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

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.

APPELLANT

v.

Appeal from the Kenton Circuit Court
Honorable Patricia M. Summe, Chief Circuit Judge
Case No. 21-CI-007766
Court of Appeals Case No. 2022-CA-0867

JOEL FREDERIC AND ELIZABETH FREDERIC

APPELLEES

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# BRIEF OF *AMICUS CURIAE* CROSS & CROWN CITY CHURCH IN SUPPORT OF APPELLANT

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Respectfully submitted,

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## INTEREST OF *AMICUS CURIAE*[1]

The Cross & Crown City Church ("City Church") is a Pentecostal church located in the City of Newport, Kentucky, whose religious practice is rooted in evangelical teaching. Established in 2010, City Church is part of The Morgan Family Ministries, Inc., a Kentucky nonprofit organization. Dan and Linda Morgan are directors of The Morgan Family Ministries and created City Church where they both also serve as lead pastors. City Church began in 2010 with holding services in a Hampton Inn motel conference room. Within six months of holding its first service however, City Church's members grew enough to where it moved to the current building it operates at. Prior to its establishment, Pastor Morgan's father Reverend O.A. Morgan began his own ministry in Newport and helped form seven other churches in the area that are all still operating today. Part of City Church's purpose is to continue the work in growing as a ministry for the surrounding area, which includes helping other churches.

The issue in this case is what the correct substantial burden standard and application is under the Religious Land Use & Institutionalized Persons Act, 42 U.S.C. § 2000cc(a)(1). As part of the Morgan Family Ministries, City Church shares in the mission of protecting religious freedoms for not only itself but, other religious institutions in the State of Kentucky. It follows that City Church holds particular interest in maintaining constitutional protections to religious exercise which applies to land use. Importantly, the holding issued by the Court of Appeals of Kentucky, if left standing, sets a dangerous precedent for infringing on known protected religious exercise. Permitting a complete restriction to certain religious land use—in this case building a grotto—

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[1] The *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae,* its members, and its counsel made a monetary contribution to its preparation or submission.

under the color Kentucky law is impactful City Church's abilities to exercise its evangelical faith. By consequence, the substantial burden provision under 42 U.S.C. § 2000cc(a)(1) must be applied to the complete denial of constructing a religious grotto, so as to ensure intended constitutional protections to religious exercise are preserved.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Religious Land Use & Institutionalized Persons Act 42 U.S.C. § 2000 *et. seq.*, ("RLUIPA" or "the Act") the government cannot substantially burden a person's religious exercise without satisfying strict scrutiny. Such provisions were enacted with the purpose of applying extensive protections to religious exercise against local and state government-imposed burdens. As recognized by the United States Supreme Court, "Congress mandated that this concept 'be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014). RLUIPA defines "religious exercise" broadly, stating it constitutes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief". 42 U.S.C. § 2000cc-5(7)(A).

RLUIPA provides a section specific to the protection of land use as religious exercise. *See,* 42 U.S.C. § 2000cc. Importantly, this section establishes that "[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..." *Id.* at § 2000cc(a)(1). The government is permitted to impose such a burden only where it "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." *Id.* This subsection is known as the substantial burden provision. Congress intended for RLUIPA's provisions be applied broadly to religious land use in part, to combat potential discriminatory reviews or denials that can occur from government individualized assessments for proposed uses. *Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic Dist. Com'n,* ("*Chabad Lubavitch*") 768 F.3d 183, 193 (2d Cir. 2014) (citing *Sts. Constantine & Helen Greek Orthodox Church, Inc.*, 396 F.3d 895, 897 (7th Cir. 2005)). ("The broad reach of this

predicate is no accident."); *see also Johnson v. Baker,* 23 F.4th 1209, 1215 (9th Cir. 2022) ("Our precedent shows we do not take a narrow view of what constitutes a 'substantial burden.'"); *see also* 42 U.S.C. § 2000cc-(3)(g)

Appellant in this matter, the Missionaries of Saint John the Baptist, Inc. ("Saint John"), applied to the City of Park Hills, Kentucky, on March 18, 2021, for a conditional use permit and setback variances in order to build a grotto on land adjacent to its church. As is observed in the Roman Catholic faith, grottos have been constructed in the image of Our Lady of Lourdes. Saint John dedicated its church to Our Lady of Lourdes. And as part of its sincerely held beliefs, building a grotto has been an integral element to Saint John's worship and faith. The City of Park Hills Board initially approved Saint John's applications with conditions. Appellees, Elizabeth and Joel Frederic appealed this decision to the Kenton Circuit Court. The circuit court affirmed the Board's decision granting Saint John's applications, whereby Appellees appealed the circuit court's decision.

On appeal, the Court of Appeals of Kentucky held denying Saint John's requests to build a grotto did not constitute a substantial burden to its religious exercise under RLUIPA. *Frederic v. City of Park Hills Bd. of Adjustment,* No. 2022-CA-0867, 2023 Ky. App. LEXIS 100, at *15-17 (Ky. App. Dec. 1, 2023). Acknowledging construction of the grotto was a form of religious exercise, the appellate court nonetheless ruled *inter alia*, "[t]he application of the ordinance to prohibit the construction of the grotto may make practice of religion somewhat more difficult for the church's congregation or the adherents of the Catholic faith broadly, but the City's Zoning Ordinance is not inherently inconsistent with their religious beliefs." *Id.* at *16.

Such an analysis improperly narrows RLUIPA's substantial burden provision for religious exercise in the land-use context. Given that RLUIPA is designed to protect religious exercise in

both realms of land-use and institutionalized persons, courts have applied substantial burden requirements in both circumstances. While legal analyses overlap at times between the two sets of cases, there are distinctions worthy enough to afford certain standards be applied exclusively. Here, the appellate court applied an improper assessment to this provision under § 2000cc(a)(1), that is considered dated by numerous circuit courts and applicable in the context of institutionalized persons.

Under a proper legal analysis recognized by a majority of current legal precedent, the complete denial of Sain John's religious exercise in establishing a grotto constitutes as a substantial burden under RLUIPA, 42 U.S.C. § 2000cc(a)(1). Therefore, the lower court's decision should be reversed.

## ARGUMENT

### I. RLUIPA's Expanded Scope of "Religious Exercise" Extends to Interpreting Substantial Burden

As articulated by the U.S. Supreme Court, "RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter v. Wilkinson,* 544 U.S. 709, 714 (2005); *Burwell.,* 573 U.S. at 696. While the First Amendment offers protections through its Free Exercise Clause, these protections "are more limited than those extended under RLUIPA." *Perez v. Frank,* 433 F. Supp. 2d 955, 964 (W.D. Wis. 2006). "[T]raditional First Amendment jurisprudence protects only 'the observation of *central* religious beliefs or practices.'" *Id.* at 964 (quoting *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 761 (7th Cir. 2003)) (emphasis added). Whereas under RLUIPA, protected "religious exercise" is defined as "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See* 42 U.S.C. § 2000cc(5)(7)(A) (emphasis added). Beyond RLUIPA's statutory language, courts too have recognized when it pertains to interpreting religious exercise, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Haight v. Thompson,* 763 F.3d 554, 567 (6th Cir. 2014) (quoting, *Hernandez v. Commissioner,* 490 U.S. 680, 699 (1989)); *see United States v. Seeger,* 380 U.S. 163, 185 (1965) ("Local boards and courts...[t]heir task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.").

In the land-use context, RLUIPA was intended to protect against *inter alia,* "subtle forms of discrimination when, as in the case of the grant or denial of zoning variance, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Fortress Bible Church v. Feiner* ("*Fortress Bible*"), 734 F. Supp. 2d 409, 501 (S.D.N.Y. 2010), *aff'd*, 694 F.3d 208 (2d Cir. 2012), (quoting, *Sts. Constantine and Helen Greek Orthodox Church,*

*Inc. v. City of New Berlin,* 396 F.3d 895, 900 (7th Cir. 2005)). Under RLUIPA's definition of "religious exercise", it includes, "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc(5)(7)(B). "RLUIPA does not protect buildings or structures per se, but rather protects their use for the purpose of religious exercise." *Fortress Bible,* 734 F.Supp.2d at 499. As such, "RLUIPA requires inquiring whether the facilities to be constructed are to be devoted to a religious purpose", but "[s]uch religious purpose need not implicate 'core religious practice,' or 'an integral part of one's faith.'" *Id.* at 499 (quoting *Guru Nanak Sikh Society of Yuba City v. County of Sutter,* 326 F.Supp.2d 1140, 1151 (E.D.Cal. 2003), and *Living Water Church of God v. Charter Township of Meridian,* 384 F.Supp.2d 1123, 1129 (W.D.Mich. 2005)).

Pursuant to RLUIPA's substantial burden provision, "[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..." 42 U.S.C. § 2000cc(a)(1) Congress left "substantial burden" intentionally undefined under the Act, leaving such task to the courts. *Id.* As such, federal circuit courts have applied different analyses to determine whether a substantial burden exists for purposes of enacting appropriate statutory protection. While the Kentucky Supreme Court falls within jurisdiction of the Sixth Circuit Court of Appeals, the Court is not strictly bound to its precedent exclusively. *See Arizonans for Official English v. Arizona,* 520 U.S. 43, 58 n.11 (1997) (federal court precedent is not a binding precedent on state judiciary); *see also Lockhart v. Fretwell,* 506 U.S. 364, 375-76, 112 S.Ct. 838, 845-46 (1993) (THOMAS, J., concurring) (Supremacy Clause does not require state courts to follow federal appellate court rulings on questions of federal law.); *Johnson v. Fankell,* 520 U.S. 911, 916 (1997). State courts

therefore may treat precedent from the federal appellate courts as persuasive, with the exception of the U.S. Supreme Court.

While lacking a statutory definition, courts have recognized that Congress indicated it did not intend to change the definition of "substantial burden" provided in Supreme Court jurisprudence of the Free Exercise Clause. *Murphy v. Zoning Com'n of Town of New Milford,* 148 F. Supp. 2d 173, 188 (D.Conn. 2001); *Westchester Day School VII v. Village of Mamaroneck,* 504 F.3d 338, 348 (2d Cir. 2007) ("*Westchester*") (*citing* 146 Cong. Rec. S7774, S7776 (2000)); 146 Cong. Rec. 16,700 (2000). Similarly, the lower court's opinion echoed the view that Congress intended for the traditional interpretation of substantial burden from Supreme Court free exercise jurisprudence, to be left intact. *Frederic,* Ky. App. LEXIS 2023 at *15-16. However, "substantial burden" cannot be applied pursuant to RLUIPA's § 2000cc(a)(1), if applied solely within the narrower confines of free exercise jurisprudence.

RLUIPA's substantial burden provision regulations codify Supreme Court jurisprudence in *Sherbert v. Verner,* 374 U.S. 398 (1963), "insofar as that case held that a "[government] system for granting individual exemptions from a general rule must have a compelling reason to deny a religious group an exemption that is sought on the basis of hardship." *Chabad Lubavitch,* 768 F.3d at 193 (citing *Sts. Constantine & Helen Greek Orthodox Church, Inc.,* 396 F.3d 895, 897 (7th Cir. 2005)). This perspective aligns with express language under RLUIPA stating it is to be "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *See* 42 U.S.C. § 2000cc-(3)(g). In addition, Congress expanded the definition of what constitutes as "religious exercise." *See id.* at § 2000cc(5)(7)(A). "By not limiting the scope of the Act's protections to the exercise of religious beliefs compelled by or central to a particular faith, Congress now requires that some of the

language used by the Supreme Court in discussing 'substantial burden' be applied in a broader context." *Murphy,* 148 F.Supp.2d at 188.

Congress intended for the Act to be applied broadly to religious land use in part, to combat potential discriminatory reviews or denials that can occur from government individualized assessments for proposed uses. *See id.* at 193 ("The broad reach of this predicate is no accident."); *see also Johnson v. Baker,* 23 F.4th 1209, 1215 (9th Cir. 2022) ("Our precedent shows we do not take a narrow view of what constitutes a 'substantial burden.'"); 42 U.S.C. § 2000cc-(3)(g). It follows that numerous courts recognize that Congress intended the Supreme Court's free exercise cases to be "instructive" or to be referred to. *See Westchester,* 504 F.3d at 448 (quoting 146 Cong. Rec. S7774, S7776 (2000)) ("the term substantial burden to be interpreted 'by reference to Supreme Court jurisprudence.'"). As will be discussed further below, religious exercise in the land-use context requires a broader multi-faceted application.

## II. The Appellate Court's Decision Conflicts with Current Interpretations on what Constitutes a Substantial Burden under 42 U.S.C. § 2000cc(a)(1)

At the outset, an analysis of Saint John's proposed construction of a grotto as protected religious exercise provides insightful groundwork for what exercise can be substantially burdened under RLUIPA. As stated, religious exercise is broadly defined under RLUIPA, which expressly includes land use for religious purposes. *See,* 42 U.S.C. § 2000cc-(5)(7)(A)-(B). Construction of a grotto in honor of the Blessed Virgin May is a known religious practice for members within the Catholic Church. Akin to building a cross or monument, a grotto for Catholic members is a small cave built for devotional purposes and tend to be associated with religious apparitions.[2] Such a practice is rooted in Saint John's sincerely held beliefs in the Catholic Church. Practices which are

[2] Catholic Dictionary, https://www.catholicculture.org/culture/library/dictionary/index.cfm?id=33836 (accessed September 20, 2024); Natalie Davis Miller, *"The Grotto: A place for all faiths"*, NDWorks, March 1, 2022, https://ndworks.nd.edu/news/the-grotto-is-open-to-all/ (accessed September 20, 2024).

sincerely held and rooted in religious belief fall under constitutional protections of RLUIPA as well as the Free Exercise Clause. *Wisconsin v. Yoder,* 406 U.S. 205, 215-16 (1972). Accordingly, the practice of building a grotto would constitute as religious exercise protected under RLUIPA, which the lower appellate court seemingly recognized. *See, Frederic,* 2023 Ky. App. LEXIS 100, at *15-16.

All the same, the appellate court's opinion discounts entirely the burden imposed to Saint John's religious exercise in using its property to build a shrine. As the court indicates in its opinion, complete denial of the grotto will not hinder Saint John's overall religious beliefs, thus its exercise is not substantially burdened. *Id.* By disregarding the specific religious significance in Saint John's requested land use, the court misapplied the appropriate substantial burden analysis under 42 U.S.C. § 2000cc(a)(1) The lower court determined complete denial of Saint John's land-use requests did not impose a substantial burden on its religious exercise, as it was not "inconsistent" to Saint John's beliefs as a whole. *Frederic,* Ky. App. LEXIS 2023, at *16. The lower court relied on an unpublished decision from the Sixth Circuit in *Living Water Church of God v. Charter Tp. Of Meridian ("Living Water")*, which provided, "there is no substantial burden when, although the action encumber[s] the practice of religion, it d[oes] not pressure the individual to violate his or her religious beliefs." 258 Fed. Appx. 729, 734 (6th Cir. 2007) (citing to *Lyng v. Nw. Indian Cemetery Protective Ass'n.,* 485 U.S. 439, 449 (1988)).

In *Living Water,* a local church sought an extended special use permit from the township to add on to an elementary school building it operated on its property. 258 Fed. Appx. 729. The challenged ordinance required a special use permit for constructing buildings larger than 25,000 square feet. *Id.* The school building was 10,925 square feet, and the church sought to expand it to 28,500 square feet. The township ultimately granted a special use permit for the use of a school

building in a nonresidential zone but denied construction to the extent it exceeded 25,000 square feet. *Living Water,* 258 Fed. Appx. 729. On appeal, the Sixth Circuit reversed the lower district court's ruling that the township's regulations imposed a substantial burden on the church's religious exercise, thus violating RLUIPA. *Id.* The court addressed different interpretations of the substantial burden provision from its sister courts', wherein it declined to ultimately set a bright line test. *Id.* Instead, the court offered the following inquiry: "does the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar the religious institution from using its property in the exercise of its religion?" *Id.,* at 737. Under this framework, the court found while the township's denial burdens the church to some degree, it has not substantially burdened the church to forego religious beliefs or choose between those beliefs and benefits. *Id.* at 740.

The standard articulated in *Living Water* has been criticized by other courts, notably the Sixth Circuit, for its application specifically to religious land-use under RLUIPA. In a subsequent decision, *Livingston Christian Schools v. Genoa Charter Tp.* ("*Livingston*"), 858 F.3d 996 (6th Cir. 2017), the Sixth Circuit declined to follow the *Living Water's* analysis, when applying RLUIPA's substantial burden provision to a religious land use matter. The *Livingston* court specifically stated that *Living Water's* test as having "fail[ed] to take into account circumstances that other circuits have considered in the substantial-burden inquiry..." *Id.* at 1003. As explained by the Fourth Circuit, "[e]ven government action preventing a religious organization from building a church will rarely, if ever, force the organization to *violate* its religious beliefs, because the organization can usually locate its church elsewhere." (emphasis added), *Bethel World Outreach Ministries v. Montgomery County Council,* 706 F.3d 548, 555 (4th Cir. 2013); *see Westchester,* 504 F.3d at 348-49 (finding "in the context of land use, a religious institution is not ordinarily faced

with the...dilemma of choosing between religious precepts and government benefits."). Therefore, "requiring a religious organization to prove that a land use regulation pressured it to violate its beliefs would be tantamount to eliminating RLUIPA's substantial burden protection in the land use context." *Id.* at 555.

Notwithstanding, the appellate court in this matter relied on another case, *Episcopal Student Foundation v. City of Ann Arbor,* 341 F.Supp.2d 691, 701 (E.D. Mich. 2004), to expand on its analysis. *Frederic,* Ky. App. LEXIS 2023, at *15-17. Under *Episcopal Student,* the court asserted in relevant part it recognized "two categories of alleged substantial burden upon the free exercise of religion." 341 F.Supp.2d at 701. The first category articulated that a substantial burden will generally exist where compliance with government regulations violates religious beliefs, and noncompliance may result in criminal sanctions or the loss of a significant government benefit or privilege. *Id.* By contrast, the second category reasoned that courts will be far more reluctant finding a substantial burden exists 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." *Id.* at 701. Yet, this analysis reflects the same tests aforementioned courts refer to as being "tantamount to eliminating RLUIPA's substantial burden in the land use context." *Bethel World,* 706 F.3d, at 555.

Courts have found that line of inquiry, including considering whether government action forced a religious institution to violate its religious beliefs, is more applicable to claims specific to institutionalized persons. *Id.* When addressing *Living Water,* the Sixth Circuit noted "[o]ther circuits have persuasively explained that land-use regulations do not typically compel plaintiffs to 'violate their beliefs' in the way that, for example, prison rules might require an inmate to engage in conduct that goes against his or her religious tenets." *Livingston,* 858 F.3d at 1003-1004 (citing

to *Bethel World,* 706 F.3d, at 555-57). This is because in such context, the government "can employ its absolute control over prisoners (like its absolute control over eligibility for unemployment benefits) to pressure a person to violate his religious beliefs." *Bethel World,* at 555. Conversely, the Government lacks that equivalent "absolute control" over litigants in land use circumstances. *Id.*

Instead, courts have applied a substantial pressure test where "a plaintiff can succeed on a substantial burden claim by establishing that a government regulation puts substantial pressure on it to *modify* its behavior." (emphasis added). *Id.* at 555-56; *see Livingston,* 858 F.3d at 1004 ("land-use regulations can prohibit a plaintiff from engaging in desired religious behaviors, causing some courts to define a substantial burden as something that places significant pressure on an institutional plaintiff to modify its behavior."); *see also Fortress Bible Church,* 734 F. Supp. 2d, at 501 (citing *Westchester,* 504 F.3d at 349) (In the context of land use disputes, "courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior, rather than government action that forces the religious entity to choose between religious precepts and governmental benefits.").

Conversely, the appellate court's ruling in this case determined no substantial burden existed under the framework of whether local regulations *forced* Saint John to *violate* its beliefs. Such a ruling should be overturned as it is based on legal factors which are misrepresentative of substantially burdened religious land use.

## III. The Complete Prohibition of Saint John's Proposed Land-Use Imposed a Substantial Burden Under 42 U.S.C. § 2000cc(a)(1)

In this case, the lower court's denial of Saint John's permit and variance requests completely prevent it from using its property to build a religious grotto. While Saint John maintains its church on the property, the court should analyze substantial burden on the exercise that is being

restricted. It is well-established amongst courts that a substantial burden "must impose a significantly great restriction or onus upon [religious] exercise." *Int'l Church of the Foursquare Gospel v. City of San Leandro,* 673 F.3d 1059, 1067 (9th Cir. 2011); *see, Livingston,* 858 F.3d at 1003. Thus, the nature of denying a religious practice is significant in weighing whether a substantial burden has been imposed. *See, Fortress Bible Church,* 694 F.3d at 219 (arbitrary and capricious application of land use regulation "bolstered" a substantial burden claim); *see also Bethel World,* 706 F.3d at 558 (finding it "significant" that the government completely prevented applicant from building any church on its property).

In *Westchester Day Sch. v. Village of Mamaroneck,* when addressing whether a village imposed a substantial burden to a religious school, the Second Circuit found it relevant the nature of the village's denial and whether it was conditional or absolute. 504 F.3d at 352. Specifically, the village denied the school's application to add another building onto its property. *Id.* In its analysis, the court determined that denial of the school's plan was "less likely to constitute a substantial burden" when it left open the possibility of approval through resubmission with modifications designed to address cited problems. *Id.* at 349. Whereas a substantial burden was more likely to exist following "definitive rejection of the same plan." *Id.* Here, the lower court's ruling amounted to an outright denial, without any conditions nor possibility to modify Saint John's proposals. Complete prohibition of Saint John's proposed land use is all the more substantial when applying other factors courts have recognized as relevant for land-use matters as well.

Recently in *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp.,* the Sixth Circuit found a township's decision to treat a prayer trail as the equivalent of a church building—thereby requiring plaintiffs to apply for a special-use permit—constituted a substantial burden. 82 F.4th 442, 449-50 (6th Cir. 2023). Catholic Healthcare acquired forty acres of undeveloped wooded

property in 2020, where it subsequently made plans to create a prayer trail with 14 displays of the "Stations of the Cross." *Id.* at 444-45. Under local rules for churches, the township notified Catholic Healthcare it required special land use and site plan approval for its trail. Catholic Healthcare ultimately filed suit alleging violations of RLUIPA's substantial burden provision. *Id.* Under the standard of review for a preliminary injunction, the Sixth Circuit found Catholic Healthcare suffered a substantial burden as it had no reason to expect an onerous review process for an accessory structure under local ordinance. *Id.* Moreover, the court found "[p]laintiffs undisputedly have suffered [substantial delay, uncertainty, and expense] after two years of administrative proceedings and considerable expense, they remain unable to place the religious displays on their trail." *Id.* at 449.

Further, in Judge Clay's Concurring Opinion, he applied whether the Catholic Healthcare had a feasible alternative location from which it can carry on its mission. Judge Clay found Catholic Healthcare acquired wooded property with the intention to develop it into a prayer campus, including a trail. *Id.* at 453. Moreover, Judge Clay considered relevant the nature of the property at issue, and that Catholic Healthcare already owned the property. *Id.*

As referenced above, the Sixth Circuit also declined to follow *Living Water's* analysis in *Livingston Christian Schools v. Genoa Charter Twp.*, 858 F.3d 996 (2017). In *Livingston*, Livingston Christian Schools ("LCS") entered into a lease with Brighton Nazarene Church to operate its religious school on the church's property. *Id.* Shortly thereafter, the township required LCS to obtain an amended special-use permit before the property could be used as a school. Despite recommended approval by the local planning commission, the township board denied LCS's special-use permit. The board's reasons included traffic concerns, inconsistency with single-family residential zoning of the surrounding area, and Brighton Nazarene Church's history

of noncompliance with the zoning ordinance. *Id.* at 999. Thus, LCS filed suit against the township alleging it violated RLUIPA's substantial burden provision. *Id.*

When considering whether the township violated such provision, the Sixth Circuit noted *Living Water* failed to take into account relevant circumstances including "whether a religious institution has ready alternatives to carry out its mission, or whether the religious institution's inability to use available land was self-imposed." *Id.* at 1003. In addition to those circumstances cited by the court, it relied on several other factors considered relevant by other circuits, in determining whether LCS was substantially burdened by the township. *Id.* at 1004-1005. The other factors referred to included "whether the religious institution will suffer 'substantial delay, uncertainty, and expense'" and "whether there is evidence that the municipality's decision-making process was arbitrary, capricious, or discriminatory." *Id.* at 1004 (quoting *Westchester,* 504 F.3d, at 352).

Among those factors, one regularly applied to religious land use matters is whether the burden imposed was "self-imposed.", or whether there was "reasonable expectation" of receiving approval for the requested land use. *Id.* at 1003; *see Bethel World,* 706 F.3d at 558; *see also Canaan Christian Church v. Montgomery County,* 29 F.4th 182, 194 (4th Cir. 2022) (quoting *Andon, LLC v. City of Newport, News,* 813 F.3d 510, 516 (4th Cir. 2016)) ("A burden is self-imposed…where a religious organization 'knowingly entered into a contingent lease or purchase agreement for a nonconforming property.'"); *Adam Community Center v City of Troy,* 381 F.Supp.3d 887 (E.D. Mich. 2019). A hardship will not be considered a substantial burden because it was "not imposed by governmental action altering a legitimate, pre-existing expectation that a property could be obtained for a particular land use." *Canaan Christian Church,* at 194 (quoting *Andon,* 813 F.3d at 515).

Factors such as the degree of delay, cost, and uncertainty, as well as the reasonable expectation to obtaining land use approval; are particularly relevant to Saint John's proposed land use. And such factors should be applied in the substantial burden analysis under RLUIPA as they reflect congressional intent and align with a majority of more recently established legal precedent. Here, Saint John had a reasonable expectation for its proposed grotto being approved. To require it build the grotto at an alternative location at this time would undeniably require substantial delay, uncertainty, and expense. *See, Westchester,* 504 F.3d at 349 ("When the school has no ready alternatives, or where the alternatives require substantial 'delay, uncertainty, and expense,' a complete denial of the school's application might be indicative of a substantial burden."). Similar to *Catholic Healthcare*, Saint John acquired property for the purpose of establishing a catholic church specifically under the mission of Our Lady of Lourdes. Since March 2021, Saint John has pursued constructing its grotto honoring Our Lady of Lourdes, to the expense of considerable delay, costs, and uncertainty. More importantly, the City granted Saint John's requests to build a grotto, on the condition that a portion of land be deeded to the Church. *Frederic,* Ky. App. LEXIS 2023 at *2. Saint John subsequently received the deeded property in 2021. *Id.* Yet, after over three years of administrative and court proceedings with considerable cost, Saint John remains incapable of placing its religious grotto on its property. *See Catholic Healthcare,* 82 F.4th at 449. The complete denial of Saint John's proposed grotto is compounded by the expectation that the property could be utilized for this purpose, as evidenced by prior approvals and administrative actions. As detailed above, Saint John's case closely parallels other instances where other courts have found substantial burdens under RLUIPA such as *Catholic Healthcare* and *Westchester.*

## CONCLUSION

Under RLUIPA's substantial burden provision, religious exercise must be protected, particularly in land-use contexts where religious organizations seek to develop or utilize property for faith-based purposes. The complete denial of Saint John's permits for such religious structures imposes a significant burden on the free exercise of religion, contrary to RLUIPA's protections. The lower court's ruling is not only incorrect but, is contrary to congressional intent and broad legal precedent. Courts must adhere to RLUIPA's strict scrutiny standard, ensuring that religious practices, even those not deemed central to faith by outsiders, are shielded from unnecessary governmental interference.

Accordingly, this Court should recognize that denying Saint John's the ability to construct its grotto substantially burdens its religious exercise under RLUIPA. Thus, the lower court's ruling should be overturned.

Respectfully submitted by,

Dated: October 17, 2024

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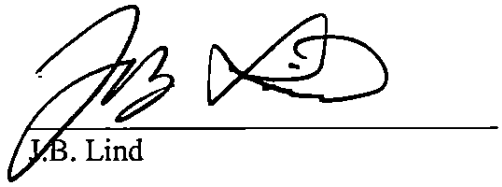
CERTIFICATE OF COMPLIANCE

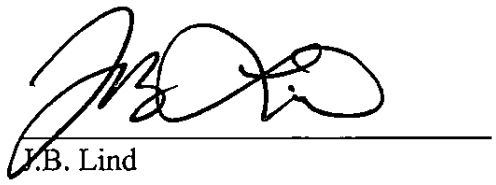
As required under the Supreme Court of Kentucky's Rules of Appellate Procedure ("RAP"), this amicus brief complies with the word limit of RAP 34(B)(4). Pursuant to RAP 31(G)(5) and RAP 15 in applying exclusions from word and page limits, this brief contains 5,035 words.



J.B. Lind

CERTIFCIATE OF SERVICE

I certify that on October 17, 2024, a true and accurate copy of the BRIEF OF *AMICUS CURIAE* CROSS & CROWN CITY CHURCH IN SUPPORT OF APPELLANT, was served upon the following: counsel for Appellees Joel and Elizabeth Frederic, Christopher Wiest, Esq., 25 Town Center Blvd., Suite 104, Crestview Hills, KY 41017 (chris@cwiestlaw.com), and counsel for Appellee the City of Park Hills, KY, Daniel Braun, Esq., 526 Greenup St., Covington, KY 41011 (braunnkylaw@aol.com), via electronic mail at the email-addresses listed and via first class U.S. mail; and served upon Honorable Patricia M. Summe, Chief Circuit Judge, Kenton County, via first U.S. mail at the Kenton County Justice Center, 230 Madison Ave., Sixth Floor, Covington, KY 41011; and upon the Clerk, Kentucky Court of Appeals, at 669 Chamberlin Ave., Suite B, Frankfort, KY 40601.



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