No. 25-1131

In the Supreme Court of the United States

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.,

Petitioner,

v.

JOEL FREDERIC AND ELIZABETH FREDERIC,

Respondents.

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

BRIEF OF MANHATTAN INSTITUTE AND NAPA LEGAL INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a land-use regulation that prohibits a religious institution from building a religious structure on its own property constitutes a "substantial burden" on religious exercise under the Substantial Burden Provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(a).

2. Whether a land-use regulation violates the Equal Terms Provision of RLUIPA, 42 U.S.C. § 2000cc(b)(1), by imposing express restrictions on religious assemblies or institutions that it does not impose on nonreligious assemblies or institutions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Manhattan Institute (MI) is a nonprofit policy research foundation whose mission is to develop and disseminate ideas that foster individual responsibility and agency. It has sponsored scholarship and filed briefs supporting economic freedom and property rights against government overreach.

The Napa Legal Institute is a religious nonprofit organization dedicated to providing legal education to religious organizations. The organization's mission is to protect the freedom and the missions of faith-based nonprofit organizations.

Amici file this brief because discriminatory zoning restrictions threaten religious institutions as pillars of American civil society.

BACKGROUND AND SUMMARY OF ARGUMENT

RLUIPA was enacted to prevent discretionary zoning regimes from excluding or burdening religious land use, particularly where local opposition can function as a de facto veto over how religious institutions use their property. The decision below departs from that purpose by allowing neighbors, through individualized zoning processes, to block a modest religious structure that the local board found would cause no harm.

It further misapplies this Court's precedents by treating the availability of smaller or alternative

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[1] Rule 37 statement: All parties were timely notified of this filing. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

projects as dispositive and by characterizing the burden as "self-imposed," even though RLUIPA focuses on the effect of government action on religious exercise, not on a religious organization's prior awareness of zoning restrictions.

The Kentucky Supreme Court's approach is part of a broader doctrinal problem. By adopting the Sixth Circuit's *Livingston* framework to determine what land-use restrictions constitute a "substantial burden" on religious exercise, it embraces an unduly narrow conception that leaves RLUIPA with little practical force in land-use disputes. Other circuits have adopted more workable standards, creating an acknowledged split over how to apply RLUIPA in such situations.

This case thus presents an ideal vehicle for the Court to clarify the proper interpretation of "substantial burden" and to ensure that RLUIPA continues to provide meaningful protection for religious organizations' use of their property.

ARGUMENT

I. RLUIPA's Text and Purpose Prohibit Zoning Ordinances That Allow Opposed Neighbors to Exercise De Facto Control Over Religious Organizations' Land Use

A small group of neighboring homeowners have no property rights in a church's land, yet under the rule below, they can function as if they do. That is exactly the sort of local overreach Congress had in mind when it enacted RLUIPA. Though many kinds of religious discrimination exist, RLUIPA specifically targets land-use ordinances that require "individualized assessments" of proposed uses. 42 U.S.C. § 2000cc(a)(2)(C). Congress recognized that

discretionary zoning regimes are unusually susceptible to covert discrimination, particularly from organized not-in-my-backyard ("NIMBY") opponents. Complaints about traffic, parking, neighborhood character, and more intense uses frequently arise in zoning processes and disputes. Sometimes they reflect legitimate concerns, but in situations like the present case, they empower litigious opponents to thwart new development. Neighbors like Respondents leverage land-use hearings to complain about anticipated externalities like traffic, noise, and community character, downplaying or ignoring the potential benefits of development in favor of stasis.

A. Congress Intended RLUIPA To Protect Religious Uses of Property from Discriminatory Land-Use Decisions

Section 2 of RLUIPA ensures that objections from members of the community do not prevent the free exercise of religion by inhibiting the construction of facilities by religious assemblies or institutions. Congress imposed strict scrutiny on zoning regimes that burden religious institutions' use of their private property, particularly where such burdens arise through discretionary permitting systems, but also by defining religious exercise to include "the use, building, or conversion of real property for the purpose of religious exercise," making clear that the ability to develop land is itself at the core of protected free exercise. 42 U.S.C. § 2000cc-5(7)(B). Congress thus ensured that religious institutions would not be subjected to exclusion through ostensibly neutral land-use processes shaped by local opposition and administrative discretion.

As this Court recognized recently in *Cedar Point Nursery v. Hassid*, the "protection of property rights is 'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'" 594 U.S. 139, 147 (2021) (quoting *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017)). That protection matters for houses of worship no less than for other property owners. Indeed, it matters more because religious land uses have historically faced a mix of NIMBY opposition and discretionary obstruction.

A zoning ordinance that allows nearby residents to block a modest Marian grotto on property owned by a religious association—merely because those objectors prefer stasis over change—does not simply regulate land use but also burdens religious exercise. RLUIPA makes clear that it encompasses land-use regulations that unreasonably limit religious assemblies or structures. *See* 42 U.S.C. § 2000cc(b)(3)(B).

This does not afford religious groups immunity from reasonable zoning regulations applied neutrally, but that application must be faithful to an understanding of RLUIPA's substantial-burden standard. Here, there can be little doubt that prohibiting construction of a Marian grotto—measuring just 16 by 39 feet—imposes a substantial burden on petitioner's religious exercise. The local board itself found that the grotto would not harm the surrounding neighborhood. Pet. App. 8a–9a. Yet the court below upheld the denial of petitioner's application, because it adopted an unduly cramped view of RLUIPA. If that approach stands, it will invite neighborhood objectors to wield discretionary zoning as a private veto over religious land use.

Congress recognized that religious institutions, as pillars of their communities, needed protection against zoning regimes that had frequently empowered local opposition to religious exercise. The record hearing "compiled massive evidence" that the right to freedom of worship was "frequently violated" through land-use regulations. 146 Cong. Rec. S7774, S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy). Congress identified that "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation." *Id.* at S7774–75.

When land-use restrictions allow such community opposition to the expansion of religious facilities to prevail, they deprive broader and more diffuse public benefits that religious institutions create, such as the benefits of a congregation's food pantry, youth programming, counseling, and charitable outreach. In doing so, they weaken the ties that bind local communities together. Religious institutions provide among the most important sources of social capital, moral formation, and community cohesion that ultimately enable effective local self-government.

Two centuries ago, Tocqueville observed the centrality of religion in the nascent United States, describing religion as the "first of their political institutions" and crediting it with teaching Americans "the art of being free." 1 Alexis de Tocqueville, Democracy in America 472, 475 (Eduardo Nolla ed., James T. Schleifer trans., Indianapolis: Liberty Fund, Inc. 2010) (1840). In his account, religious belief did not merely coexist with liberty, but was "necessary for maintaining republican institutions," furnishing the

moral habits and civic virtues upon which democratic self-government depends. *Id.* at 475.

A narrow understanding of "substantial burden" would entrench these structural defects and depart from how Congress intended RLUIPA to function. The right to use one's property for religious exercise cannot depend on satisfying local opponents who can recast exclusion in the language and processes of ordinary zoning administration. Such an approach would entrench the status quo and render religious exercise contingent on others' approval—precisely the dynamic Congress sought to correct in enacting RLUIPA.

B. A Substantial Burden Cannot Be Avoided by Proposing Smaller or Alternative Uses

RLUIPA defines "religious exercise" broadly and expressly includes the "use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7)(A)–(B). The question is whether Park Hills's zoning ordinance, as interpreted by the Kentucky courts, substantially burdens petitioner's intended religious use of the property. The statute does not ask whether a court can imagine whether some alternative project might remain available.

This Court said as much in *Holt v. Hobbs*, 574 U.S. 352 (2015). The question, it explained, is whether government has substantially burdened the claimant's religious exercise, "not whether the RLUIPA claimant is able to engage in other forms of religious exercise." *Id*. at 361–62. The courts below here nonetheless held that there was no substantial burden because petitioner might construct "a smaller grotto or shrine" somewhere else on the church lot. Pet. App. 25a. That logic cannot be reconciled with *Holt*. If the possibility of a downsized substitute defeats a claim, then nearly

every land-use burden can be minimized by having the religious organization build ever smaller structures.

That approach is also inconsistent with basic property rights. Ownership carries a presumptive right to use and improve land, subject to lawful and reasonable regulation directed to actual public harms. Once a court tells an owner that a project is not burdened because a hypothetical alternative might still be possible, control effectively shifts from the owner to the regulator, who, in practice, responds to the most organized objectors.

The point is especially important for religious institutions, whose property decisions often reflect pastoral, liturgical, and theological judgments that courts are poorly situated to second-guess. A church may believe that a shrine belongs in one place and at one scale because that configuration best serves its religious mission. Even if a smaller or relocated version might be permitted, when courts require such changes, they collapse the distinction between ordinary land-use regulation and active management of religious design choices. RLUIPA does not authorize courts to redraw religious projects until they no longer impose a perceived burden.

C. The Kentucky Courts Misread RLUIPA by Treating a Government-Imposed Burden as "Self-Imposed"

The Kentucky courts' contention that petitioner's burden was "self-imposed," because it knew of the ordinance and acknowledged the problem, misreads the law. RLUIPA contains no notice-based exception allowing the government to impose a substantial burden on religious exercise simply because the regulated party was aware of the restriction. Congress

did not intend to condition or favor protection for religious land use on ignorance of local law.

If anything, importing such an exception would nullify RLUIPA in most cases, because zoning burdens typically arise from preexisting ordinances. As here, longstanding religious organizations—including those with grandfathered-in structures—that wish to adapt their worship to the needs of their congregations seek to build or adapt structures in ways that would violate zoning laws. Under the rule below, local governments could entrench discriminatory or unduly burdensome regulations simply by enacting them and mailing a notice to every religious organization in town. That cannot be what Congress intended.

This Court's own RLUIPA precedents establish as much. In *Holt*, the Court did not ask whether the petitioner knew of the Arkansas Department of Correction's grooming policy. 574 U.S. at 360–61. Nor was it enough that the policy advanced departmental and state interests. *Id.* at 365–66. Even accepting those premises, the Court held that the policy still violated RLUIPA as applied to the claimant's religious exercise. *Id.* at 366.

The same reasoning applies here. The inquiry remains whether the government has imposed a substantial burden on petitioner's religious exercise in the circumstances presented. If so, the government must show that its imposition furthers a compelling interest and is the least restrictive means of furthering that interest under RLUIPA's "exceptionally demanding" standard. *Id.* at 364.

D. Park Hills's Zoning Ordinance Violates RLUIPA's Equal-Terms Provision by Treating Religious Worship Less Favorably Than Other Comparable Uses

Park Hills requires "churches and other buildings for the purpose of religious worship" to be adjacent to an arterial street. Pet. App. 6a. But it does not subject other uses to the same requirement; cemeteries, nursery schools, public and parochial schools, golf courses, country clubs, and publicly owned community recreation centers, and libraries are not subject to that condition. *Id.* at 28a–29a. On its face, then, the ordinance treats religious worship less favorably than numerous other assemblies and institutions.

The Kentucky Supreme Court nevertheless found no unequal treatment because some secular uses must also be located on arterial streets. Pet. App. 29a. That is inconsistent with RLUIPA, which asks whether a religious assembly is treated on less than equal terms "with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). Under that logic, so long as government treats at least one secular use in the same way as churches and other religious structures, it can impose a substantial burden on religious exercise with impunity. Congress could not have intended such a restrictive outcome, given RLUIPA's "expansive protection for religious liberty." *Holt*, 574 U.S. at 358.

This Court's precedents suggest as much. In *Tandon v. Newsom*, this Court held that government regulations trigger strict scrutiny under the Free Exercise Clause when "they treat any comparable secular activity more favorably than religious exercise." 593 U.S. 61, 62 (2021). And in *Roman Catholic Diocese of Brooklyn v. Cuomo*, this Court did

not excuse New York's harsher treatment of houses of worship during the COVID-19 pandemic compared with stores, factories, schools, nonessential businesses, and other secular activities. 592 U.S. 14, 17 (2020). It did not matter that some secular uses were subject to restrictions as harsh as religious gatherings. *See id.* The relevant question was whether at least some secular activities were treated more favorably. There, as here, the regulatory scheme treated houses of worship more stringently than some secular activities, which was enough for this Court to find that it was not "neutral." *Id.* at 18.

Park Hills's ordinance is likewise not neutral in that sense. Secular uses that do not require an arterial street under the ordinance, such as golf courses, recreation centers, and country clubs, generate traffic and other comparable externalities. Congress enacted RLUIPA against a backdrop of zoning regimes that permitted comparable secular uses while excluding religious ones. The act's lead sponsors specifically identified "all sorts of buildings that were permitted when they generated traffic for secular purposes," but not when used for worship. 146 Cong. Rec. at S7774. Subjecting religious structures to more stringent land-use requirements, while permitting those secular uses to proceed without the same conditions, reflects a violation of RLUIPA's equal-terms provision.

The errors in the decision below are not isolated to Kentucky. Courts applying RLUIPA have adopted divergent approaches to the "substantial burden" inquiry, with some, such as the Sixth Circuit, embracing unduly narrow frameworks that leave the statute with little practical force.

II. The Kentucky Courts' Application of RLUIPA Renders The Statute Practically Ineffective

RLUIPA's text makes its purpose clear. *See* 42 U.S.C. § 2000cc(a)(1)(A)–(B).[2] Land-use regulations, even when facially neutral and generally applicable, have the potential to interfere with religious exercise. RLUIPA exists to mitigate that interference absent a compelling government interest achieved through narrowly tailored means. The courts below failed to interpret RLUIPA according to its text and purpose.

A. The Kentucky Courts Misconstrued the "Substantial Burden" Requirement by Adopting an Unduly Narrow *Livingston* Framework

The Kentucky Supreme Court, quoting the lower court, is correct that "RLUIPA's history demonstrates that Congress intended to leave intact the traditional 'substantial burden' test, as defined by the Supreme Court's free exercise jurisprudence." Pet. App. at 15a (citations omitted). But in applying this test, it adopted an unduly narrow framework that strips the statute of practical effect.

The majority accepted as a substantial burden instances "where compliance with the statute itself

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[2] RLUIPA states: "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
(A) is in furtherance of a compelling governmental interest; and
(B) is the least restrictive means of furthering that compelling governmental interest."

violates the individual's religious beliefs and noncompliance may subject him to criminal sanctions or the loss of a significant government privilege or benefit." *Id.* at 16a. The court then states that "courts have been far more reluctant to find a violation where compliance with the challenged regulation makes the practice of one's religion more difficult or expensive, but the regulation is not inherently inconsistent with the litigant's beliefs." *Id.*

If that reasoning governs whether a land-use regulation qualifies as a substantial burden under RLUIPA, the statute is left with little practical force. Very few, if any, land-use regulations expressly violate an individual's religious beliefs and subject him to criminal sanctions or the loss of significant privileges.

In accord with this faulty reasoning, the Kentucky Supreme Court adopted the four-factor test articulated in *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996 (6th Cir. 2017), to determine whether the substantial burden threshold has been met.[3]

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[3] The Sixth Circuit articulated its test as follows:

> The first factor is "whether the religious institution has a feasible alternative location from which it can carry on its mission." The second is "[w]hether the religious institution will suffer substantial delay, uncertainty, and expense due to the imposition of the regulation[.]" The third is whether "a plaintiff has imposed a substantial burden upon itself. . . [f]or example when an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes[.]" And the fourth factor was "whether there is evidence that the municipality's decision making process was arbitrary, capricious, or discriminatory.

Livingston, 858 F.3d at 1004; Pet. App. at 24a–25a.

The *Livingston* test is not as extreme as the view that a substantial burden only exists when religious beliefs are violated in a way that subjects the religious individual or organization to criminal sanctions or the loss of significant government benefits. But it does rest on that overly restrictive logic, and, in practice, severely weakens RLUIPA. Land-use burdens on religious exercise typically arise through facially neutral zoning laws that prevent religious institutions from using their property for worship or related activities. Such instances will likely fail the *Livingston* test for substantial burden, particularly because its first prong allows municipalities to deny a proposed use simply by asserting that the religious organization can locate its activities in an alternative location.

The Kentucky Supreme Court's reasoning presents a false dichotomy between the *Livingston* test on the one hand and an interpretation of RLUIPA that does away entirely with the substantiality threshold. There is plenty of room for a middle way that gives effect to RLUIPA's text and intent while also maintaining a meaningful substantiality threshold. Such a course has been charted in other circuits.

B. Other Circuit Courts Have Adopted Approaches That Better Preserve RLUIPA's Meaning and Intent

Multiple circuits have treated the "substantial burden" question differently than the Sixth Circuit did in *Livingston*. This reveals two crucial points: 1) there is a circuit split that needs to be resolved to have a consistent application of RLUIPA; and 2) there are better tests than *Livingston* already available that may be better suited to determine whether a burden on religious exercise is substantial under RLUIPA.

While the Kentucky Supreme Court relied on reasoning that the general circumstances where "substantial burden" is met are those in which a religious individual or organization must violate religious beliefs or face criminal sanctions or loss of significant benefits, other courts have recognized that the analysis must be different in the context of land-use violations. As the Second Circuit noted, "in the context of land use, a religious institution is not ordinarily faced with the same dilemma of choosing between religious precepts and government benefits." *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348–49 (2d Cir. 2007). The proper "substantial burden" test should not be drawn from reasoning or precedent regarding religious exercise in other contexts, because land-use regulations present a distinct set of issues.

The Second Circuit proposed a test similar to *Livingston* but more modest: when considering whether a substantial burden on religious exercise exists under RLUIPA, courts will consider whether the land-use decision was arbitrary or unlawful, as well as "whether there are quick, reliable, and financially feasible alternatives [the religious organization] may utilize to meet its religious needs absent its obtaining the construction permit; and . . . whether the denial was conditional." *Id.* at 352.

The Fourth Circuit also explained that pressuring a person to violate his religious beliefs is not the correct standard for substantial burden in RLUIPA cases related to land-use regulations. *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 555 (4th Cir. 2013). The proper standard for has been articulated by several circuit courts: "every one of our sister circuits to have considered the

question has held that, in the land-use context, a plaintiff can succeed on a substantial burden claim by establishing that a government regulation puts substantial pressure on it to modify its behavior." *Id.*

While the Fourth Circuit is correct that RLUIPA is not simply a tool to exempt religious organizations from neutral zoning laws, in a case where the current land use is inadequate to serve its congregation's needs, restrictions on further land use—such as the prevention in this case of building a grotto on the church property—can very well rise to the level of a substantial burden. The question is whether the regulation puts sufficient pressure on the religious institution to modify its behavior, rather than its beliefs. This approach protects against both discriminatory and non-discriminatory conduct that imposes a substantial burden.

The First Circuit has refused to adopt an abstract formula to determine whether a substantial burden exists under RLUIPA. *Roman Catholic Bishop v. City of Springfield*, 724 F.3d 78, 95 (1st Cir. 2013). The court will look at factors such as whether religion or religious practice is targeted by a land-use regulation, "whether local regulators have subjected the religious organization to a process that may appear neutral on its face but in practice is designed to reach a predetermined outcome contrary to the group's requests," or whether "the land use restriction was 'imposed on the religious institution arbitrarily, capriciously, or unlawfully.'" *Id.* at 96–97. The result is that, in the First Circuit, "a court may block application of a land use regulation under RLUIPA's subsection (a) where the context raises an 'inference' of hostility to a religious organization, even when the evidence does not necessarily show the explicit

discrimination 'on the basis of religion' contemplated by subsection (b)." *Id.* at 97.

The above examples are not exhaustive. There are other alternatives to the *Livingston* test found in the Fifth Circuit, *see Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004), and the Eleventh Circuit, *see Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004). As the Fifth Circuit notes, "RLUIPA does not contain a definition of 'substantial burden,' and the courts that have assayed it are not in agreement." *Adkins*, 393 F.3d at 568.

Some circuits follow the substantial burden jurisprudence created in RFRA cases; others do not. *See id.* The Fifth Circuit acknowledged that there is wide variation.[4] It then cited an important piece of

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[4] The court detailed the circuit split:

> Despite RLUIPA's eschewing the requirement of centrality in the definition of religious exercise, the Eighth Circuit adopted the same definition that it had employed in RFRA cases, requiring the burdensome practice to affect a "central tenet" or fundamental aspect of the religious belief. The Seventh Circuit, in contrast, abandoned the definition of "substantial burden" that it had used in RFRA cases, holding instead that, "in the context of the RLUIPA's broad definition of religious exercise, a . . . regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." Neither did the Ninth Circuit retain the definition of "substantial burden" that it had employed in RFRA cases, which required interference with a central religious tenet or belief. Turning to Black's Law Dictionary and Merriam-Webster's Collegiate Dictionary, the Ninth Circuit defined a "substantial burden" as one that imposes "a significantly great restriction or onus upon such exercise." The most recent

legislative history surrounding RLUIPA's passage and noted that this legislative history, "although sparse, affords some guidance: '[Substantial burden] as used in the Act should be interpreted by reference to Supreme Court jurisprudence.'" *Id.* at 569.

The divergence among the circuits reflects a broader lack of consensus over how to apply RLUIPA's substantial-burden provision. These differences matter because RLUIPA should provide a consistent protection for the religious use of property, regardless of where a religious group is located. For RLUIPA to be applied according to its original public meaning, it is important both that substantial burden not be reduced to mean "any burden," but also that courts not adopt a test so narrow that the statute rarely applies.

The *Livingston* test adopted by the Kentucky Supreme Court here veers too far toward restricting RLUIPA's protections. The multi-circuit split shows that more balanced alternatives to the *Livingston* test already exist that preserve a meaningful threshold while still giving effect to Congress's intent to protect religious organizations' use of their property.

Because the circuits vary greatly in how they analyze what constitutes a substantial burden and because substantial burden is meant to be interpreted by reference to this Court's jurisprudence, this case is an ideal opportunity for the Court to provide a clear,

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> appellate interpretation of the term under the RLUIPA is that of the Eleventh Circuit, which declined to adopt the Seventh Circuit's definition, holding instead that a "substantial burden" is one that results "from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."

Adkins, 393 F.3d at 568–69 (internal citations omitted).

consistent principle for analyzing substantial burden under RLUIPA that protects the religious use of property from overbearing land use regulations.

CONCLUSION

This case presents a recurring and consequential question about the proper interpretation of RLUIPA's substantial-burden and equal-terms provisions. It provides an ideal vehicle to resolve deep divisions in the circuit courts and to clarify that RLUIPA offers meaningful protection to religious land use without eliminating the statute's substantiality requirement.

The Court should grant certiorari.

Respectfully submitted,

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