

No. 25-1131

IN THE
Supreme Court of the United States

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.,

Petitioner,

v.

JOEL FREDERIC, *et ux.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

**BRIEF OF THE PRIORY OF SAINT ALBERT
THE GREAT AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

M. KEVIN COSTELLO
Counsel of Record
MING-YIN CHANG
VINSON & ELKINS LLP
555 Mission Street, Suite 2000
San Francisco, CA 94105
(415) 979-6900
kcostello@velaw.com

MICHAEL A. HEIDLER
VINSON & ELKINS LLP
200 West Sixth Street,
Suite 2500
Austin, TX 78701

Counsel for Amicus Curiae

392409



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION & SUMMARY OF ARGUMENT...	2
ARGUMENT.....	7
I. Petitioner’s Desire to Build The Shrine at its Proposed Site—not Elsewhere—is Religious Exercise Protected by RLUIPA	7
II. Under RLUIPA’s Plain Text and Structure, Prohibiting Construction of Petitioner’s Shrine Constitutes a “Substantial Burden.” ...	11
III. Lower Courts Have Created a Patchwork of Contradictory Multifactor Tests to Determine “Substantial Burdens.”.....	15
CONCLUSION	20

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Apache Stronghold v. United States</i> , 145 S. Ct. 1480 (2025).....	3, 11
<i>Bethel World Outreach Ministries v.</i> <i>Montgomery Cnty. Council</i> , 706 F.3d 548 (4th Cir. 2013).....	6, 18
<i>Braxton v. United States</i> , 500 U.S. 344 (1991).....	7, 19
<i>Henry Schein, Inc. v. Archer & White Sales, Inc.</i> , 586 U.S. 63 (2019).....	14
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015).....	4, 7, 10-14
<i>Int’l Church of Foursquare Gospel v.</i> <i>City of San Leandro</i> , 673 F.3d 1059 (9th Cir. 2011).....	6, 18
<i>Livingston Christian Schools v.</i> <i>Genoa Charter Twp.</i> , 858 F.3d 996 (6th Cir. 2017).....	5, 6, 12, 15-17
<i>Springfield Roman Cath. Bishop of Springfield</i> <i>v. City of Springfield</i> , 724 F.3d 78 (1st Cir. 2013).....	6, 17

Cited Authorities

	<i>Page</i>
<i>Thai Meditation Ass'n of Alabama, Inc. v. City of Mobile, Alabama</i> , 980 F.3d 821 (11th Cir. 2020)	6, 18, 19
<i>Westchester Day Sch. v. Vill. of Mamaroneck</i> , 504 F.3d 338 (2d Cir. 2007)	5, 6, 17
<i>Yellowbear v. Lampert</i> , 741 F.3d 48 (10th Cir. 2014)	13

Statutes and Other Authorities

42 U.S.C. § 2000cc	5
42 U.S.C. § 2000cc(a)(1)	3, 7, 12
42 U.S.C. § 2000cc-3(e)	14
42 U.S.C. § 2000cc-3(g)	14
42 U.S.C. § 2000cc-5(7)	3, 11
146 Cong. Rec. S7774	2, 5, 8, 11
17 <i>The Oxford English Dictionary</i> (2d ed. 1989)	13
Marion Amberg, <i>Mary's Miracles: A Traveler's Guide to Catholic America</i> (2022)	9, 10

Cited Authorities

	<i>Page</i>
R. Bernstein, <i>Abandoning the Use of Abstract Formulations in Interpreting RLUIPA's Substantial Burden Provision in Religious Land Use Cases</i> , 36 COLUM. J.L. & ARTS 283 (2013)	6
René Laurentin, <i>Bernadette Speaks</i> (2000).....	9, 10
John T. McGreevy, <i>Catholicism and American Freedom: A History</i> (2003).....	9
Catherine M. Odell, <i>Those Who Saw Her</i> (2023).....	9, 10
Antonin Scalia & Bryan Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2012).....	12

INTEREST OF AMICUS CURIAE¹

The Priory of St. Albert the Great (St. Albert's) is the house of formation for the Province of the Most Holy Name of Jesus (Province), which is a province of the Order of Friars Preachers—a Catholic mendicant order commonly known as the Dominican Order. Located on five acres in Oakland, California, St. Albert's houses a large community of Dominican friars, including student brothers, cooperator brothers,² deacons, and priests, some of whom serve as members of the faculty and staff of the Dominican School of Philosophy & Theology in Berkeley, where the brothers study. St. Albert's is principally dedicated to an eight-year process of spiritual, intellectual and apostolic formation of young friars, most of whom will be ordained as Roman Catholic priests. From St. Albert's, many friars go on to serve in parishes, campus ministries, and special apostolates across the Province of the Most Holy Name of Jesus, which is the territory that encompasses the Dominican Order's ministry in much of the continental Western United States, Alaska, and Mexicali, Mexico. Friars from the Province also teach in Catholic universities across the U.S., and in Italy, Switzerland and Germany.

1. Counsel of record for all parties—and Respondents themselves—received notice at least 10 days prior to the due date of *amicus curiae's* intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus* and its counsel, has made a monetary contribution to its preparation or submission.

2. Cooperator brothers are solemnly professed religious who not ordained as deacons or priests, but who “cooperate” in the Dominican Order's overall mission of preaching.

As a Catholic religious community, St. Albert’s engages in a wide range of religious exercise on and around its property. This includes—without limitation—the celebration of Holy Mass, chanting of the Divine Office, Eucharistic Adoration, individual prayer, community meetings, the formation and education of young friars,³ and the housing, feeding, and the caretaking of friars at all stages of their lives. Sustaining these operations—and the physical space on which they take place—requires a variety of conduct that is subject to federal, state, and local land use regulations. The Religious Land Use and Institutionalized Persons Act (RLUIPA) codifies important protections that safeguard St. Albert’s freedom to engage in such protected religious conduct. So, too, of other religious organizations and communities like it. To that end, St. Albert’s respectfully requests that the Court grant certiorari to prevent dilution of the protections that RLUIPA affords.

INTRODUCTION & SUMMARY OF ARGUMENT

When Congress passed RLUIPA in 2000, it understood that “[c]hurches and synagogues cannot” exercise their “core First Amendment right to assemble for religious purposes” absent “[t]he right to build, buy, or rent” a “physical space adequate to their needs and consistent with their theological requirements.” 146 Cong. Rec. S7774 (2000) (Joint Statement of Senators Hatch and Kennedy). The latter being “indispensable” to the former, *id.*, RLUIPA flatly prohibits the imposition or implementation of land use regulations in any “manner that imposes a

3. This activity also occurs on property adjacent to St. Albert’s, which the Province controls.

substantial burden” on a religious organization’s “religious exercise” unless it satisfies strict scrutiny, 42 U.S.C. § 2000cc(a)(1). “Religious exercise” is defined broadly to encompass “*any* exercise of religion”—including, crucially, “[t]he use, *building*, or conversion of real property for the purpose of religious exercise.” 42 U.S.C. § 2000cc-5(7) (emphases added). Any form of exercise, even if not “compelled by, or central to” the religious system in question, may qualify. *Id.*

The facts of this case straightforwardly implicate RLUIPA’s protections. Petitioner seeks to build a shrine on a hillside parcel of land that stands adjacent to the church it operates in Park Hills, Kentucky. *See* Pet. App. 4a. The purpose of the shrine is to honor the Virgin Mary and her reported apparitions in Lourdes, France. *See id.* Petitioner’s conscience compels the construction of *this* shrine in *this* location—not another shrine in another location. *See* Pet. 5-6. By any measure—but especially under RLUIPA’s broad definition—that constitutes religious exercise. *See* 42 U.S.C. § 2000cc-5(7).

A Kentucky zoning ordinance bars Petitioner from building the shrine. *See* Pet. App. 27a. That imposes a substantial burden. Indeed, “[a]s a matter of ordinary meaning,” an ordinance that prevents a religious organization from building a shrine in accordance with its beliefs “does not just burden that exercise substantially,” but “completely.” *Apache Stronghold v. United States*, 145 S. Ct. 1480, 1488 (2025) (Gorsuch, J., dissenting from denial of certiorari).

Under these facts, the Kentucky Supreme Court should have found that the ordinance must either

satisfy strict scrutiny or give way. Unfortunately, it held that Petitioner failed to satisfy its initial burden of demonstrating a substantial burden on religious exercise. *See* Pet. App. 27a. It did so not through a straightforward application of RLUIPA’s plain text, but instead through a convoluted multifactor test that considered whether an “alternative location” existed for construction of the proposed shrine, whether preventing construction would impose “substantial delay, uncertainty, and expense,” whether petitioner “imposed a substantial burden upon itself,” and whether the municipality’s decision-making process “was arbitrary, capricious, or discriminatory.” *Id.* at 24a-25a.

This multifactor test runs afoul of the Court’s RLUIPA precedents. The first factor it considers is whether an alternative location exists for the religious exercise in question. *See* Pet. App. 24a-25a. On this factor, the Kentucky Supreme Court found that because alternative locations may exist in which Petitioner could build a shrine, it is not a substantial burden for the zoning ordinance to bar construction of this shrine in the location that Petitioner desires. *See id.*

The Court has never allowed for this sort of second-guessing of religious convictions. Petitioner’s proposed location for Petitioner’s shrine is not arbitrary, but rather is imbued with religious significance. *See* Pet. 1, 5. It is thus of no relevance—as the Court made plain in *Holt v. Hobbs*—that there remain “other ways” for Petitioner to “exercise [its] religion.” 574 U.S. 352, 360 (2015). What matters is whether *this* form of religious exercise has been substantially burdened. *See id.*

Moreover, RLUIPA neither provides nor implies the sort of multifactor test applied here. *See generally* 42 U.S.C. § 2000cc. The test is a judicial invention that conflicts with the broad protections that RLUIPA is supposed to afford religious exercise. Far from empowering believers to worship, build, and conduct themselves in a manner “consistent with their theological requirements,” this line of reasoning opens the door for courts—not to mention cities, zoning commissions, and hecklers—to second-guess how believers engage in religious exercise. 146 Cong. Rec. S7774.

The Kentucky Supreme Court certainly erred by applying this multifactor test, but it hardly did so alone. Indeed, the opinion below is only the latest in a long line of similar judicial missteps. The court did not create the test it applied here, nor was it even an early adopter. Rather, as the opinion below makes plain, the test comes from the Sixth Circuit’s decision in *Livingston Christian Schools v. Genoa Charter Twp.*, 858 F.3d 996 (6th Cir. 2017). *See* Pet. App. 22a (“This leaves us to look to the federal circuit courts for guidance, and we agree with the Frederics’ assertion that the Sixth Circuit’s jurisprudence as delineated in [*Livingston*] should be our polestar.”)

Further, *Livingston* is far from the first lower court decision to recast RLUIPA’s straightforward prohibition as a complex, multifactor test. That lineage extends back to at least 2007, when the Second Circuit in *Westchester Day Sch. v. Vill. of Mamaroneck* delineated five factors to be considered—some, but not all of which, overlap with *Livingston*.⁴ 504 F.3d 338 (2d Cir. 2007).

4. Like *Livingston*, *Westchester* considered: (1) the feasibility of an alternative location, *see id.* at 352; (2) the prospect of substantial

All told, the question of how to determine what constitutes a substantial burden remains a source of chaos in the lower courts. Since RLUIPA's enactment in 2000, courts have conjured up at least six different multifactor tests to determine whether a restriction amounts to a substantial burden.⁵ These tests apply a patchwork of different factors, many of which conflict with each other, rendering it difficult for litigants and lower courts to determine when an impingement rises to the level of "substantial burden." See R. Bernstein, *Abandoning the Use of Abstract Formulations in Interpreting RLUIPA's Substantial Burden Provision in Religious Land Use Cases*, 36 Colum. J.L. & Arts 283, 305 (2013) ("The various opinions of the courts of appeals offer a pastiche

delay, uncertainty, and expense, *see id.* at 349, and (3) whether the decision was arbitrary, capricious, or discriminatory. *See id.* at 349-52. It also considered two factors not applied in *Livingston*: (4) whether denial of the proposed religious exercise was "conditional" or "absolute"; and (5) whether there was a "close nexus," between the affected conduct and the affected person or institution's "need" to engage in such conduct. *Id.* at 349. It did not consider whether the religious person or organization's burden was self-imposed which *Livingston* did. Compare *id.* at 349-52 with *Livingston*, 858 F.3d at 1004.

5. See *Springfield Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 96-97 (1st Cir. 2013) (considering at least three factors); *Westchester*, 504 F.3d at 349-52 (considering at least five factors); *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 557-58 (4th Cir. 2013) (considering at least four factors); *Livingston*, 858 F.3d at 1003-1011 (considering at least seven factors); *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067-1069 (9th Cir. 2011) (considering at least four factors); *Thai Meditation Ass'n of Alabama, Inc. v. City of Mobile, Alabama*, 980 F.3d 821, 831-32 (11th Cir. 2020) (considering at least six factors).

of RLUIPA interpretative principles from which it is quite difficult to glean a coherent picture.”).

This status quo is unworkable. That lower courts have neutered RLUIPA’s straightforward religious liberty protections through a series of atextual multifactor tests is trouble enough. But worse, lower courts have not even been able to agree on which factors should be considered in determining whether something is a substantial burden—much less how they should be balanced.

The Court should end this discord. Resolving conflicts “among the United States courts of appeals and state courts concerning the meaning of provisions of federal law” is a “principal purpose for which” this Court exercises its certiorari jurisdiction. *Braxton v. United States*, 500 U.S. 344, 347 (1991). Absent definitive guidance, confusion concerning what constitutes a “substantial burden” under RLUIPA is likely to persist. This case presents an ideal opportunity for the Court to provide such guidance.

ARGUMENT

I. Petitioner’s Desire to Build The Shrine at its Proposed Site—not Elsewhere—is Religious Exercise Protected by RLUIPA.

To satisfy its initial burden under RLUIPA, Petitioner must demonstrate that the imposition or application of a land use regulation substantially burdens religious exercise. *See* 42 U.S.C. § 2000cc(a)(1). The first step of this inquiry is defining the religious exercise on which the regulation impinges. *See Holt*, 574 U.S. at 360-61. Only then can it be discerned whether the impingement rises to the level of substantial burden.

Correctly defining the religious exercise in question is crucial towards determining whether a substantial burden exists. If, for example, the religious exercise in question is the construction of a generalized place of worship on a plot of land, there remain plenty of restrictions that a government could place on the precise location, size, color, and design of the proposed construction without creating a substantial burden. But if the place of worship must adhere to certain specifications in order to be “consistent” with the builders’ “theological requirements,” the corpus of non-substantially-burdensome restrictions shrinks. 146 Cong. Rec. S7774. And if government restrictions flatly prevent the builders from constructing a place of worship that meets their theological requirements, then the burden is complete—not just substantial.

The opinion below demonstrates the consequences of getting the religious exercise definition wrong. The Kentucky Supreme Court rushed past this initial inquiry, devoting only one sentence to it. It defined Petitioner’s desired religious exercise as “building a grotto that honors the Virgin Mary’s appearance at a grotto in Lourdes, France.” Pet. App. 22a. This framing is too general. Petitioner seeks not just to build a grotto, but to build it “into the hill” that sits on the “plot of land that it acquired next to its church.” Pet. 1, 5. These details carry religious significance.

Petitioner’s grotto is meant to honor a specific devotion that many Catholics—including Petitioner—have to a series of apparitions that took place in Lourdes, France in 1858. Adherents believe that between February 11 and July 16 of that year, the Virgin Mary appeared to a young girl named Bernadette Soubirous 18 times in a rock grotto

“located just at the bottom of” a “small mountain” on the outskirts of town. Catherine M. Odell, *Those Who Saw Her* 102 (2023). During the thirteenth apparition, the Virgin Mary reportedly told Bernadette: “Go tell the priests to have a chapel built here.” René Laurentin, *Bernadette Speaks* 75 (2000). Bernadette relayed this instruction to a local parish priest, Abbé Dominique Peyramale. *See id.* Peyramale later spearheaded construction of the chapel at the apparition site, which was consecrated in 1866. *See id.* at 294-95.

The Lourdes apparitions have long been of significant religious importance to Catholics in the United States. Catholic newspapers in New Orleans and New York reported on the apparitions as early as October 1858. *See* John T. McGreevy, *Catholicism and American Freedom: A History* 24-25 (2003). Devotion to “Our Lady of Lourdes” spread quickly thereafter, and American Catholics—joining believers from around the world—began to make pilgrimages to the grotto where Bernadette reported her apparitions, as well as the church that was built at her directive. *See* Odell, *Those Who Saw Her, supra*, at 117-19. Today, “an estimated five million pilgrims” visit Lourdes each year. *Id.* at 118.

Devotion to the Lourdes apparitions in the United States has spawned not just pilgrimages, but a proliferation of shrines—constructed as grottos—throughout the country. *See, e.g.,* Marion Amberg, *Mary’s Miracles: A Traveler’s Guide to Catholic America* 71-74, 82-84, 126-29, 148-49, 231-36, 238-43 (2022) (discussing Lourdes grottos in Maryland, Indiana, Kansas, Michigan, and North Carolina). A recurring feature of these shrines is their proximity to churches, often built “just outside” the

church. *Id.* at 241. This is unsurprising. In Lourdes, the church that Abbé Peyramale constructed is immediately proximate to the grotto, pursuant to what the Virgin Mary reportedly told Bernadette: “Go tell the priests to have a chapel built here.” Laurentin, *Bernadette Speaks, supra*, at 75. So, too, of the shrines built in honor of that apparition. Petitioner’s desire to do the same here “is by no means idiosyncratic.” *Holt*, 574 U.S. at 362.

Another crucial element of Petitioner’s design is that the proposed grotto “be built into the hill” next to the church. *Id.* at 5; *see also* Pet. App. 139-43a. Like the proximity to the church, this detail also carries religious significance. The Lourdes grotto—after which Petitioner’s design is patterned—is “located just at the bottom of” a “small mountain” and sits in a space that has been “hollowed out by centuries of water erosion.” Odell, *Those Who Saw Her, supra*, at 102. By choosing to build into the hill, as opposed to a flat, standalone site, Petitioner seeks to replicate the original grotto where the apparitions took place.

These details of the proposed shrine are part and parcel of Petitioner’s religious exercise. It is not mere aesthetic preference or Roarkean stubbornness that compel them to build the grotto next to the church and into the hill. It is, rather, a religious devotion to the Marian apparitions at Lourdes—which, for Catholics, ranks as “the most popular healing shrine in the world.” Odell, *Those Who Saw Her, supra*, at 118.

The Kentucky Supreme Court’s failure to incorporate these aspects of the proposed build into its definition of the “religious exercise” affected here improperly dilutes

what counts as “religious exercise” under RLUIPA. The statute “define[s] ‘religious exercise’ capaciously” so that *all* aspects of exercise are subject to protection. *Holt*, 574 U.S. at 358. That includes not just the freedom to “build[]” in the abstract, 42 U.S.C. § 2000cc-5(7), but also adherents’ right to build in a manner “consistent with their theological requirements,” 146 Cong. Rec. S7774. The desired placement of the Petitioner’s shrine—steeped in religious significance—readily qualifies.

The Court should take this opportunity to instruct lower courts as to the importance of properly defining “religious exercise” before proceeding to the question of “substantial burden.” Particularly in cases like this one—where the exercise in question involves construction—the “religious exercise” definition can carry significant weight. To be sure, there may be cases where the precise location of a proposed construction carries no religious significance, in which case reasonable location restrictions may not necessarily impose a substantial burden. But where, as here, the precise location of the intended construction *does* carry significance, restrictions that prevent construction in the desired location are much more likely to impose such a burden.

II. Under RLUIPA’s Plain Text and Structure, Prohibiting Construction of Petitioner’s Shrine Constitutes a “Substantial Burden.”

A regulation that prohibits an organization from engaging in a form of religious exercise might ordinarily be understood to “completely”—not just “substantially”—burden that exercise, *Apache Stronghold*, 145 S. Ct. at 1488 (Gorsuch, J., dissenting from denial of certiorari),

yet the Kentucky Supreme Court here held that a flat prohibition on the construction of Petitioner’s desired shrine did not constitute a “substantial burden,” Pet. App. 27a. It reached this conclusion through application of the multifactor test the Sixth Circuit established in *Livingston*. See *id.* at 22a. The *Livingston* test allows governments to avoid a “substantial burden” finding if there remain alternative forms of religious exercise that the government has not prohibited. See *Livingston*, 858 F.3d at 1004 (“One factor, which the district court properly considered here, is whether the religious institution has a feasible alternative location from which it can carry on its mission.”). Drawing on this reasoning, the Kentucky Supreme Court mused that no substantial burden existed here because Petitioner could build “a smaller grotto or shrine” in “other feasible alternative locations.” Pet. App. 25a.

That holding is wrong. It conflicts with RLUIPA’s text, structure, and purpose. It imports the very reasoning this Court unanimously rejected in *Holt* and renders the statute’s sweeping protections all-but-ineffectual.

RLUIPA provides that governments may not impose or implement land use regulations in a manner that creates a “substantial burden” on religious exercise. 42 U.S.C. § 2000cc(a)(1). The statute does not define “substantial” in this context, but its ordinary meaning can be readily discerned.⁶ A “substantial” burden rates as something less than a complete prohibition, but more than a slight

6. See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (noting that the “most fundamental semantic rule of interpretation” is that “[w]ords are to be understood in their ordinary, everyday meanings” unless “the context indicates that they bear a technical sense”).

impingement—it is a burden of an “ample or considerable amount.” 17 *The Oxford English Dictionary* 67 (2d ed. 1989); see also *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.) (“[T]he term ‘substantial,’ . . . doesn’t mean complete or total, so a ‘substantial burden’ need not be a complete or total one.”).

The ordinance in question here foists not just an ample or considerable burden on Petitioner’s construction plans, but a complete bar. Yet, the opinion below provides that Petitioner has failed to meet its burden. See Pet. App. 27a. These facts cannot be reconciled. If a burden “need not be a complete or total one” to rate as “substantial,” then a burden that *is* total *must* qualify. *Yellowbear*, 741 F.3d at 55.

The Kentucky Supreme Court attempts to square this circle by reasoning that the burden here is not substantial because Petitioner may build different shrines in different locations—just not this shrine in this location. See Pet. App. 25a. But this Court unanimously rejected such reasoning in *Holt*. There, the Court applied RLUIPA to a case where an incarcerated man sought to grow a beard in accordance with his Islamic faith, but the Arkansas Department of Correction maintained a policy forbidding long facial hair. 574 U.S. at 361. The government argued that the grooming policy did not create a substantial burden because the man could practice his religion in other ways—through a prayer rug, a prescribed diet, and the observance of religious holidays, for example. See *id.* at 355-56. The Court rejected this alternatives-based approach and held that 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.” *Id.* at 361–62. *Holt*’s reasoning applies all the same here.

Moreover, the structure of RLUIPA simply provides no support for the notion that a ban on one means of religious exercise is not substantial simply because *another* means has not been banned. To the contrary, it includes a broad-construction mandate providing that the statute “shall 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.” 42 U.S.C. § 2000cc-3(g); *see also Holt*, 574 U.S. at 358 (emphasizing RLUIPA’s “expansive protection for religious liberty”). Congress could hardly have been clearer about the scope of the protection here.

If the drafters wanted to create a gaping, alternatives-based exception to the otherwise expansive protections that RLUIPA affords, it would have included as much in the statute. They did not. When Congress declines to make such “exceptions” explicit, this Court has properly declined to “engraft” its “own onto the statutory text.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 70 (2019).

Finally, RLUIPA makes plain that where a regulation’s application imposes a substantial burden on religious exercise, the onus to remove that burden rests on the *government*, not the religious adherent. Section 2000cc-3(e) provides that “[a] government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise[.]” 42 U.S.C. § 2000cc-3(e).

Put otherwise, it is not the Petitioner’s responsibility to draw up alternative construction plans that avoid the throngs of regulation, but rather the government that must come up with less restrictive alternatives.

Simply put, the text and structure of RLUIPA afford no basis for courts to tolerate the prohibition of one form of religious exercise just because the government permits other forms. Any regulation that imposes a substantial burden against any form of religious exercise must satisfy strict scrutiny. Notwithstanding the broad scope of this protection—plainly spelled out in the text—the Kentucky Supreme Court failed to apply it. The Court should grant certiorari to correct this serious error.

III. Lower Courts Have Created a Patchwork of Contradictory Multifactor Tests to Determine “Substantial Burdens.”

The multifactor test applied in the opinion below came from the Sixth Circuit’s decision in *Livingston*, which the Kentucky Supreme Court expressly adopted as its “polestar.” Pet. App. 22a. The *Livingston* test for what constitutes a substantial burden under RLUIPA involves weighing at least seven factors. 858 F.3d at 1003-11. These include: (1) whether the religious institution has a feasible alternative location, *see id.* at 1004; (2) whether the institution will suffer substantial delay, uncertainty, and expense, *see id.*; (3) whether the burden was self-imposed, *see id.*; (4) whether plaintiffs were unable to carry out the “core function of their religious activities” due to the “inadequacy of their current facilities,” *id.* at 1006; (5) whether the burden should be “evaluated at the present moment, not based on speculation,” *id.* at 1007;

(6) the additional travel distance caused by the denial, *see id.* at 1008; and (7) whether the plaintiff could easily access similar properties in a neighboring, less-restrictive jurisdiction, *see id.* at 1011.

This unwieldy framework is not merely complex—it is internally incoherent. For example, the “self-imposed” factor requires that courts look backward and assess whether the religious adherent knew of the applicable restrictions before acquiring the land in question. *Id.* at 1004. Yet, the “present moment” factor insists that the burden “must be evaluated at the present moment, not based on speculation about whether such a burden might arise in the future.” *Id.* at 1007. These two temporal frames sit in obvious tension: one scrutinizes the religious adherent for what it knew in the past, while the other prevents it from anticipating the harms likely to materialize in the future.⁷

Similarly, it is unclear how courts are supposed to weigh these factors if the relatively burdensome restrictions on one parcel of land force a religious adherent to move to a less restrictive site. The first, sixth, and seventh factors compel inquiry into whether the institution can relocate or find alternative sites—the idea being that substantial burdens somehow become less substantial if the adherent packs up and leaves. *See id.* at 1004, 1008, 1011. Yet, the fourth factor considers whether adherents were forced to cease the “core function[s] of their religious activities” as the result of government regulations. *See id.*

7. Likewise, the “delay, uncertainty, and expense” factor seems to invite courts to assess future harms flowing from the current denial, *id.* at 1004, yet the “present moment” factor forecloses “speculation” about future burdens, *id.* at 1007.

at 1006. If onerous regulations force a religious institution to temporarily halt its operations and reallocate time and resources towards relocation to a friendlier jurisdiction, the test does not explain in which direction these factors are supposed to cut.

Simply put, the *Livingston* test is atextual, difficult to apply, and prone to inconsistent results. This, alone, would suffice for the Court to step in and provide guidance. Yet, the confusion does not end with the Sixth Circuit. Rather, the various circuit courts have splintered into at least *six* different camps—each applying a different standard that generates different outcomes.

The First Circuit has coalesced around three factors. *See Springfield Roman Cath. Bishop of Springfield*, 724 F.3d at 96–97. These include: (1) whether the land use restriction was imposed “arbitrarily, capriciously, or unlawfully,” *id.* at 96; (2) whether the regulation subjects the religious organization to a process “designed to reach a predetermined outcome contrary to the group’s requests,” *id.* and (3) whether the restriction was the result of “religious discrimination,” *id.* at 97.

The Second Circuit, by contrast, weighs five factors. *See Westchester*, 504 F.3d at 349-52. These include: (1) the feasibility of an alternative location, *see id.* at 352; (2) the prospect of substantial delay, uncertainty, and expense, *see id.* at 349; (3) whether the decision was arbitrary, capricious, or discriminatory, *see id.* at 350-51; (4) whether denial of the proposed religious exercise was “conditional” or “absolute,” *id.* at 349; and (5) whether there was a “close nexus,” between the affected conduct and the adherent’s “need” to engage in such conduct, *id.* at 349.

The Fourth Circuit considers four factors, some—but not all—of which overlap with those in the Second Circuit’s five-factor test. *See Bethel World Outreach Ministries*, 706 F.3d at 557-58. The Fourth Circuit’s factors include: (1) whether the religious adherent reasonably expected to build in furtherance of religious exercise on the land at the time of acquisition, *see id.* at 557; (2) the burden associated with the “delay, uncertainty, and expense” of leaving the land to go elsewhere, *id.*; (3) whether the denial was conditional or absolute, *see id.* at 558; and (4) whether current facilities “inadequately serve [the religious adherent’s] needs,” *id.*

The Ninth Circuit’s framework also entails four factors. *See Int’l Church of Foursquare Gospel*, 673 F.3d at 1067-1069. These include: (1) whether the requested land use is required to service the religious adherent’s “unique core beliefs,” such as the belief that all members of a religious community can congregate in one place to engage in “joyous corporate worship,” *id.* at 1069; (2) the availability of other “objectively reasonable alternatives,” *id.* at 1067-68, (3) the “delay, uncertainty, and expense,” associated with a prohibition on the requested exercise, *id.* at 1068; (4) whether the restriction on proposed religious exercise is “complete,” *id.*

Finally, the Eleventh Circuit test applies six factors. *See Thai Meditation Ass’n of Alabama, Inc.*, 980 F.3d at 831-32. These include: (1) whether the religious adherent has “a genuine need for new or more space—for instance, to accommodate a growing congregation or to facilitate additional services or programming;” (2) the extent to which the restriction “effectively deprives the plaintiffs of any viable means by which to engage in protected religious

exercise;” (3) whether there is a “nexus” between the “coerced or impeded conduct and the plaintiffs’ religious exercise”; (4) whether the government’s decisionmaking process reflected “any arbitrariness of the sort that might evince animus or otherwise suggests that the plaintiffs have been, are being, or will be (to use a technical term of art) jerked around”; (5) whether the denial in question was “final”; and (6) whether the burden “is properly attributable to the government” or “self-imposed.” *Id.*

Simply put, the lower courts are in disarray as to what constitutes a substantial burden under RLUIPA. This Court principally exercises its certiorari jurisdiction for precisely this sort of problem. *See Braxton*, 500 U.S. at 347 (“A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.”). It should do so here to give the lower courts much-needed guidance as to what Congress meant by “substantial burden.”

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

M. KEVIN COSTELLO
Counsel of Record

MING-YIN CHANG
VINSON & ELKINS LLP
555 Mission Street, Suite 2000
San Francisco, CA 94105
(415) 979-6900
kcostello@velaw.com

MICHAEL A. HEIDLER
VINSON & ELKINS LLP
200 West Sixth Street,
Suite 2500
Austin, TX 78701

Counsel for Amicus Curiae