No. 12-1191

In The
Supreme Court of the United States

BIG SKY COLONY, INC.,
and DANIEL E. WIPF,

Petitioners,

v.

MONTANA DEPARTMENT
OF LABOR AND INDUSTRY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF OF *AMICI CURIAE* THE NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA, QUEENS FEDERATION OF CHURCHES, NATIONAL ASSOCIATION OF EVANGELICALS, LUTHERAN CHURCH-MISSOURI SYNOD, AMERICAN BIBLE SOCIETY, CHRISTIAN AND MISSIONARY ALLIANCE, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Free Exercise Clause requires a plaintiff to demonstrate that the challenged law singles out religious conduct or has a discriminatory motive, as the First, Second, Fourth, and Eighth Circuits and the Montana Supreme Court have held, or whether it is instead sufficient to demonstrate that the challenged law treats a substantial category of nonreligious conduct more favorably than religious conduct, as the Third, Sixth, Tenth, and Eleventh Circuits and Iowa Supreme Court have held.

2. Whether the government regulates "an internal church decision" in violation of the Religion Clauses, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,* 132 S. Ct. 694 (2012), when it forces a religious community to provide workers' compensation insurance to its members in violation of the internal rules governing the community and its members.

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INTEREST OF *AMICI CURIAE*[1]

The **Christian Legal Society** ("CLS") believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs and speech. CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of traditional Christian beliefs. The ability of a religious organization, such as the Big Sky Colony, to organize around its core religious beliefs lies at the heart of religious liberty.

The **National Hispanic Christian Leadership Conference** ("NHCLC"), The Hispanic National Association of Evangelicals, is America's largest Hispanic Christian organization serving millions of constituents via our 40,118 member churches and member organizations. The NHCLC exists to unify, serve and represent the Hispanic Born Again Faith

[1] As required by Rule 37.2(a), counsel for *amici curiae* provided timely notice of the intent to file this brief in support of petitioners to all parties' counsel of record. The parties' letters consenting to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, neither a party nor its counsel authored this brief in whole or in part nor made a monetary contribution intended to fund its preparation or submission. Only *amici curiae*, their members, and their counsel made such a monetary contribution.

community by reconciling the vertical and horizontal elements of the Christian message via the 7 directives of Life, Family, Great Commission, Stewardship, Education, Justice and Youth.

The **Union of Orthodox Jewish Congregations of America** is the nation's largest Orthodox Jewish umbrella organization, representing nearly one thousand synagogues throughout the United States. The American Orthodox Jewish community has flourished because of the religious liberties guaranteed by the First Amendment.

The **National Council of the Churches of Christ in the USA**, also known as the National Council of Churches, is a community of 35 Protestant, Anglican, Orthodox, historic African American and Living Peace member faith groups which include 45 million persons in more than 100,000 local congregations in communities across the nation. Its positions on public issues are taken on the basis of policies developed by its General Assembly. The National Council of Churches is an active defender of religious liberty which it believes is served in the protection of the church's autonomy to structure and govern itself according to its faith principles.

The **Queens Federation of Churches** was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over

390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Federation and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty as manifest in the present action.

The **Lutheran Church-Missouri Synod** ("The Synod") is a nonprofit corporation organized under the laws of the State of Missouri. It has approximately 6,000 member congregations which, in turn, have approximately 2,400,000 baptized members. The Synod has a keen interest in protecting religious liberty generally and in supporting the Free Exercise Clause of the First Amendment particularly.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves fifty member denominations and associations, representing 45,000 local churches and over thirty million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries.

The **American Bible Society** ("ABS"), established in 1816 and based in New York City, works to make the Bible available to every person in a language and format each can understand and afford so that all may experience its life-changing message. ABS partners with churches, national Christian ministries, and the global fellowship of United Bible

Societies to help touch millions of lives hungry for the hope of the Bible and to support individual and corporate worship.

The **Christian and Missionary Alliance** ("C&MA") is an evangelical denomination established in 1897 with a major emphasis on world evangelization. It maintains a "big tent" stance in reference to many doctrinal matters, encouraging believers of diverse backgrounds and theological traditions to unite in an alliance to know and exalt Jesus Christ and to complete His Great Commission. The C&MA has 2,035 member churches in the 50 states, Puerto Rico and the Bahamas with approximately 439,000 individual members and adherents.

The **General Conference of Seventh-day Adventists** is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than 17 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,200 congregations with more than one million members. The church employs over 80,000 individuals in the United States in its various ecclesiastical, educational, and healthcare institutions. The Seventh-day Adventist church has a strong interest in insuring that individuals and institutions are not compelled to extend benefits that violate their beliefs.

The **Ethics & Religious Liberty Commission of the Southern Baptist Convention** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 44,000 churches and 16.2 million members. The ERLC is charged by the SBC with addressing public policy issues including religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom and freedom from governmental interference as guaranteed under the Constitution are indispensable, bedrock values for SBC churches as they follow the dictates of their conscience in the practice of their faith.

SUMMARY OF ARGUMENT

Amici urge this Court to grant the writ. In this case, the State of Montana admits that the legislature amended Montana's Workers' Compensation Act ("the amended Act") with the specific purpose of bringing the Hutterites within the amended Act and requiring them to participate in the State's workers' compensation insurance program. This burdens the Hutterites' free exercise because their religious beliefs dictate that they live and work together as a community, renouncing all rights to individual property, including the right to bring legal actions against one another. The amended Act is not generally applicable because it contains twenty-six secular exemptions and two religious exemptions, but the State refuses to exempt the Hutterites.

The First Amendment requires that a State[2] "shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. In interpreting that provision in *Employment Division v. Smith*, this Court held – while noting important exceptions – that a neutral and generally applicable law need not meet strict scrutiny, even if the law had the incidental effect of burdening free exercise. 494 U.S. 872 (1990). A particularly critical exception is the requirement that a law must meet strict scrutiny if it treats a substantial category of nonreligious conduct more favorably than similar religious conduct. *See id.* at 884.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* this Court was presented with a law that prohibited ritual animal sacrifice but allowed for killing of animals for many other purposes. 508 U.S. 520 (1993). The Court held that the law was not neutral because "[t]he ordinances had as their object the suppression of religion." *Id.* at 542. In addition, the Court held that the law was not generally applicable because the law allowed for many secular exemptions which interfered with the law's scope to the same degree as religiously-motivated activities would if exempted. *Id.* at 542-46.

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[2] In *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), this Court ruled that the Free Exercise Clause was applicable to the States through the Fourteenth Amendment.

Since *Lukumi*, courts have divided over what factors are necessary to trigger strict scrutiny under that case. In the simplest terms, the "neutrality only" view, followed by several circuits and the Montana Supreme Court, is that a law that burdens free exercise is not subject to strict scrutiny unless it either 1) singles out religious conduct for negative treatment or 2) has a discriminatory motive. Focusing solely on *Lukumi*'s neutrality holding, this view fails to take into account *Lukumi*'s equal holding that the law was not generally applicable because of its secular exemptions.

In contrast, under the "no favoring of secular exemptions" interpretation of "general applicability," followed by several circuits, and exemplified by *Fraternal Order of Police v. City of Newark,* 170 F.3d 359 (3d Cir. 1999) (Alito, J.), a law that burdens free exercise is not generally applicable and must meet strict scrutiny if it treats a substantial category of nonreligious conduct more favorably than similar religious conduct.

Amici urge that this Court should resolve the circuit split by holding that: 1) the "no favoring of secular exemptions" rule is the correct interpretation of the "general applicability" requirement under *Smith* and *Lukumi* and 2) singling out religion for negative treatment and intentional discrimination are each *sufficient* to trigger strict scrutiny, but neither is *necessary*. Instead, it is also sufficient to show that a law is not generally applicable because it

treats a substantial category of nonreligious conduct more favorably than similar religious conduct.

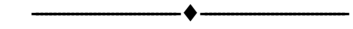
The "neutrality only" view is inadequate to protect free exercise because cases in which religion is singled out for negative treatment are rare, as are cases in which the law has a discriminatory motive. Neither prong protects religious exercise against discrimination that is unconscious or unintentional. This toleration of unconscious or unintentional discrimination is contrary to the Free Exercise Clause for several reasons.

First, prohibiting only intentional discrimination requires the nearly impossible task of discerning the motive of lawmakers. Second, the "neutrality only" view is not faithful to the text of the Free Exercise Clause because the text is not directed "to the *purposes* for which legislators enact laws, but to the *effects* of the laws enacted." *Lukumi,* 508 U.S. at 558 (Scalia, J., and Rehnquist, C.J., concurring in part and concurring in the judgment) (emphasis added). Third, for the religious adherent, it does not matter what motive is in the heart of legislators. The concrete loss of the right to live openly in accordance with one's religious convictions is all that matters. Fourth, in other contexts, this Court has recognized that bias not only may be deliberately disguised, but also may be unconscious and unintentional.

Protecting free exercise only against intentional discrimination does not protect free exercise to the extent the Framers intended. The Free Exercise Clause

requires a robust protection of religious exercise because the Framers were determined that the religious persecution from which many Americans had escaped would not be tolerated in this country. In addition, the Framers believed that the nation would be protected and strengthened against tyranny by making clear that the State recognized the limits of its power and authority set by the religious citizen's first duty to God and conscience. *See, e.g.,* James Madison, *Memorial and Remonstrance Against Religious Assessments, reprinted in Everson v. Bd. of Educ. of Ewing Twp.,* 330 U.S. 1, 63 (1947) (Appendix).

Finally, by imposing an employer/employee relationship on the Hutterites and seeking to regulate that relationship, the State violates the Hutterites' right of free exercise by interfering in internal church governance. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 132 S. Ct. 694 (2012). The Hutterites live together on the basis of commitment to the community as a whole and cannot receive any form of compensation or assert legal claims against the community. But under the amended Act, a worker cannot waive a claim. Requiring the Hutterites to participate in the workers' compensation system interferes with their internal affairs. This Court recently reiterated in *Hosanna-Tabor* that even a neutral and generally applicable law that interferes with internal church affairs violates the First Amendment. *Id.* at 707.



ARGUMENT

I. THE MONTANA SUPREME COURT MISINTERPRETED *LUKUMI*.

A. The circuits have split over competing interpretations of *Lukumi*.

The Hutterites filed a petition for declaratory relief in Montana state court seeking a declaration that the amendments to Montana's Workers' Compensation Act targeting the Hutterites ("the amended Act") violated their rights under the First Amendment. Specifically, the Colony argued that the amended Act was "neither neutral" nor "generally applicable" under *Employment Division v. Smith,* 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993), because the amended Act was gerrymandered to apply to the Hutterites while exempting a wide variety of similar secular and religious conduct. App. 243a-49a, 261a; Big Sky Colony Cert. Petition ("Pet.") at 8.

The Montana Ninth Judicial District Court granted summary judgment to the Colony, App. 75a, but the Montana Supreme Court, in an *en banc* 4-3 decision, reversed. App. 18a. In so doing, the district court and the Montana Supreme Court chose opposite sides of a significant circuit split on the meaning of *Smith* and *Lukumi*.

The "neutrality only" view of *Lukumi,* followed by the Montana Supreme Court, is that a law that burdens free exercise is not subject to strict scrutiny

unless it either 1) singles out religious conduct for negative treatment or 2) has a discriminatory motive. *See Bethel World Outreach Ministries v. Montgomery Cnty. Council,* 706 F.3d 548 (4th Cir. 2013); *Olsen v. Mukasey,* 541 F.3d 827 (8th Cir. 2008); *Skoros v. City of N.Y.,* 437 F.3d 1 (2d Cir. 2006); *Strout v. Albanese,* 178 F.3d 57 (1st Cir. 1999).

In contrast, under the "no favoring of secular exemptions" interpretation of general applicability, exemplified by *Fraternal Order of Police v. City of Newark,* 170 F.3d 359 (3d Cir. 1999) (Alito, J.), a law that burdens free exercise is not generally applicable and, therefore, must meet strict scrutiny if it exempts a substantial category of similar nonreligious conduct. Other circuits have likewise adopted the "no favoring of secular exemptions" interpretation. *See Ward v. Polite,* 667 F.3d 727 (6th Cir. 2012); *Shrum v. City of Coweta, Okla.,* 449 F.3d 1132 (10th Cir. 2006) (McConnell, J.); *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214 (11th Cir. 2004); *Mitchell Cnty. v. Zimmerman,* 810 N.W.2d 1 (Iowa 2012). Under this view, a religious individual or institution may show that a law triggers strict scrutiny by showing either of the requirements of the "neutrality only" view *or* by showing that the law provides relevant secular exemptions.

B. The "no favoring of secular exemptions" rule is the correct interpretation of *Lukumi*.

The First Amendment requires that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. Prior to this Court's decision in *Smith*, even when a law was neutral and generally applicable, if the law had the incidental effect of burdening a religious practice, this Court applied strict scrutiny to the law. *See, e.g., Thomas v. Review Bd., Indiana Employment Security Div.,* 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972) ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").

But in *Smith*, this Court held that a neutral and generally applicable law that had the incidental effect of burdening religious practice was not necessarily subject to strict scrutiny. 494 U.S. at 879, 881-84. However, in *Smith,* this Court did not overrule its previous free exercise cases, but distinguished several on the ground that they involved laws that allowed for secular exemptions, but not religious ones. *Id.* at 883-84. Thus, this Court explained that prior cases, such as *Thomas,* stood "for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases

of 'religious hardship' without compelling reason." *Id*. (citation omitted).

Soon thereafter, in *Lukumi*, this Court held that a municipal ordinance forbidding ritual animal killing violated the Free Exercise Clause. The Court held that the ordinance was not neutral because the object of the ordinance was suppression of the Santeria religious exercise. The Court reasoned that this object was apparent from the fact that the ordinance "singled out [religious conduct] for discriminatory treatment." *Id.* at 538.

But in addition, the Court also held that the law was not generally applicable because the law provided many secular exemptions that interfered with the law's stated purpose to the same degree as the religiously-motivated activities would. *Id.* at 543-46. By this reasoning, the Court made clear that, where a law allows for secular exemptions but not religious ones, courts need not inquire into the motive of legislators. *See id.* A law that grants secular exceptions but not religious ones requires strict scrutiny because, regardless of legislators' intentions, the law treats religious reasons for an exemption as less important than secular reasons. *See id.*

In *Lukumi,* the Court explained that "[n]eutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531. It is not entirely surprising then that, after *Lukumi,* courts have been

mistaken about what is requisite to show that a law is not generally applicable. That is, some courts have found that it is *sufficient* to show that the law provides exemptions for secular conduct but not for similar religious conduct, while other courts have said it is *necessary* to show that the law was enacted with an intent to target a religious practice or from a discriminatory motive. Thus, as the Petition details, some courts have "focuse[d] on the 'neutrality' portion of *Lukumi,* without giving independent significance to the requirement of 'general applicability.' " Pet. at 12.

In contrast, in *Fraternal Order v. City of Newark,* the Third Circuit held that a police department's "no-beard policy" was unconstitutional because the policy provided an exemption to officers who needed to refrain from shaving for medical reasons, but not for religious reasons. 170 F.3d 359 (3d Cir. 1999) (Alito, J.). As the Third Circuit explained, the police department's policy represented the government's impermissible judgment that secular reasons were more worthy of protection than religious reasons. *Id.* at 364-66. Specifically, the court reasoned:

> [T]he medical exemption . . . indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. . . . [W]hen the government makes a value judgment in favor of secular motivations, but

> not religious motivations, the government's actions must survive heightened scrutiny.

Id. at 366.

Resting solidly on *Smith* and *Lukumi,* the *Fraternal Order* ruling follows the simple rule that if a law contains secular exemptions that reduce the law's impact to the same degree that a rejected religious exemption would, the law is not generally applicable. Therefore, the government's refusal to allow the religious exemption must survive strict scrutiny. *See Lukumi,* 508 U.S. at 542-46; *Smith,* 494 U.S. at 884.

In this case, the various legislative amendments to the workers' compensation law allowed for a multitude of secular exceptions and even two religious exceptions. But the principle of general applicability was violated because the Hutterites' religious reasons for requesting an exemption were rejected despite numerous secular exemptions that undermined the government's alleged interest even more than an exemption for the Hutterites would. *See Lukumi,* 508 U.S. at 524.

C. The "neutrality only" interpretation of *Lukumi* is improperly focused on motive rather than effect and ignores the power of unconscious bias.

The "neutrality only" interpretation of *Smith* followed by the Montana Supreme Court and the First, Second, Fourth, and Eighth Circuits says that a law does not trigger strict scrutiny unless it singles out

religion for negative treatment or has a discriminatory motive. *See Bethel World Outreach Ministries,* 706 F.3d at 561; *Olsen,* 541 F.3d at 832; *Skoros,* 437 F.3d at 39; *Strout,* 178 F.3d at 65.

While both of these triggers are mentioned in this Court's discussion of neutrality in *Lukumi,* the "neutrality only" interpretation fails to take into account the "general applicability" holding of *Lukumi*. *See* 508 U.S. at 531-41 (analyzing neutrality);[3] *id.* at 542-48 (analyzing general applicability). Thus, either of these showings is sufficient to find a free exercise violation, but neither is necessary. *See Shrum v. City of Coweta,* 449 F.3d 1132.

Laws that single out religious conduct for negative treatment or have a discriminatory motive are rare. "The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." *Lukumi,* 508 U.S. at 523. Therefore, the "neutrality only" interpretation will not adequately protect free exercise, particularly from unintentional or unconscious discrimination which is nonetheless quite real in its effect. This result is contrary to the Free Exercise Clause. Instead, understanding *Smith* and *Lukumi* to require that religious exemptions must be provided when a law

[3] In fact, the part of the opinion addressing discriminatory motive failed to garner a majority vote. *Lukumi,* 508 U.S. at 540-42 (Kennedy & Stevens, JJ.).

otherwise provides relevant secular exceptions is an approach that makes sense for numerous reasons. *Smith*, 494 U.S. at 884; *Lukumi*, 508 U.S. at 542-46.

1. Motive is difficult, if not impossible, to discern.

Determining motive is always complex, but determining the motive of legislators is often impossible. "[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body, and this Court has a long tradition of refraining from such inquiries." *Lukumi*, 508 U.S. at 558 (Scalia, J., and Rehnquist, C.J., concurring in part and concurring in the judgment) (citation omitted) (citing *Fletcher v. Peck,* 6 Cranch 87, 130-31, 3 L.Ed. 162 (1810) (Marshall, C.J.); *United States v. O'Brien,* 391 U.S. 367, 383-84 (1968)). *Cf., Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 255 n.8 (1981) (recognizing in the context of racial discrimination the "elusive" nature of the inquiry into the "factual question of intentional discrimination").

2. The text of the Free Exercise Clause is not directed at motive but at practical effect.

As Justice Scalia has observed, the text of "[t]he First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Lukumi*, 508 U.S. at 558 (Scalia, J., and Rehnquist, C.J., concurring in part and concurring

in the judgment). What matters is not the legislators' intentions, but the real world effect of their enactments. "Pure-hearted" legislators with no bias against religion might pass a law that nonetheless impermissibly burdens free exercise, while a malicious yet incompetent legislator might draft a law that fails to burden religion in spite of the malicious intent. *Id.* at 558-59. As Justice Scalia explained, the law in *Lukumi* was not unconstitutional because of the city council's motives, but because the law they passed in fact burdened religious exercise. *Id.*

The "no favoring of secular exemptions" approach takes into account a foundational fact: if a law treats religious conduct worse than analogous nonreligious conduct, then, from the point of view of the religious believer, it makes no difference what motive is in the heart of the lawmaker. As Justice Scalia explained in his concurrence in *Lukumi*, he declined to join section 2 of Part II-A of the opinion "because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers, i.e.,* whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria." *Id.* at 558.

In this case, there is no evidence that state officials were motivated by conscious animosity toward the religious practices of the Hutterites. The State conceded that the law was targeted at the Hutterites, but not because their religious practices were considered repugnant, but because the State wanted to protect the interests of construction

companies that incorrectly believed that the Hutterites derived a competitive advantage from not having to participate in the workers' compensation system. The State asserted a compelling interest in "creating a level playing field . . . between religious and secular organizations competing in [commercial activities]." App. 319a. *See also,* App. 316a-17a.

Even though not motivated by anti-religious animus, the State acted with utter disregard for the Hutterites' free exercise rights. As this case demonstrates, a religious practice may be just as burdened by a lawmaker who does not care about religious freedom, as by one who exudes conscious religious bias. The Free Exercise Clause forbids the *effect* of burdening free exercise in this case.

3. In other contexts, it has been recognized that bias, though quite real, may not be readily identified.

Protecting free exercise only against intentional discrimination is insufficient because discrimination is easily disguised, and more importantly, is often unconscious. As members of this Court recently noted, after Title VII became effective in July 1965, "[e]mployers responded to the law by eliminating rules and practices that explicitly barred racial minorities from 'white' jobs. But removing overtly race-based job classifications did not usher in genuinely equal opportunity. More subtle – and sometimes unconscious

– forms of discrimination replaced once undisguised restrictions." *Ricci v. DeStefano,* 557 U.S. 557, 620 (2009) (Ginsburg, J., dissenting).

Recent scholarship has demonstrated that prejudice is often unconscious and frequently hidden even from those being influenced by it. Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 Cornell J.L. & Pub. Pol'y 415 (2000). For example, societal norms regarding racial prejudice "have changed fundamentally since the passage of the 1964 Civil Rights Act. While earlier, 'old fashioned' racism was overt and accepted, prejudicial attitudes and behavior have become unacceptable in mainstream white America." *Id.* at 426. Nonetheless, even though "the percentage of whites with overt racist prejudices against blacks dropped precipitously between 1933 and 1988," some researchers have found "that even whites who consider themselves to be liberal and egalitarian on race issues harbor unconscious racist attitudes and behave in racist fashion toward blacks, often unaware that their responses are race-based." *Id.*

It stands to reason that what is true of racial bias is also true of religious bias. Specifically, legislators who have no conscious bias may still be deeply influenced by attitudes and assumptions of which they are unaware. Thus, a rule which ignores any burden on free exercise as long as the legislator acted without conscious prejudice will fail to protect religious

practices as required by the Free Exercise Clause and by *Smith* and *Lukumi*.

D. The "neutrality only" view does not protect free exercise to the degree the Framers intended.

"In assuring the free exercise of religion, . . . the Framers of the First Amendment were sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience." *Sch. Dist. of Abington Twp. v. Schempp,* 374 U.S. 203, 232-33 (1963) (Brennan, J., concurring) (internal quotations omitted). One of many "historical instances of religious persecution and intolerance" (*Bowen v. Roy,* 476 U.S. 693, 703 (1986)), familiar to the Framers may have been the persecution of the Hutterite faith's founder, Jakob Hutter, who was burned at the stake in 1536 in Europe for his Anabaptist beliefs.

The Framers most likely intended the Free Exercise Clause to apply to "all laws prohibiting religious exercise *in fact,* not just those *aimed* at its prohibition." *Lukumi*, 508 U.S. at 576 (Souter, J., concurring in part and concurring in the judgment) (emphasis added). The Framers, driven by a desire to protect free exercise and, as seems likely, also "well aware of potential conflicts between religious conviction and social duties, . . . [probably] hoped to bar not

only prohibitions of religious exercise fueled by the *hostility* of the majority, but prohibitions flowing from the *indifference* or *ignorance* of the majority as well." *Id.* at 576 n.8 (emphasis added and internal quotations and citation omitted). *See generally,* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

Religious liberty is the "first freedom" protected by the Bill of Rights and is foundational because it is "based on the view that the relations between God and Man are outside the authority of the state." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 173 (1992). Our "first freedom" is likely the reason that the Hutterites came to this country in the 1870's in search of freedom to practice their religion.

The Framers believed that recognizing the right of each person to have a loyalty which *supersedes* his loyalty to the State would protect our nation from the dangers of totalitarianism and despotism by recognizing that the authority of the State is therefore limited. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments, reprinted in Everson v. Bd. of Educ. of Ewing Twp.,* 330 U.S. 1, 63 (Appendix).

In this case, as in *Lukumi,* "the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential

commitment to religious freedom." 508 U.S. at 524. In accord with this strong constitutional protection of free exercise and this Court's precedents, a view of *Lukumi* that offers merely the slender protection of the "neutrality only" view fails to protect those who sought refuge from persecution under the shelter of our Nation's Free Exercise Clause.

II. UNDER *HOSANNA-TABOR*, THE ACT VIOLATES THE RELIGION CLAUSES BY REGULATING THE INTERNAL AFFAIRS OF A RELIGIOUS ORGANIZATION.

The Hutterites' petition for declaratory relief in the Montana state court also argued that the amended Act unconstitutionally regulated their "internal church decision[s]" in violation of *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 132 S. Ct. 694, 707 (2012). Pet. at 8. The Hutterites argued that the amended Act impermissibly interferes with their internal church governance because its requirement of mandatory compensation for work, and mandatory participation in a legal system for compensation for injuries, flies directly in the face of the Hutterite renunciation of personal property rights in favor of devoting oneself to the community. *Id*. In addition, the amended Act "mak[es] it illegal for the Colony to discipline members who violate church teaching." *Id.*

Renunciation of individual rights, including legal rights against the Colony, in favor of complete commitment to the community and the Colony's Covenant by which the Colony is governed, lies at the core of the Hutterites' religious exercise. The amended Act's requirements strike directly at the heart of these core religious practices. Under the amended Act, workers have a non-waiveable right to potential legal claims, and their employment cannot be terminated for making such a claim against the Colony. *See* Mont. Code Ann. §§ 39-71-409(1), 39-71-317. Under the Colony's Covenant, workers renounce rights against the Colony and would be subject to excommunication for filing a legal claim against the Colony. Thus, the amended Act interferes with the Colony's governance of its internal affairs, destroying the Hutterites' ability to govern themselves in accordance with their religious convictions.

This governmental action violates the First Amendment. In *Hosanna-Tabor*, this Court unanimously held that the Religion Clauses preclude suits by the EEOC and by a Lutheran schoolteacher. This Court reasoned that the religious school's right to govern itself under the First Amendment barred the government from intervening in the church's internal decisions. *Hosanna-Tabor,* 132 S. Ct. at 703-05. Even a neutral law of general applicability violates the First Amendment if it "concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. Thus, even though the federal nondiscrimination law

is neutral and generally applicable, it could not be used to interfere with the religious school's First Amendment right to control its own "faith and mission." *Id.* As the Court noted, James Madison, "the leading architect of the religion clauses of the First Amendment," characterized the Free Exercise Clause as anchored in the Constitution's "scrupulous policy of . . . guarding against [ ] political interference with religious affairs." *Id.* at 703 (internal quotations omitted).

The Court relied on many previous cases recognizing that questions of church "discipline, or of faith, or ecclesiastical rule, custom, or law" are outside the authority of secular courts. *Id.* at 704 (citing *Watson v. Jones*, 13 Wall. 679 (1872)). The First Amendment requires the government to treat religious organizations with "'a spirit of freedom . . . [and] an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Id.* at 704 (quoting *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

Thus, in this case, even if the amended Act were neutral and generally applicable, under the First Amendment, it would be unconstitutional because it interferes with the Hutterites' ability to organize their community and to conduct their internal affairs in accord with that organization. The amended Act represents precisely the type of political interference

with the autonomy of religion that the Framers sought to prohibit. *Id*. at 703, 707.

CONCLUSION

Amici urge the Court to grant the petition for a writ of certiorari.

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May 2, 2013