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 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

MICHAEL A. HEIDLER
VINSON & ELKINS LLP
200 West 6th Street,
Suite 2500
Austin, TX 78701

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

Attorneys for Amicus Curiae

398417

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INTEREST OF AMICUS CURIAE[1]

The Priory of Saint 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 a seven-year process of spiritual, intellectual, human, 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, 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.

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—

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1. 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 are not ordained as deacons or priests, but who "cooperate" in the Dominican Order's overall mission of preaching.

the celebration of Holy Mass, chanting of the Divine Office, Eucharistic Adoration, individual prayer, community meetings, the formation and education of young friars, and the housing, feeding, and caretaking of friars at all stages of their lives.[3] 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 the freedom of St. Albert's to engage in such protected religious conduct. So, too, does RLUIPA protect other religious organizations and communities like St. Albert's. To that end, St. Albert's respectfully requests that the Court reverse the decision of the Supreme Court of Kentucky 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 substantial burden" on a religious organization's "religious exercise" unless it satisfies strict

3. These activities also occur on property adjacent to St. Albert's, which the Province controls.

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 municipal 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 where 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 its 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.*

Further, it is not—and has never been—for courts to decide that a purported alternative suffices to satisfy a

religious claimant's conscience. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). When the Kentucky Supreme Court concluded that "feasible alternative locations" existed for construction of the grotto, it considered only whether a smaller grotto could be built in another location on Petitioner's property. Pet. App. 25a. That analysis may encompass what the *court* deems important in an alternative, but it neglects *Petitioner's* convictions.

Strikingly absent from the Kentucky Supreme Court's decision is any consideration of whether a smaller grotto built in another location would cohere "with [Petitioner's] theological requirements" to the same extent as the proposed design. 146 Cong. Rec. S7774. This is curious. So long as a proposed land use amounts to religious exercise, RLUIPA protects the claimant's freedom to engage in the specific "use, building, or conversion" that it "intends"—not its freedom to settle for a judicially imposed, second-best alternative. 42 U.S.C. § 2000cc-5(7)(B). Yet the Kentucky Supreme Court would force Petitioner into such a pivot without first examining whether any supposed alternatives would just as readily accomplish Petitioner's intended religious exercise. Indeed, its decision failed to consider whether the details of Petitioner's proposed design carried religious significance, or whether any such significance would be lost if Petitioner were forced to build elsewhere.

In lieu of the claimant-centered inquiry that RLUIPA demands, the Kentucky Supreme Court instead applied

a multifactor test that is neither stated nor implied in the statute's text or legislative history. This test—a complete judicial invention—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," it 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.

Amicus respectfully requests that the Court correct this error. It should not only hold that the multifactor balancing test the Kentucky Supreme Court applied was erroneous, but it should also give proper guidance to lower courts evaluating whether a land use regulation imposes a substantial burden under RLUIPA. Proper guidance here involves two steps.

First, the Court should emphasize the importance of correctly—and precisely—defining the religious exercise at issue. As discussed in greater detail below, the Kentucky Supreme Court's analysis on this first step was deficient. It defined the religious exercise at issue as the mere construction of a generic Lourdes grotto. *See* Pet. App. 22a ("The action [Petitioner] wishes to take—building a grotto that honors the Virgin Mary's appearance at a grotto in Lourdes, France—constitutes a religious exercise."). This highly generalized definition fails to account for several religiously significant details in Petitioner's current proposal, such as the proposed grotto's proximity to the church and its construction into an adjacent hill. *These details constitute religious exercise* and are thus entitled to protection under

RLUIPA. Yet, the Kentucky Supreme Court would have Petitioner abandon them in favor of a "smaller shrine" in an "alternative location[]," which would render adherence to these details impossible. Pet. App. 25a.

Second, the Court should clarify that where land use regulations flatly prevent a claimant from engaging in an intended form of religious exercise, the burden imposed is substantial—regardless of whether there are "other ways" for the claimant to practice its faith. *Holt*, 574 U.S. at 360. In so holding, it should explain that courts may not second-guess claimants who intend to use real property for religious exercise by assuming that, for example, alternative construction sites or modes of conduct are equally viable means of fulfilling the claimant's sincere religious convictions. Put otherwise, courts must not substitute their own judgment for the claimant's as to whether a purported alternative to the intended conduct is "just as good religiously[.]" Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 Va. L. Rev. 1759, 1794 (2022). It is the *claimant*—not the court—that must determine whether alternative forms of religious exercise are equally "consistent with [its] theological requirements." 146 Cong. Rec. S7774. If the purported alternatives are not "just as good religiously" from the claimant's point of view, then prohibitions on the intended form of exercise must be deemed substantial burdens.

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 imperative. Without a correct understanding of the exercise on which the land use regulation impinges, it is difficult to determine whether the impingement is a substantial burden or—as the Kentucky Supreme Court opined here—a "mere inconvenience[.]" Pet. App. 25a. This first question can thus prove dispositive.

For example, if a claimant seeks only the construction of a generalized place of worship on a nondescript plot of land, many aspects of the proposed construction—such as its proposed location, size, color, and design—may not carry religious significance. In such cases, reasonable governmental regulations may attach to these features without creating a substantial burden, so long as the regulations do not impose excessive expense or other difficulty on the claimant seeking to build. That said, if the place of worship must adhere to certain specifications to be "consistent" with the

claimant's "theological requirements," the corpus of non-substantially-burdensome restrictions shrinks. 146 Cong. Rec. S7774. And if government restrictions flatly prevent the claimant from constructing a place of worship that meets its 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 just 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 shepherdess named Bernadette Soubirous eighteen 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, which took place on March 2, 1858, 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.* News of the apparitions quickly spread, not just locally,

but throughout France—and later, the world. Peyramale 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. Devotion to "Our Lady of Lourdes" started as early as October 1858, when Catholic newspapers in New Orleans and New York began reporting on the apparitions. *See* John T. McGreevy, *Catholicism and American Freedom: A History* 27-28 (2003). Devotees believe not only that the Virgin Mary appeared at the Lourdes grotto, but also that water from the grotto has healing properties. *See* Odell, *Those Who Saw Her*, *supra*, at 118. Indeed, believers suffering from illness, injury, and other afflictions have reported miraculous cures after drinking or bathing with Lourdes water. *See id.*

Ever since news of the apparitions spread, American Catholics—joining believers from around the world—have made pilgrimages to Lourdes. *See id.* at 117-19. There, they wash in the water, pray at the grotto, and attend Mass at the church that Catholic authorities built in response to the directive that Bernadette relayed. *See id.* Today, an "estimated five million pilgrims" visit Lourdes each year. *Id.* at 118. It is one of only a few Marian apparition sites that have been recognized not just by the local Catholic bishop, but also by the Vatican.[4]

4. *See The Ultimate Guide to Marian Apparitions*, Ascension (July 21, 2025), https://ascensionpress.com/blogs/articles/the-ultimate-guide-to-marian-apparitions.

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); Adrienne Nock Ambrose, *"Lourdes of the Southwest": The Borderlands Transformation of a Nineteenth-Century French Shrine*, *in American Patroness: Marian Shrines and the Making of US Catholicism* 21, 21-25 (Katherine Dugan & Karen E. Park eds., 2024) (discussing a Lourdes grotto in Texas). A recurring feature of these shrines is their proximity to churches, often built "just outside" the church. Amberg, *Mary's Miracles*, *supra*, at 241. This is unsurprising. In Lourdes, the church that Abbé Peyramale helped build 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. Pet. 5; *see also* Pet. App. 139a-44a. 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; *see also* Laurentin, *Bernadette Speaks*, *supra*, at 20 (describing

the apparition site in Lourdes as a "grotto" that had been "hollowed out at" the "foot" of a "rocky cliff" of a mountain, which stretched about "thirty feet" above the ground). 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 compels it 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* forms 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 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 Petitioner's intended location are much more likely to impose such a burden.

In sum, the Kentucky Supreme Court's failure to define the precise religious exercise at issue suffices for reversal here. Its decision should have accounted not just for Petitioner's desire to build a Lourdes grotto, but also for the religiously significant details of its proposed design. Otherwise, any subsequent burden analysis will necessarily understate the burden imposed. Indeed, the purported alternatives advanced by the Kentucky Supreme Court—such as building a "smaller grotto or shrine" in "other feasible alternative locations"—would prevent Petitioner from building its grotto next to its church and into the hillside. Pet. App. 25a. The Court should reverse and require that the Kentucky Supreme Court consider all impacted aspects of Petitioner's religious exercise.

II. Under RLUIPA's Plain Text and Structure, Prohibiting Construction of Petitioner's Shrine Constitutes a "Substantial Burden."

The Kentucky Supreme Court also erred by applying the substantial burden test that the Sixth Circuit devised in *Livingston Christian Schools v. Genoa Charter Township*. This multifactor test allows governments to

evade a substantial burden designation if the court decides that alternatives exist to the claimant's preferred form of religious exercise. *See Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1004-05 (6th Cir. 2017). Crucially, the *Livingston* test does not consider whether the purported alternatives equally cohere with the claimant's theological convictions, nor whether anything of religious significance to the claimant would be lost if the claimant were forced to abandon its preferred form of exercise. *See generally id.* As such, it leaves courts and governments with broad discretion to second-guess claimants' religious beliefs.

The Court should reject this framework. In its place, it should adopt a claimant-centered substantial burden test that considers whether the purported alternatives left by land use regulations are equally religiously satisfactory *from the claimant's point of view.* If not, then the burden imposed on the claimant should be regarded as substantial. This way, the test appropriately protects *all* sincere forms of religious exercise—which is what RLUIPA requires. *See* 42 U.S.C. § 2000cc-5(7).

A. The *Livingston* Substantial Burden Test That the Kentucky Supreme Court Applied Is Unworkable.

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 paradoxical conclusion through application of the *Livingston* test, which allows governments to avoid a "substantial burden" finding if there remain alternative forms of religious exercise that the government has not prohibited. *See id.* at 22a; *see also 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 exists 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.[5] A "substantial" burden rates as something less than a complete prohibition, but more than a slight impingement—it is a burden of an "ample or considerable amount." Substantial, 17 *The Oxford English Dictionary*

5. *See* Antonin Scalia & Bryan A. 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").

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 holds 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 only reason the Kentucky Supreme Court can square this circle is that *Livingston* tolerates it. Under *Livingston*, virtually any prohibition on a proposed construction can avoid the substantial burden designation if, in the court's judgment, there is "a feasible alternative location" such that the claimant could undertake construction elsewhere. 858 F.3d at 1004. "Feasible" does not contemplate whether moving the project to another site would detract from the religious significance of the proposed construction, nor whether any religiously important design details would be lost in the process. *Id.* It gives no consideration to whether the original site better adheres to the claimant's theological convictions than the alternatives. *See id.* As such, it allows governments and judges to superimpose their own ideas as to whether other locations would suffice to satisfy the claimant's religious beliefs.[6] Applying this reasoning, the Kentucky Supreme

6. This Court has long recognized that it "is not within the judicial ken" to make such determinations regarding litigants' religious "beliefs or practices[.]" *Hernandez*, 490 U.S. at 699.

Court concluded that the burden here is not substantial because Petitioner could simply build other shrines in other locations—just not this shrine in this location. *See* Pet. App. 25a.

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. *See* 574 U.S. at 360-61. 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, 361-62. 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 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 RLUIPA's drafters wanted to create a gaping, alternatives-based exception to the otherwise expansive protections that the statute affords, then they would have included as much. 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 claimant. 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 claimant's responsibility to draw up alternative construction plans that avoid the thicket 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 on any form of religious exercise must satisfy strict scrutiny. The *Livingston* test that the Kentucky Supreme Court applied undercuts this broad grant of protection, which RLUIPA's text spells out plainly. To rectify this error—and prevent future errors of a similar sort—the Court should condemn the *Livingston* standard and admonish lower courts against applying it.

B. RLUIPA Requires a Substantial Burden Test That Considers Whether—From the Claimant's Perspective—Purported Alternatives to the Intended Course of Conduct Equally Satisfy the Claimant's Religious Beliefs.

The substantial burden analysis must consider the claimant's understanding of its own theological convictions and whether any purported alternatives would equally suffice to meet those convictions. The rationale for adopting such a test is as follows: RLUIPA protects "any" form of religious exercise a claimant might wish to undertake. 42 U.S.C. § 2000cc-5(7). Claimants may—and often do—wish to engage in multiple forms of religious exercise. Yet as this Court has held, the claimant does not lose RLUIPA's protections with respect to one form of exercise that a regulation impinges merely because it may also be disposed towards another, less-regulated form. *See Holt*, 574 U.S. at 361-62 ("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.").

For example, a claimant may feel religiously inclined to undertake construction of two shrines on two different plots of land that it owns—one shrine on Plot A and another on Plot B. Each proposed construction constitutes a distinct form of religious exercise. A regulatory scheme permitting the shrine on Plot A but forbidding the one on Plot B would fail under the Court's holding in *Holt*, for RLUIPA does not permit the foreclosing of one form of exercise merely because "other forms" remain available. *Id.* The statute protects "any" form of religious exercise,

which, in this example, means *both*. 42 U.S.C. § 2000cc-5(7).

Nor, crucially, could a court sustain this regulatory scheme under RLUIPA on the grounds that—in its view—the claimant's religious convictions should be satisfied if the claimant built a shrine (or both shrines) on Plot A only. Civil courts may not opine on whether a claimant's "religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). They "are not arbiters of scriptural interpretation[,]" *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981), nor are they qualified to "resolve ecclesiastical questions" or other "controversies over religious doctrine and practice[,]" *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). If a claimant holds a sincere religious belief that one shrine must be constructed on Plot A and another must be constructed on Plot B, "[i]t is not within the judicial ken to question" it. *Hernandez*, 490 U.S. at 699.

To faithfully apply RLUIPA's protection of "any exercise of religion" without improperly enlisting civil courts in the business of resolving theological matters, the substantial burden inquiry must adopt the claimant's perspective. That means that any purported alternatives to the impinged land use must be equally satisfactory to the claimant seeking to exercise its religion. So, if—from the claimant's perspective—there is no religious difference between building on Plot A and Plot B, a regulation that limits construction to Plot A may not necessarily impose a substantial burden. But if the claimant has sincere religious reasons for desiring the two constructions on the

two separate plots, a scheme preventing as much would impose a substantial burden.

C. The Kentucky Zoning Ordinance Foists a Substantial—if Not Complete—Burden on Petitioner.

Here, the religious exercise at issue is the Lourdes grotto that Petitioner intends to build next to its church. As discussed, the intended placement and design of the grotto are imbued with religious significance, for they seek to replicate the grotto in Lourdes, France, to which Petitioner has a religious devotion. So, the intended religious exercise is not merely the construction of a general shrine, but a specific grotto in a particular location. The zoning ordinance at issue prevents Petitioner from undertaking the construction.

The Kentucky Supreme Court opined that the zoning ordinance does not impose a substantial burden because Petitioner could simply build a "smaller shrine" in an "alternative location[.]" Pet. App. 24a-25a. Not so. If Petitioner built another grotto in another location, it would lose many of the religiously significant details present in the current proposed design.

Accordingly, the Kentucky zoning ordinance prevents Petitioner from engaging in its intended form of religious exercise, and the purported alternatives that the Kentucky Supreme Court referenced would not be the same from Petitioner's perspective. That imposes a substantial—if not complete—burden on Petitioner. Under RLUIPA, the ordinance must either satisfy strict scrutiny or give way so that Petitioner can build its intended shrine.

CONCLUSION

The Court should reverse the judgment of the Supreme Court of Kentucky.

Respectfully submitted,

MICHAEL A. HEIDLER
VINSON & ELKINS LLP
200 West 6th Street,
Suite 2500
Austin, TX 78701

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

Attorneys for Amicus Curiae