KRS 100.247's limitations are irrelevant. The Board interprets zoning ordinances and makes individual decisions on particular applications. *See Harrison Silvergrove Prop. v.*

Campbell Cty., 492 S.W.3d 908, 913 (Ky. App. 2016) ("entirely within the [Board's] statutory authority . . . to interpret and define conditional uses and terms [in] a zoning ordinance . . . [while determining] whether to grant a conditional use in a particular zone"). And even if a board were to lack power to make an individualized assessment, "[a] property owner need not [even] pursue such [permit] applications" to bring a RLUIPA claim. *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 349 (2d Cir. 2005). The Board made an individualized assessment. This case easily falls within RLUIPA's scope.

III. The Frederics fail to rebut Saint John's arguments.

The Frederics effectively concede that there was no compelling government interest to satisfy strict scrutiny, rightly abandoning their "traffic" argument from below. *Compare* Appellees' Brief at 29-30, *with* Frederics' COA Brief at 10. The Frederics also endorse the Sixth Circuit's substantial burden standard without adequately addressing any other circuit test. Appellees' Brief at 9-10.[2] Yet, their Sixth Circuit analysis is incorrect for the following reasons.

A. The Frederics misapply "religious exercise."

"'[R]eligious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or

[2] They correctly abandoned their "effectively impracticable" argument. *See* Frederics' COA Brief at 9. And their "coercion or pressure" section merely incorrectly reargues that there is no prohibition. Appellees' Brief at 26.

intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7). Saint John's religious exercise is to construct the "Our Lady of Lourdes" grotto next to Our Lady of Lourdes Church. It is not a "general" exercise of practicing Catholicism or even venerating the Blessed Virgin Mary. *Id.*; *see Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015) (discussing religious exercise); *Ackerman v. Washington*, 16 F.4th 170, 182-83 (6th Cir. 2021). This is about constructing a religious shrine depicting "Our Lady of Lourdes," in accordance with a church-approved apparition, during which the Blessed Virgin requested Saint Bernadette "to tell the priests to build a chapel" *next to* the grotto. *See* Appellant's Brief at 13-14, 18, 25 n.10, 33.

Saint John's religious "mission" is similar to the religious adherent's mission in *Catholic Healthcare International, Inc. v. Genoa Charter Township*, which was to construct a prayer campus. 82 F.4th 442, 453 (6th Cir. 2023) (Clay, J., concurring). The structure here is not a corporate building or school. The grotto is a shrine—its very nature is religious—and Saint John's religious exercise is the act of constructing it next to its already established church. This location and this type of shrine are unique to the church's mission. *See* Appellant's Brief at 13-14, 18, 25 n.10, 33. As explained in *Catholic Healthcare*, that is why no alternative locations are adequate. 82 F.4th at 453 (Clay, J., concurring) (rejecting the township's alternative location argument because the church did not own the other property, and it "lack[ed] the qualities which [made] the property . . . suitable for a prayer campus").

This property is unique to Saint John's religious mission to construct the "Our Lady of Lourdes" grotto, with space for reflection and repose, next to Our Lady of Lourdes Church. No alternative locations can feasibly satisfy because no other property contains Our Lady of Lourdes Church, and "the substantial burden inquiry 'requires a case-by-case, fact-specific inquiry,'" *Lozano v. Collier*, 98 F.4th 614, 626 (5th Cir. 2024) (citation omitted).

The Frederics wrongly conflate Saint John's particular religious exercise with the broad practice of Catholicism or honoring the Blessed Virgin Mary in general. Appellees' Brief at 4, 18, 29 (suggesting incorrectly that Saint Agnes in Fort Wright or two Catholic schools could somehow suffice). Thus, the Frederics fail to correctly engage with the substantial burden analysis at hand.

B. The Frederics incorrectly contend that Saint John's grotto is permissible, but if correct, their case is moot.

The Frederics argued below that the grotto was prohibited at this location due to the arterial street requirement. *See* Frederics' COA Brief at 10; TR 222-23. The Court of Appeals agreed, then ruled that "[c]onstruction of a grotto — large or small — in the rear of the *church property* . . . constitutes an expansion of both the scope and area of the nonconforming use. KRS 100.253(2) *prohibits* the church from doing so." *Frederic*, 2023 Ky. App. LEXIS 100, at *10 (emphasis added).

To bolster its point, the court added: "[T]he fact that acquisition of [the plot behind the church] was *necessary* to construct the grotto *further* illustrates [it] would constitute an enlargement of the church's preexisting nonconforming

use in terms of both scope and area[.]" *Id.* (emphasis added). 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 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

[3] This prohibition amounts to a substantial burden.

adherent worked for about two years "to address the [board's] concerns" and had already offered to make changes to its project).[4]

Further, if "no one" is preventing the grotto's construction, Appellees' Brief at 19, then the Frederics lack standing. Standing requires injury, causation, and redressability. *Cabinet for Health & Family Services v. Sexton*, 566 S.W.3d 185, 195 (Ky. 2018). An asserted injury must be caused by alleged *illegality*. *Id.* If the grotto is legal in one location and illegal a few feet away—as the Frederics suggest—then any alleged illegality is not the but-for cause of the Frederics' alleged injuries of "traffic," "lighting," and "noise," TR 226-27. *See Patton v. Bickford*, 529 S.W.3d 717, 730 (Ky. 2016) (no causation if event "would have occurred without it"). Their asserted injuries will also not be "redressed" if, regardless of the outcome of this case, the grotto can be built a mere few feet away and closer to their home.

This Court should rule in Saint John's favor either way. Either the Frederics wrongly interpret the Court of Appeals' holding, and there is a substantial burden due to the complete prohibition of this religious exercise, or the Frederics' interpretation is correct, and the Board's permit denial would have *still* been a substantial burden, but the Frederics' case is moot due to lack of standing. If moot, this Court should vacate the lower court's decision and dismiss this case.

[4] Even any lack of clarity under the Court of Appeals' reasoning would cause Saint John substantial delay, uncertainty, and expense.

C. The Frederics fail to adequately address the Sixth Circuit test.

Saint John previously addressed the lack of feasible alternative locations factor above. The Frederics also fail to fully or accurately address the remaining Sixth Circuit substantial burden factors.

Regarding delay, uncertainty, and expense, the Frederics do not address Saint John's arguments. One of the considerations in *Catholic Healthcare* was that "after years of administrative proceedings" the church was "still . . . unable to obtain permission to erect the desired religious displays on the property." 82 F.4th at 454 (Clay, J., concurring); *see also id.* at 449. Here, after the 2017 meeting, Saint John reduced the size of its planned grotto, conducted a geotechnical study, applied to PDS with updated measured visual schematics and illustrations, and finally appeared before the Board in 2021.[5] *See* VR 04/15/2021, 00:31:50-00:33:56; TR 117-148; PARK HILLS CAUCUS MEETING – Feb. 27, 2017, https://www.parkhillsky.net/documents/minutes/WEB-CAUCUS-2-27.pdf.[6] A denial by the Board would have caused further delay, uncertainty, and expense. And as Saint John stated previously, this factor is uniquely satisfied here because Saint John would be prohibited from this religious exercise if the Board denied its permit on the Court of Appeals'

[5] They also acquired the title to land behind Saint John's property to satisfy the Board's condition. TR 78.

[6] This Court may take judicial notice of this document. KRE 201.

reasoning. *See* Appellant's Brief at 15. The Frederics do not demonstrate otherwise.

The Frederics also fail to show that Saint John placed any burden upon itself and assert inaccurate, inadmissible facts.[7] In *Catholic Healthcare*, the township emailed the church, stating that the zoning ordinance prohibited the proposed construction unless the church first obtained a building permit. 82 F.4th at 444-45. The church "proceeded to create the prayer trail anyway, with the Stations of the Cross, [a] mural, and a stone altar[.]" *Id.* Yet, the Sixth Circuit determined that the church did not place the burden upon itself, despite this emailed "notice." *Id.* 449-50. Instead, the Sixth Circuit considered the "ordinary meaning" of terms in the ordinance. *Id.* at 449.

Here, Saint John's permit application before the Board stated that any street requirement should be waived because the property was grandfathered. TR 118. And Amsterdam Road "becomes a street of choice during peak traffic conditions which results in the same use as an arterial street." *Id.* Thus, Saint John reasonably believed its proposed accessory would be allowed. *See also* Brief for Appellant at 35-37. The Board and the trial court agreed with Saint John's analysis. TR 232 (stating that Amsterdam Road "meets the definition" of an arterial street and the grotto was "grandfathered in" as a permissible accessory). The Frederics cannot reasonably expect pastors to make a

[7] *See, e.g.*, Appellees' Brief at 3-4, 23, 30, (discussing one-sided alleged mediation discussions not in the record and inadmissible under KRE 408).

preemptive legal determination regarding a then-unsettled area of law better than a sitting judge. RLUIPA does not place such a high burden upon religious adherents. *See Johnson v. Baker*, 23 F.4th 1209, 1214 (9th Cir. 2022) (explaining that courts "must construe [RLUIPA's] text 'in favor of a broad protection of religious exercise"). And Saint John had a "*reasonable* expectation of being able to use that land for [its] religious purpose[]." *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1004 (6th Cir. 2017) (emphasis added). Saint John's permit to build was granted, TR 78, and the trial court agreed, TR 232. Saint John had no notice that its permit would be denied because Saint John's permit was, in fact, granted. *See id.*

IV. The Frederics' unequal terms argument fails.

In the trial court, Saint John asserted RLUIPA, "42 USC Sec. 2000 *et. seq.*," protected against "inequalities," "discrimination in zoning laws," and "prohibit[ed] zoning laws that *discriminate* against churches *and burden* their ability to exercise religious beliefs." TR 203-04 (emphasis added).[8]

The Frederics argued under RLUIPA's substantial burden provision and addressed the "plain language of the zoning ordinance." TR 226; Frederics' COA Brief at 10. Saint John asserted RLUIPA's equal terms and nondiscrimination section (and the substantial burden section) before the Court of Appeals. *See* City COA Brief at 18. Additionally, some courts analyze discrimination and unequal terms under the umbrella of "substantial burden,"

[8] Saint John's permit application also asserted inequalities. TR 118.

while others treat it independently. Appellant's Brief at 42-44. Saint John covered both options in its opening brief. The proper analysis depends on whether this Court agrees with the statutory structural interpretation in *Livingston*, 858 F.3d at 1005.[9] Thus, this argument is preserved for appeal.[10]

The Frederics also fail to acknowledge that, regarding *accessories*, the zoning ordinance is facially unequal. The equal terms provision requires four elements: (1) "a religious assembly or institution," that is "(2) subject to a land use regulation[] that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution." *Canaan Christian Church v. Montgomery Cnty.*, 29 F.4th 182, 196 (4th Cir. 2022). The first two elements are not in dispute.

The Frederics cite *Tree of Life* to argue the last two elements. Appellees' Brief at 31-33. But that case involved an as-applied challenge; the ordinance was "facially neutral." *Tree of Life Christian Sch. v. City of Upper Arlington*, 905 F.3d 357, 366 (6th Cir. 2018). Here, Saint John asserts a *facial* challenge, which "focuses on the *content* of the challenged land-use regulation to determine whether it *expressly* treats a religious assembly or institution on less than equal terms than a nonreligious assembly or institution[.]" *River of*

[9] The Frederics' "arbitrary, capricious, or discriminatory" section is superfluous for this reason. *See* Appellees' Brief at 23-24. The Sixth Circuit bifurcated this factor. Saint John accordingly addressed discrimination separately, under its strict scrutiny and unequal terms sections. *Id.* at 38-44.

[10] Even if it had not been preserved, the error is palpable because the ordinance is facially irrational, and it affected the substantial rights of Saint John.

Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 383 (7th Cir. 2010) (emphasis added). "[L]ess than equal treatment [is shown] if the *law* treats religious assemblies . . . differently than nonreligious . . . *by its very terms*." *Tree of Life*, 905 F.3d at 381 (Thapar, J., dissenting) (emphasis added).

To be sure, there appears to be a circuit split. *Hunt Valley Baptist Church v. Baltimore Cty.*, No. ELH-17-804, 2017 U.S. Dist. LEXIS 171539, at *82 n.20 (D. Md. Oct. 17, 2017). But this Court should find that "only the as-applied challenge requires [a religious adherent] to bring forward a comparator of any kind," *Canaan Christian Church*, 29 F.4th at 200 (Richardson, J., concurring), when the ordinance itself provides the comparators like the one here, *see* PARK HILLS, KY., ZONING ORDINANCE ART. X, § 10.4 (1974).

Here, the zoning ordinance conditionally permits "customary accessory buildings" in this zone if they are in one of nine categories. *Id.* Church accessories—like Saint John's grotto—are permitted but must be "located adjacent to an arterial street." *Id.* The ordinance does *not* require numerous secular accessories to satisfy the same arterial street requirement. *Id.* Specifically, cemeteries, nursery schools, public and parochial schools, "[p]ublicly owned and/or operated parks, playgrounds, golf courses, community recreational centers, including libraries," and privately owned golf courses and country club accessories may all be constructed regardless of whether they are located next to an arterial street. *Id.*

Thus, any of these secular institutions could construct a stone structure on a local or collector street that is the same size as Saint John's grotto with the same features—like statues, patio, and walking path—and the same number of daily visitors, dimensions, and lighting. *See id.* The ordinance makes an irrational distinction regarding church accessories. And the only reason that the Court of Appeals found that Saint John's grotto was prohibited was because it determined that the grotto is not on an arterial—as opposed to a collector—street. *Frederic*, 2023 Ky. App. LEXIS 100 at *9.

If an ordinance treats just one secular institution differently than religious, it violates RLUIPA's equal terms provision. 42 U.S.C. § 2000cc(b)(1). Here, the zoning ordinance itself provides numerous comparators.

The Frederics also fail to acknowledge that this is about a church *accessory*, not a church. A church may impact traffic with an influx of additional visitors for church services at certain times, but Saint John's grotto is an accessory. It is like "a sacred, elaborate garden with two small statues . . . and space for reflection and repose." TR 117; *see also* VR 04/15/2021, 01:31:00-01:46:05 (Board "not convinced that the addition of this grotto [will] significantly affect . . . traffic . . . one way or the other"). Saint John's grotto is akin to a "simple piazza" in a neighborhood park. VR 04/15/2021, 00:40:01-00:40:20. And unlike a church, each of these *accessories* "generate[s] 'a smooth[] flow of traffic throughout the day,'" *Immanuel Baptist*

Church v. City of Chicago, 283 F. Supp. 3d 670, 677, 680 (N.D. Ill. 2017). The zoning ordinance regarding church accessories is unequal on its face.

CONCLUSION

This Court should vacate or reverse the Court of Appeals' decision.

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WORD COUNT CERTIFICATION

This Reply Brief complies with RAP 31(G) because excluding the parts of the document exempted by RAP 15(D) and RAP 31(G)(5), this Reply Brief contains 3,491 words.

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