No. 25-1131

IN THE

Supreme Court of the United States

MISSIONARIES OF ST. JOHN THE BAPTIST, INC.,
Petitioner,

v.

JOEL FREDERIC AND ELIZABETH FREDERIC,
Respondents.

On Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF OF HILLSDALE COLLEGE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Hillsdale College is a small Christian liberal arts college. Since its founding in 1844, the College, "grateful to God for the inestimable blessings resulting from the prevalence of civil and religious liberty and intelligent piety in the land, and believing that the diffusion of sound learning is essential to the perpetuity of these blessings," has provided an education to "develop the minds and improve the hearts of the students."[2] A "conspicuous aim" of the College is "to teach by precept and example the essentials of the Christian faith and religion."[3]

Hillsdale College resides on a nearly 400-acre campus located in Hillsdale, Michigan. The College also maintains other properties, such as its Washington, D.C. campus, the G. H. Gordon Biological Station on Michigan's Rockwell Lake, and the Blake Center for Faith and Freedom in Somers, Connecticut. Freedom in the use of these and other properties is vital for the College's pursuit of its mission. The Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000), serves as an important safeguard of that freedom for Hillsdale and many of its sister religious colleges and universities.

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[1] No party's counsel authored any part of this brief, and nobody other than *amicus* and its counsel made any monetary contribution intended to fund its preparation or submission.

[2] Hillsdale Coll., *Founding Documents and Resolutions: Articles of Association*, https://perma.cc/W62W-STQF.

[3] *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Kentucky Supreme Court offered two reasons for its conclusion that a land use restriction totally barring a religious nonprofit from building a shrine on its land was not a "substantial burden" for purposes of the Religious Land Use and Institutionalized Persons Act (RLUIPA). One of these reasons is contradicted by the clear command of Congress as embodied in RLUIPA's text. The other is just as clearly contradicted by this Court's case law. Neither reason provides support for the decision below.

The Kentucky Supreme Court took the view that, though the land use restriction at issue clearly burdens Petitioner's religious exercise, that burden is not "severe" enough to trigger RLUIPA's protections. But the word "severe" appears nowhere in the statute. Nor is it a permissible interpretation of the word "substantial." That word has a wide range of meanings, which only context can narrow. And here, the most important context is a "rule of construction" that Congress itself provided: RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [its] terms … and the Constitution." 42 U.S.C. § 2000cc-3(g). Under that rule, the best interpretation of "substantial"—because the one most protective of religious exercise—is one recognized in this Court's case law: the term means "actual" as opposed to "seeming or imaginary." *Victor v. Nebraska*, 511 U.S. 1, 19-20 (1994). Critically, this interpretation would avoid two errors to which the Kentucky Supreme

Court succumbed: reintroducing the "centrality" test that RLUIPA rejected, and casting judges as arbiters of theological questions which the First Amendment forbids.

Even if the Court concludes that the best reading of "substantial" is as a reference to the size or importance of a burden on religious exercise, it should still reject the Kentucky Supreme Court's equation of that term with "severe." That is because, as this Court's case law shows, "substantial" can denote a wide variety of quantities or qualities, some of them quite minor. Given that wide variety, 42 U.S.C. § 2000cc-3(g)'s rule of construction requires interpreting the term to refer to a modest burden rather than a "severe" one.

The Kentucky Supreme Court likewise declined to apply RLUIPA because it concluded that Petitioner knew about the land use restriction in advance. The statutory text provides no support for this reliance-interests-based approach. Moreover, the Kentucky Supreme Court's reasoning runs headlong into this Court's case law, which has considered and rejected just such an account of protection for religious exercise.

Interpreting RLUIPA as broadly as Congress intended is vital for religious colleges like *amicus* Hillsdale College. Hillsdale, like others of its sister schools, depends on such an interpretation to ensure it can use its campus and other properties, into which it has poured financial resources and countless labor, in furtherance of its religious mission.

ARGUMENT

I. RLUIPA Applies to Burdens on Religious Exercise Even When They Are Not "Severe."

In this case, a land use restriction would entirely bar a religious nonprofit from building a shrine on a parcel of its own land. That bar, one of the courts below conceded, "may make practice of religion somewhat more difficult for" Petitioner and those it serves. Pet. App. 55a. The Kentucky Supreme Court nevertheless found that the bar did not constitute a substantial burden on Petitioner's religious exercise because it did not have the requisite "degree of severity." Pet. App. 25a. Instead, the court concluded, this barrier to religious exercise fell "more into the category of a mere inconvenience." Pet. App. 25a.

But Congress did not limit RLUIPA to "severe" burdens on religious exercise. To the contrary, the statute applies strict scrutiny to burdens that are "substantial." 42 U.S.C. § 2000cc(a)(1). That word, ambiguous on its own, must be interpreted in the context of the statutory scheme in which it occurs. And there can be no doubt, in the light of RLUIPA's other provisions, that a burden can be "substantial" without being "severe."

A. "Substantial" Means "Actual," Not "Severe."

First things first: Congress did not use the word "severe" in RLUIPA, though it has used that word often throughout the United States Code, including in reference to burdens on the exercise of religion. *See, e.g.*, 22 U.S.C. § 6442(a)(1) ("It shall be the policy of the United States … to oppose particularly severe

violations of religious freedom …. "). Instead, it hinged RLUIPA's protections on a finding that a burden on religious exercise is "substantial."

This Court has recognized that that word is ambiguous taken by itself. *See, e.g.*, *Life Techs. Corp. v. Promega Corp.*, 580 U.S. 140, 739 (2017). The word has two basic meanings. One is "that specified to a large degree." *Victor*, 511 U.S. at 19. "Substantial" may be used in this way of either quantity or quality, referring either to "large size" or "importance." *Life Technologies*, 580 U.S. at 146.

How large or how important? Only context can tell. In some quantitative contexts, the word means "more than half." *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 474 (D.C. Cir. 1998). But in others it means more than a very little. *See id.* at 474-75. When used qualitatively, "substantial" can mean "to a high degree" or, alternatively, just enough. *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988).

The other basic meaning of "substantial" is "not seeming or imaginary." *Victor*, 511 U.S. at 19-20. When used in this way, the term is equivalent to the word "reasonable" in criminal law's "reasonable doubt" standard. *Id.* Something is substantial in this sense when it is "actual" rather than a "mere possibility," "bare imagination," or "fanciful conjecture." *Id.* at 20.

This Court has made clear that only statutory context can determine which of the many senses of the word "substantial" Congress has intended in a given statutory provision. *See, e.g.*, *Life Techs.*, 580 U.S. at 146. But the Kentucky Supreme Court ignored that

teaching here. Instead, it jumped to the conclusion that Congress in RLUIPA intended the first basic meaning of "substantial," i.e., having to do with size or importance. And it further assumed that the size or importance required to trigger RLUIPA's protections was quite significant, i.e., "some degree of severity." Pet. App. 25a.

But as the statutory context shows, in RLUIPA Congress meant "substantial" in the sense of "actual." *Victor*, 511 U.S. at 19-20. Begin with the rules of construction that Congress itself wrote into RLUIPA. *See* 42 U.S.C. § 2000cc-3. The statute, Congress provided, "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [its] terms … and the Constitution." *Id.* § 2000cc-3(g). Manifestly, interpreting "substantial" to mean "actual" rather than "large" or "important" would afford broader protection to religious exercise, because such an interpretation would apply strict scrutiny to burdens that are real yet (in a court's eyes) not sufficiently large or important to trigger RLUIPA.

Our interpretation falls well within the "maximum extent" of the word "substantial." After all, "actual" is one ordinary meaning of that term. *See Victor*, 511 U.S. at 19-20. And none of RLUIPA's other provisions so much as suggest that Congress had a different meaning in mind. Even if RLUIPA is ambiguous as between the two basic meanings of "substantial," that ambiguity is resolved by § 2000cc-3(g) in favor of the interpretation here urged.

To be sure, the phrase "substantial burden" has a history: this Court used it in a number of Free Exercise decisions prior to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). But as the Court has explained, "RLUIPA provides greater protection" than the Court's pre-*Smith* case law. *Holt v. Hobbs*, 574 U.S. 352, 361 (2015); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 714 (2014) (explaining that 42 U.S.C. § 2000cc-3(g) indicates Congress's intent in RLUIPA to depart from the pre-*Smith* case law). This Court's pre-*Smith* Free Exercise decisions thus do not govern the interpretation of "substantial" in RLUIPA.

There are other compelling reasons to interpret "substantial" to mean "actual." For one, the alternative—interpreting "substantial" to mean "large" or "important"—would effectively reintroduce the centrality test for religious exercise, which RLUIPA repudiated. This test, articulated in some of the Court's Free Exercise cases, asks whether "government has placed a substantial burden on the observation of a central religious belief or practice." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). In response to cases like *Hernandez*, Congress in RLUIPA defined "religious exercise" as "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), thus extending broader protections than the Court's First Amendment case law afforded. *See Hobby Lobby*, 573 U.S. at 595.

Interpreting "substantial" to mean "large" or "important" would invite a return to the centrality test. This case illustrates the point. The Kentucky

Supreme Court held that Petitioner's "ability to build a smaller shrine or grotto than what it desires falls … into the category of a mere inconvenience," because being forced to make do with a smaller grotto was simply not a large or important enough restriction on Petitioner's religious exercise. Pet. App. 25a. But this conclusion is obviously untenable if at the heart of Petitioner's religious mission is making opportunities for Marian devotion available to as many people as possible; in that case, far from being a "mere inconvenience," restricting the size of the planned grotto would be immensely burdensome to Petitioner's religious exercise. The court's judgment thus depended on implicitly evaluating the centrality to Petitioner of promoting Marian devotion—an inquiry 42 U.S.C. § 2000cc-5 squarely forbids.

Errors like the Kentucky Supreme Court's are all but inevitable when "substantial" is interpreted to mean "large" or "important." In ordinary speech, an obstacle or impediment to an activity is large or important when it blocks the core of the activity, not something marginal or ancillary to it. That was the understanding of the Sixth Circuit in *Livingston Christian Schools v. Genoa Charter Township*, 858 F.3d 996 (2017), which the Kentucky Supreme Court cited as the "polestar" of its interpretive approach. Pet. App. 22a. The *Livingston* court distinguished the case before it, in which the burden on religious exercise failed to reach the requisite "degree of severity," from other cases in which religious practitioners had shown burdens on "some core function of their religious activities" or conduct that was "central to [their] beliefs." 858 F.3d at 1003, 1006. *Livingston*, like the opinion below, illustrates the deep

tension between interpreting "substantial" to mean "large" or "important" and RLUIPA's clear abandonment of the centrality test. Interpreting "substantial" to mean "actual" avoids this difficulty.

Our interpretation likewise avoids casting judges as arbiters of theological questions. Whether a burden is large or important turns on the content of the burdened belief or conduct; a burden that is massive for practitioners of one faith may be modest for practitioners of another. To decide whether a burden is large or important, judges must form a view about the content of the burdened belief or conduct—and all too often, that view will be informed by judges' own conceptions rather than the tenets of the faith in question.

Again, this case illustrates the point. To hold that a restriction on the size of a shrine is a "mere inconvenience" presupposes an understanding of Petitioner's religious beliefs and practices, namely that they do not involve a commitment to fostering widespread Marian devotion. The Kentucky Supreme Court cited no evidence in support of this understanding of Petitioner's religion. In fact, many Catholics do see fostering Marian piety as part of their religious mission. *See, e.g.*, Second Vatican Council, *Dogmatic Constitution on the Church: Lumen Gentium* ¶ 67 (1964).

This Court has warned that litigation involving religious groups presents a "substantial danger that the State will become entangled in essentially religious controversies." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976). That danger

is most clearly present "when … litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). That is exactly what happens when RLUIPA's protections are made to turn on judges' understanding of parties' religious beliefs and practices. The Court has taught that statutes should be read to avoid entangling state authorities in religious questions. *See NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 500 (1979). Interpreting "substantial" to mean "actual" rather than "large" or "important" would achieve that goal.

It would also be consistent with this Court's case law. In *Holt v. Hobbs*, the Court found that the burden on the petitioner's exercise of religion was substantial under RLUIPA without inquiring as to its severity. *See* 574 U.S. 352, 361 (2015). Nor is the Court's decision in *Hobby Lobby* to the contrary. There, the Court found that "severe" fines respondents would be forced to pay if they did not undertake certain conduct that violated their religious beliefs constituted a "substantial[] burden" under the Religious Freedom Restoration Act (RFRA). *Id.* at 361. But *Hobby Lobby* did not hold that severity was a prerequisite for finding substantial burden. Furthermore, RFRA lacks RLUIPA's statutory rule of construction mandating a broad interpretation "to the maximum extent permitted by the [statutory] terms … and the Constitution."[4] 42 U.S.C. § 2000cc-3(g); *see*

[4] RFRA incorporates RLUIPA's definition of "exercise of religion." *See* 42 U.S.C. § 2000bb-2(4). That definition, as part of RLUIPA, is subject to RLUIPA's rules of construction, including the rule found in 42 U.S.C. § 2000cc-3(g). But

also id. (applying this rule of construction only to "[t]his chapter," which includes RLUIPA but not RFRA). Thus, the "substantial burden" requirement under RFRA may well be more demanding than under RLUIPA.

Interpreting "substantial" to mean "actual" would achieve Congress's objectives in enacting RLUIPA. As previously discussed, it would protect a considerably broader swath of religious exercise than alternative interpretations. And it would do so without giving *carte blanche* to religious landholders. For one thing, the "substantial burden" requirement would continue to do important work. A burden that is insubstantial—meaning one that is imaginary, conjectural, or merely possible, *see Victor*, 511 U.S. at 20—would not trigger RLUIPA's protections. For another, states and local governments may defeat unreasonable demands by religious landholders under RLUIPA's "compelling governmental interest" standard—a standard which, though demanding, does not "override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

B. In the Alternative, a Burden Is "Substantial" When It Is Not Very Small.

Even if the Court concludes that Congress used "substantial" in RLUIPA in the sense of "large" or "important," it should still hold that RLUIPA does not require a burden to have a "degree of severity," Pet. App. 25a, before affording relief. That is because

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RLUIPA's rules of construction do not apply to other RFRA provisions, including the phrase "substantially burden" in 42 U.S.C. § 2000bb-1(a).

"substantial" has a variety of meanings when used in reference to size or importance, and the rules of construction Congress wrote for RLUIPA mean that the word should be given the least demanding of these meanings.

As explained above, "substantial" has many meanings; it can refer to a wide range of sizes or amounts (when used quantitatively) or degrees of importance (when used qualitatively). *See supra* at 5. Many of these meanings are decidedly minor. That is the case, for instance, in the phrase "substantial evidence" used in several statutes across administrative law. As the Court has explained, the substantial evidence threshold "is not high"; it demands only evidence amounting to "more than a mere scintilla." *Biestek v. Berryhill*, 587 U.S. 97, 102-03 (2019).

On the qualitative side, this Court has interpreted the phrase "substantially justified," as used in the context of various provisions governing the award of attorney's fees, to mean "justified to a degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 565. For purposes of these attorney's fee provisions, an action is "substantially justified" if "there is a genuine dispute" about its lawfulness. *Id.* The threshold for substantiality is even lower in the jurisdictional context. The Court has explained that the "substantial federal question" standard demands only a federal question that is not "obviously frivolous," "immaterial," or "legally speaking non-existent." *Shapiro v. McManus*, 577 U.S. 39, 45 (2015).

Even when used in reference to size or importance, then, the word "substantial" by itself can mean nearly anything; its wide range can be narrowed only by context. In RLUIPA, the most important context is Congress's clear command that the statute is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [its] terms … and the Constitution." 42 U.S.C. § 2000cc-3(g). Religious exercise would receive broader protection by construing "substantial" in accord with the cases just cited than by interpreting it to require "a degree of severity." And because such an interpretation would fall within the capacious "maximum extent" of this ambiguous word, 42 U.S.C. § 2000cc-3(g) requires its adoption.

II. This Court Has Already Rejected the Kentucky Supreme Court's Reliance-Interest Theory of Protection for Religious Exercise.

The Kentucky Supreme Court also found that Petitioner's advance knowledge of the land use restriction at issue counseled against a finding of substantial burden. As that court explained, "there can be no serious contention that St. John was uncertain of the likelihood that its applications would be denied pursuant to the applicable zoning ordinance." Pet. App. 27a. The court contrasted Petitioner's situation with one in which a township's "zoning ordinance gave plaintiffs little reason to expect the treatment they … received." Pet. App. 26a. The Kentucky Supreme Court cited *Livingston* for the proposition that when a "plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes," any

hardship from the enforcement of land use regulations against it is insubstantial. Pet. App. 24a (quoting 858 F.3d at 1004) (internal quotation marks omitted). The Kentucky Supreme Court thus proceeded on a reliance-interests theory, in which RLUIPA operates to safeguard the reasonable investment-backed expectations of religious landholders.

The text of RLUIPA provides no support for this theory. To the contrary, RLUIPA makes clear that its protections apply when a burden is substantial, not when it is unexpected. While "substantial" has a wide variety of meanings, "unexpected" is not among them.

This is not the first time the Court has been invited to embrace a reliance-interests theory of protection for religious exercise. In *Hobby Lobby*, the government urged that followers of a religion who entered the marketplace "as a matter of choice" should be deemed to accept any statutory limits on their religious exercise that they find there. Br. of Pet'r at 39, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 10, 2014). This Court considered and rejected that argument. The Court held that "when followers of a particular religion choose to enter into commercial activity, the Government does not have a free hand in imposing obligations that substantially burden their exercise of religion. Rather, the Government can impose such a burden only if the strict RFRA test is met." *Hobby Lobby*, 573 U.S. at 735 n.43. Substitute "landholding" for "commercial" and "RLUIPA" for "RFRA," and this case is described exactly. The Kentucky Supreme Court offered no reason why the Court's holding about commercial

activity under RFRA should not apply to landholding under RLUIPA, and there is none.

III. To Carry Out Their Missions, Religious Colleges Depend on Interpreting RLUIPA as Broadly as Congress Intended.

RLUIPA provides protections that are vital for religious groups large and small across the country, and for none more than religious colleges and universities.

For Hillsdale, as for others of its sister colleges, religion is not merely one aspect of campus life or one subject of academic instruction; it motivates all the College does, even the most apparently secular activity. As its Articles of Association testify, Hillsdale teaches young men and women out of gratitude to God and with the goal of cultivating "civil and religious liberty and intelligent piety in the land."[5] The College believes God created mankind for freedom, which men and women need intellectual, moral, and physical formation to attain and use well. Everything the College offers its students is in pursuit of that mission.

To carry out its faith-driven mission, in the nineteenth century Hillsdale's founders acquired the core of the campus which the College continues to call home. Over the decades, Hillsdale has added to the campus as well as acquired off-campus properties in the area for student housing, sporting events, etc. Hillsdale also now owns properties in Washington,

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[5] Hillsdale Coll., *Founding Documents and Resolutions: Articles of Association*, https://perma.cc/W62W-STQF.

D.C. which serve as the College's campus in that city, the G. H. Gordon Biological Station on Michigan's Rockwell Lake, and the Blake Center for Faith and Freedom in Somers, Connecticut. Each of these properties serves an invaluable function in Hillsdale's pursuit of its mission.

RLUIPA serves as vital protection for Hillsdale and other religious colleges and universities for several reasons. First, colleges need to put their land to an enormously diverse array of uses. Classrooms and office space; chapels and performance halls; dining commons and dormitories; sports facilities and conference centers; laboratories and art studios: a college like Hillsdale needs all these and many more. These uses can pose a large variety of issues under state and local land use laws. And while many colleges enjoy mutually respectful and accommodating relationships with their zoning authorities, that is not always the case. RLUIPA serves as a critical backstop to ensure religious colleges and universities can put their land to use in the many ways they need to carry out their faith-driven missions. RLUIPA can serve this role effectively only if courts recognize that RLUIPA's protection do not turn on a finding that a restriction is "severe."

Second, many religious colleges are deeply committed to remaining in the communities they have called home for decades or even centuries. At the same time, they need to erect new buildings and put old ones to new uses to realize their religious goals. The need to stay in place yet develop over time makes colleges and universities particularly vulnerable to

becoming stranded. They may find important new projects stymied by land use restrictions, yet relocation may be functionally impossible. RLUIPA plays a critical role in preventing religious colleges from facing such a Hobson's choice. This is because being put to the choice of either abandoning a new project that would advance the college's religious mission or moving to a different location would be a substantial burden on religious exercise, requiring that land use regulations give way unless they are the least restrictive means to attain a compelling governmental interest. But again, RLUIPA can play this role effectively only if courts recognize that the statute's protections apply not just when a burden is "severe," but rather whenever a land use restriction would keep a religious college from living out its faith.

For these reasons among others, religious colleges and universities depend on the courts to give RLUIPA the broad construction that Congress intended.

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment of the Supreme Court of Kentucky and remand for further proceedings.

Respectfully submitted,

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