# Supreme Court of Kentucky

No. 2024-SC-0006

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

On Discretionary Review
from the Court of Appeals
v. No. 2022-CA-0867

Appeal from Kenton Circuit Court
No. 21-CR-766

JOEL FREDERIC, et al., *Appellees*

## AMICUS BRIEF OF THE COMMONWEALTH OF KENTUCKY

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## INTRODUCTION

A religious organization wants to build a relatively small outdoor shrine next to its church building so that its congregants can pray and meditate there when they go to mass. And the city wants to let that happen. Its land-use board approved a zoning variance for the shrine. But the Court of Appeals reversed. In its view, the city board lacked authority to grant the zoning variance. And critically, the court held that the organization's statutory religious-exercise rights do not change that. According to the court, not building the shrine may make it harder for the organization and its congregants to practice their faith, but that is not inconsistent with their religious beliefs. Building the shrine, in the court's view, is not important enough to the organization's religious exercise.

The Commonwealth, through Attorney General Russell Coleman, files this amicus brief to explain why the Court of Appeals' holding cannot be right. Courts do not weigh how important a religious practice is. They do not sit in judgment of an organization's beliefs. Their role is to assess only whether the organization's religious exercise is burdened and whether that burden is large or not. They assess the burden *on* the religious exercise, not the importance of the religious exercise itself. The Court of Appeals erred in concluding otherwise.

## STATEMENT OF THE CASE

**1.** This case turns on whether denying a zoning variance is a substantial burden on religious exercise under the Religious Land Use and Institutionalized

Persons Act (RLUIPA). Just like the General Assembly enacted our state Religious Freedom Restoration Act (RFRA) in response to a court decision, *Gingerich v. Commonwealth*, 382 S.W.3d 835 (Ky. 2012), the federal RFRA and its "sister statute," RLUIPA, were enacted in response to a court decision, *Ramirez v. Collier*, 595 U.S. 411, 424 (2022). The goal was "to ensure 'greater protection for religious exercise than is available under the First Amendment'" as interpreted in *Employment Division v. Smith*, 494 U.S. 872 (1990). *Ramirez*, 595 U.S. at 424 (citation omitted).

Under RLUIPA, a land-use regulation cannot impose "a substantial burden on the religious exercise" of a religious organization, unless it satisfies strict scrutiny. 42 U.S.C § 2000cc(a)(1). In other words, when it comes to zoning, the government must make an individualized exception to avoid substantially burdening religious exercise, unless it has a very good reason not to do so. That makes the key question here whether denying the religious organization a variance to build its shrine imposes a substantial burden on its religious exercise.

**2.** The organization in question is the Missionaries of Saint John the Baptist, which runs a Catholic church in the City of Park Hills in Kenton County. The church was originally built in 1930 and was bought by Saint John in 2015. R. at 198. Like most Catholic churches, the church is named after a patron saint: Our Lady of Lourdes. The name refers to a believed Marian apparition. Catholics believe that Mary, the mother of Jesus, miraculously appeared to Saint Bernadette

in a grotto (or cave) in Lourdes, France. So to honor its church's patron saint and provide a "quiet place for meditation and worship" for its "existing parishioners primarily before and after mass," Saint John decided to build a modest shrine next to its church. R. at 117, 206. The shrine would include a patio, walking path, retaining wall, and statues of Mother Mary and Saint Bernadette. R. at 183.

In 2021, Saint John applied for a variance from Park Hill's zoning ordinance to build the shrine. R. at 117. Over the objection of some neighbors, the city board granted that variance. Those neighbors, the Frederics, appealed to circuit court. There, Saint John and the city board argued that denying the variance would violate RLUIPA because the zoning law "substantially interfere[d] with religious exercise" and there was "'no compelling reason' to prevent" construction of the shrine. R. at 203. The circuit court affirmed without reaching the RLUIPA issue. R. at 233.

The Frederics appealed again. This time, the Court of Appeals reversed. It held that the city board did not have statutory authority to grant the variance. *Frederic v. City of Park Hills Bd. of Adjustment*, No. 2022-CA-0867, 2023 WL 8286391, at *4 (Ky. App. Dec. 1, 2023). And it held that RLUIPA did not change that. In the court's view, there was no substantial burden on Saint John's religious exercise because the zoning ordinance neither pressured Saint John to violate its

religious beliefs nor was "inherently inconsistent" with those beliefs. *Id.* at *6–7. Saint John then moved for discretionary review, which this Court granted.

## ARGUMENT

Respectfully, the Court of Appeals got it wrong. It doesn't matter how important building the shrine is to Saint John's religious beliefs. What matters under RLUIPA is whether prohibiting Saint John from building the shrine is a substantial burden on its religious exercise. Of course, it burdens that exercise. *See* 42 U.S.C. § 2000cc-5(7). So the only question is whether the burden is substantial.

**1.** In the prison context, a substantial burden under RLUIPA is often easy to spot. For example, a prison policy prohibiting a Muslim inmate from growing a short beard "easily" qualifies as a substantial burden because the inmate cannot engage in the religious exercise without facing "serious disciplinary action." *Holt v. Hobbs*, 574 U.S. 354, 361 (2015). But the land-use context can be different. For example, when a zoning ordinance prohibits a religious organization from building a church, "the organization can usually locate its church elsewhere." *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 555 (4th Cir. 2013). So the substantial-burden inquiry is more nuanced in the land-use context. Prohibiting a particular religious exercise in a specific location does not by itself necessarily constitute a substantial burden.

That's why courts have considered different factors in determining whether a burden is substantial in the land-use context. The Sixth Circuit is a good example. It considers three factors to ensure that a burden has "'some degree of severity' and [is] 'more than an inconvenience.'" *Cath. Healthcare Int'l, Inc. v. Genoa Charter Township*, 82 F.4th 442, 449 (6th Cir. 2023) (quoting *Livingston Christian Schs. v. Genoa Charter Township*, 858 F.3d 996, 1003 (6th Cir. 2017)). Those factors are whether the organization has a "feasible alternative location," whether the land-use regulation causes it "substantial 'delay, uncertainty, and expense,'" and whether the burden is self-imposed. *Livingston Christian Schs.*, 858 F.3d at 1004 (citation omitted). The factors, however, are not a checklist for a religious organization to meet. They are factors to consider based on the circumstances.

For instance, the second factor is usually relevant only if there is a feasible alternative location. In that circumstance, a burden could still be substantial if using that alternative location would cause significant delay, uncertainty, and expense. *See Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) ("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." (citation omitted)); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005). But if there are no feasible alternatives, and the land-use restriction prohibits the desired religious exercise, then there is little

need to consider any delay, uncertainty, or expense. Then the situation is akin to the prison context, in which a prohibition of religious exercise coupled with a sufficient repercussion for a violation "easily" qualifies as a substantial burden—unless the burden is self-imposed. *Holt*, 574 U.S. at 361.

So understood, the Sixth Circuit's three factors are a useful guide. If a religious organization can easily use another location to engage in its desired exercise, then the burden on it usually will not be substantial. But if there are no alterative locations or those locations pose significant problems, then the burden is substantial—that is, unless self-imposed. That last factor makes sense given the usual availability of multiple locations on which to build. For example, if a religious organization purchased land knowing the zoning code did not allow it to build a church there, then the zoning code would not have imposed the burden. The organization would have done that to itself. *See Andon, LLC v. City of Newport News*, 813 F.3d 510, 515 (4th Cir. 2016). It should have picked a different location.

**2.** There's no need for the Court to reinvent the wheel. In determining whether there is a substantial burden under RLUIPA in the land-use context, it should apply the relevant factors that courts like the Sixth Circuit have used. Because of the complete prohibition on building the shrine given the Court of Appeals' decision, the factor considering any delay, uncertainty, and expense would be relevant only if there were feasible alternative locations. That means

the two key factors here are whether there are any feasible alternative locations for Saint John to build its shrine and whether Saint John imposed the burden on itself. Consider both relevant factors, starting with the latter.

First, the record shows that Saint John did not impose the burden on itself. For starters, Saint John bought the 1930 historic church building in 2015. R. at 198. It used the church for six years before applying for the variance to build its outdoor shrine honoring its patron saint and providing its congregants space to meditate and worship along with going to mass. R. at 117, 206. So this is not a situation in which a religious organization bought land intending to use it for a specific religious purpose that it knew was prohibited. But even putting that aside, nothing suggests that Saint John should have known it could not get a variance to build the shrine. For that, look no further than the circuit court affirming the city board's grant of the variance. R. at 233. At a minimum, that means Saint John had a good-faith belief that it could build its shrine. So the burden was not self-imposed.

Second, turn to whether Saint John has other feasible locations. The record all but resolves that factor too. Saint John wants to build the shrine so that its congregants can meditate and worship there "before and after mass." R. at 117, 206. That means the desired religious exercise depends on the shrine being built near the existing church building. Otherwise, Saint John's congregants cannot use the shrine along with going to mass. So any feasible alternative location

would have to be within a short walk of the church. In other words, because of the existing historic church building that Saint John has used for six years combined with the purpose of the shrine, the possible feasible locations for the shrine are limited. The existing church and the purpose of the shrine make the area unique. *See Cath. Healthcare Int'l*, 82 F.4th 442, 453 (Clay, J., concurring) (finding no feasible alternative location because of the uniqueness of the property).

Given the Court of Appeals' decision interpreting the zoning ordinances and the board's power, on this record there does not appear to be a feasible alternative location within close walking distance. According to the lower court, the shrine could be built only on an arterial street—a street serving "the major movements of traffic within and through the community." *Frederic*, 2023 WL 8286391, at *3–4. And the road on which the church sits is a collector street, not an arterial one. *Id.* at 4. Plus, from looking at the record evidence, it appears that the same is true of the other roads in close walking distance. *See* R. at 134 (showing aerial map). That means the record seems to confirm that there are no feasible alternative locations for Saint John to build its shrine for its desired religious exercise of its congregants meditating and worshiping there before and after mass.

To be sure, the record perhaps leaves some factfinding to be desired. And that gives the Court two viable options. It could vacate and remand to the circuit court to determine whether there are any feasible alternative locations to build

the shrine. Or it could simply conclude based on the record that there are not.[1] Either way, the Court of Appeals erred in holding that denying Saint John a variance for its shrine does not impose a substantial burden on its religious exercise.

**3.** Consider for a moment how big that error was. The Court of Appeals held that, even if prohibiting Saint John from building the shrine makes the practice of its religion "somewhat more difficult," there is no substantial burden because the ordinance "is not inherently inconsistent with" its beliefs. *Frederic*, 2023 WL 8286391, at *7. Let's unpack that. In saying the ordinance is not inconsistent with Saint John's beliefs, the court can only mean that the effect of the ordinance is not inconsistent. So the court determined that not building the shrine may make it "somewhat more difficult" for Saint John and its congregants to practice their faith, but that ultimately is not a big deal because they have other available

[1] If the Court vacates and remands—assuming the circuit court determines that there are no feasible alternative locations or that any such locations would impose too much delay, uncertainty, and expense—then that also lets the lower court first decide whether denying the variance passes strict scrutiny. But if the Court itself concludes that there are no feasible alternatives and so finds a substantial burden, then denying the variance does not pass strict scrutiny—not on this record. Indeed, the city has already conceded that it had no compelling reason to prevent construction of the shrine. R. at 203. It already rejected the Frederics' arguments about increased traffic and safety. *See* R. at 225. And nothing in the record suggests that the shrine will cause increased traffic or endanger safety.

forms of religious exercise. Or put differently, building the shrine so its congregants can meditate and worship there before and after mass is not important enough to Saint John's religious beliefs.

That religious judgment was not the Court of Appeals to make. RLUIPA itself defines "religious exercise" to include "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) (emphasis added). It expressly tells courts not to weigh how "central" a religious practice is to the religion. And the U.S. Supreme Court has expressly interpreted RLUIPA not to care whether there are "alternative means of practicing religion" or whether the claimant can "engage in other forms of religious exercise." *Holt*, 574 U.S. at 361–62.

So the importance of a particular religious exercise is irrelevant to whether there is a substantial burden. For good reason: "it is not within the judicial function and judicial competence to inquire" into the importance of a belief. *Thomas Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981). "Courts are not arbiters of scriptural interpretation." *Id.* They have "no business" addressing whether a religious belief is reasonable. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). Such judgments are off limits for courts—and rightly so. We do not want courts trying to make such judgment calls about matters of people's faith. In short, the Court of Appeals erred badly in holding that denying Saint John the variance was not a substantial burden on its religious exercise.

**4.** One last point. In holding that the lower court erred, this Court would not open the door to churches or religious organizations getting around zoning ordinances left and right. The inquiry under RLUIPA is claimant specific. So this Court's holding would necessarily turn on the specific facts here. Saint John wants to build a shrine next to its existing historic church building, which it has occupied for years. Saint John did not impose the land-use burden on itself. It had a good-faith belief it could get the variance. And Saint John has or likely has no feasible alternative locations given the specific purpose of its religious exercise: to let its congregants use the shrine before and after mass. All that says nothing about other religious organizations and their land-use requests.

Besides, RLUIPA is meant "to ensure 'greater protection for religious exercise than is available under the First Amendment.'" *Ramirez*, 595 U.S. at 424 (citation omitted). It provides "very broad protection for religious liberty." *Holt*, 574 U.S. at 356 (citation omitted). The whole point is for governments to make individualized exceptions when there is a substantial burden, unless there is a very good reason not to.

## CONCLUSION

The Court should vacate and remand to the circuit court, or it should simply reverse.

Respectfully submitted,

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## WORD-LIMIT CERTIFICATE

This brief complies with the word limit of RAP 34(B)(4) because, excluding the parts of it exempted by RAP 15(D) and 31(G)(5), it contains 2,788 words.