No. _____

In the Supreme Court of the United States

BIG SKY COLONY, INC., AND DANIEL E. WIPF,
PETITIONERS

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY

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

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS LAYCOCK
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903

RON A. NELSON
MICHAEL P. TALIA
Church, Harris, Johnson & Williams
114 3rd Street South
Great Falls, MT 59403

S. KYLE DUNCAN
LUKE W. GOODRICH
Counsel of Record
ERIC C. RASSBACH
HANNAH C. SMITH
JOSHUA D. HAWLEY
DANIEL BLOMBERG
The Becket Fund for Religious Liberty
3000 K St., NW Ste. 220
Washington, DC 20007
(202) 955-0095
lgoodrich@becketfund.org

Counsel for Petitioner

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 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 Free Exercise Clause, *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.

PARTIES TO THE PROCEEDINGS

Petitioner Big Sky Colony, Inc., is an apostolic association and member colony of the Hutterian Brethren Church. Petitioner Daniel E. Wipf is the Colony's lead minister. Petitioners were plaintiffs-appellees below. Petitioner Big Sky Colony, Inc., has no parent corporation and issues no stock.

Respondent Montana Department of Labor and Industry is an agency of the State of Montana. Respondent was defendant-appellant below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court appears at 291 P.3d 1231. App. 1a. The opinion of the Montana district court is unpublished. App. 53a.

JURISDICTION

The Montana Supreme Court rendered its decision on December 31, 2012. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * ."

The relevant portions of the Montana Workers' Compensation Act, Mont. Code Ann. § 39-71, are reprinted in the Appendix. App. 93a-141a.

STATEMENT

This case involves an attempt by the State of Montana to force a small religious community of Hutterites to participate in the State's workers' compensation scheme, in direct violation of 500 years of Hutterite religious practice. In a sharply divided 4–3 decision, the Montana Supreme Court upheld the State's action under the Free Exercise Clause on the

ground that it was not motivated by "discrimination against religious organizations." App. 19a.

This ruling widens a square, well-developed circuit split over the proper legal standard governing claims under the Free Exercise Clause. It also conflicts with a long line of cases from this Court and federal and state appellate courts protecting the right of internal church governance. This case presents an ideal vehicle for resolving these significant conflicts on matters of national importance.

1. Petitioner Big Sky Colony ("Colony") is a member colony of the Hutterian Brethren Church. Petitioner Daniel E. Wipf is the Colony's lead minister.

The Hutterian Brethren Church was founded in the 1530s by Jakob Hutter, who in 1536 was burned at the stake by Ferdinand I in Innsbruck, Austria, for refusing to recant his Anabaptist beliefs. After suffering severe persecution in Europe, the Hutterites emigrated to North America in the 1870s in search of religious freedom. During World War I, many Hutterites in the United States were jailed because of their pacifism, and two died from brutal mistreatment in prison. John W. Bennett, *Hutterian Brethren: The Agricultural Economy and Social Organization of a Communal People* 32 (Stanford Univ. Press 1967).

In North America, Hutterites are organized into three branches: the *Schmiedeleut*, *Dariusleut*, and *Lehrerleut*. Petitioners are part of the *Lehrerleut*, the most traditional and religiously orthodox branch.

The *Lehrerleut* Hutterites live in remote religious communes called colonies. Each colony consists of several Hutterite families, typically totaling 100-150 individuals. To support themselves, colony members live simply and operate a communal farm. App. 148a-

149a. The harvest is used to feed the members, and the excess is sold to other colonies or non-members. *Ibid.* There are approximately thirty-five *Lehrerleut* colonies in Montana, all of which share the same religious beliefs as Petitioner Big Sky Colony.

Daily life in the colonies is regulated much like a monastery or convent. Families live in identical dwelling units surrounding a communal nursery, school, and dining hall. They eat their meals together in the communal dining hall. They attend daily worship services in the communal church. They educate their children in the communal school. They work together on the communal farm. They wear the same homemade clothing. They speak a unique German dialect, refrain from voting, and have limited contact with the outside world. App. 148a-149a.

The defining feature of the Hutterites, and the one that has separated them from all other Christian groups for almost 500 years, is their radical commitment to *Gütergemeinschaft*, or "community of goods." Hutterites believe that true Christian love requires all members to renounce private property and hold all their possessions in common. This belief is based on a literal interpretation of the biblical Book of Acts, which describes how early Christians sold their possessions, lived communally, and distributed to anyone who had need. Peter Riedemann, *Peter Riedemann's Hutterite Confessions of Faith* 120-21 (John Friesen ed., Herald Press 1999) (1565) (discussing *Acts* 2:44-47 and 4:32-35).

Accordingly, all Hutterites renounce any claim to real or personal property and transfer all their property to the colony. App. 180a-181a, 221a-223a. Members receive food, clothing, and other necessities un-

der the supervision of a steward (*Diener der Notdurft*, literally "servant of need"), who manages the Colony's possessions. Robert Friedmann, *Hutterite Studies* 115-18 (Hutterian Brethren Book Center 2d ed. 2010) (1961). Each member also vows to devote all of his or her time, labor, and energy to the colony "without compensation or reward of any kind whatsoever." App. 182a; see also App. 221a-223a, 149a. This voluntary sharing of labor, like the sharing of property, is an act of religious worship. App. 149a.

Hutterite members also renounce the use of the legal system to assert claims against each other or the community. App. 224a-225a. In a community with no private ownership, there can be no ownership of a legal claim against the community. Friedmann, *supra*, at 138. Thus, legal claims between believers are forbidden. Riedemann, *supra*, at 138 (citing *1 Corinthians* 6:7-8).

All of these commitments are embodied in the colony's *Bund*, or covenant, which each member can voluntarily sign upon reaching the age of eighteen. App. 221a-225a. Members who violate the *Bund* are subject to excommunication. App. 223a.

The absolute community of goods also extends to communal provision of medical care. Hutterite colonies have pooled their resources to form the Hutterite Medical Trust, a cooperative medical trust that provides comprehensive, modern medical care to all members. App. 149a-150a. All members receive the same care regardless of their ability to work or the reason for their illness or injury. *Ibid.*

2. Like other states, Montana has a Workers' Compensation Act ("Act"), which provides "wage-loss and medical benefits to a worker suffering from a

work-related injury or disease." Mont. Code Ann. § 39-71-105(1). The Act is part of a "quid pro quo" between employers and employees. *State Farm Fire and Cas. Co.* v. *Bush Hog, LLC*, 219 P.3d 1249, 1253 (Mont. 2009). Employers receive immunity from tort suits for workplace negligence; in return, employees receive guaranteed compensation for workplace injuries regardless of fault. *Ibid.*

Under the Act, certain employers must provide workers' compensation coverage to their employees, either through self-insurance, private insurance, or a state fund. Mont. Code Ann. §§ 39-71-2101, 2201, 2311. An employee who suffers a work-related injury is entitled to assert a claim and receive compensation. *Id.* at § 39-71-407. Employees are not permitted to waive their rights under the Act, *id.* at § 39-71-409(1), and employers are prohibited from terminating workers for filing a claim, *id.* at § 39-71-317.

Montana was one of the first states to adopt a comprehensive workers' compensation law in 1915. *State Farm*, 219 P.3d at 1253 n.1. For the first 94 years, Hutterite colonies were exempt. As the Montana Department of Labor and Industry explained, because "the Colony did not pay 'wages' to its members," "the Colony did not fall within the definition of 'employer,'" and "the Colony's members did not fall within the definition of 'employee.'" App. 4a. Throughout that time, there is no record of any Hutterite member ever being injured on the job and failing to receive comprehensive medical care, or any member ever seeking to assert a workers' compensation claim.

3. In 2009, the Montana Legislature amended the Act to include the Hutterites. The amendments were

introduced at the request of several construction companies, which complained that Hutterite colonies received an unfair advantage by performing construction jobs without paying workers' compensation costs. App. 227a. As the sponsor of the amendments explained: "[T]his section [of the bill applies to] Hutterite colonies who frequently bid on and perform jobs, often in the construction industry * * * . [The Hutterites] avoid the payment of wages and avoid the payment, therefore, of workers' compensation costs[,] thereby gaining a competitive advantage." App. 58a. Because the Hutterites shun politics and were not consulted during the drafting process, they were never able to inform the Legislature that they already provide more comprehensive medical insurance than the Act requires.

To include the Hutterites under the Act, Section 6 of House Bill 119 amended the definition of "employer" to include:

> (d) a religious corporation, religious organization, or religious trust receiving remuneration from nonmembers for agricultural production, manufacturing, or a construction project conducted by its members on or off the property of the religious corporation, religious organization, or religious trust.

Mont. Code Ann. § 39-71-117(1). Similarly, Section 7 of the Bill amended the definition of "employee" to include:

> (i) a member of a religious corporation, religious organization, or religious trust while performing services for the religious corporation, religious organization, or religious trust, as described in 39-71-117(1)(d).

Mont. Code Ann. § 39-71-118(1).

The State concedes that these amendments were designed to extend coverage of the Act to the Hutterites. App. 326a. There is also no evidence that these amendments affect any other secular or religious organization in the State. App. 42a.

Despite these amendments, the Act continues to include twenty-six exemptions for various types of employment. Mont. Code Ann. § 39-71-401(2)(a)-(z). These include, for example: "household or domestic" employees; "independent contractor[s]," "sole proprietor[s]," and members of a partnership, LLP, or LLC; "real estate, securities, or insurance salesperson[s]"; railroad workers; "timer[s], referee[s], umpire[s], or judge[s], at an amateur athletic event"; "newspaper carrier[s]"; "freelance correspondent[s]"; "cosmetologist[s]" and "barber[s]"; horseracing jockeys and trainers; "petroleum land professional[s]"; officers or managers of "ditch compan[ies]"; certain common carriers or motor carriers; athletes engaged in a contact sport; and musicians performing under a written contract. *Ibid.*

The Act also includes two exemptions that would seem to protect the Hutterites. First, the Act exempts any service performed "by a member of a religious order in the exercise of the duties required by the order." *Id.* at § 39-71-401(2)(t). Second, it exempts "employment of a person performing services in return for aid or sustenance only." *Id.* at § 39-71-401(2)(h). However, the State interprets neither exemption to protect the Hutterites.

4. On January 8, 2010, the Colony and its minister, Daniel E. Wipf, filed a "Petition for Declaratory Relief" in Montana state court, seeking a declaration

that the amendments to the Workers' Compensation Act violate the First Amendment. The parties filed cross-motions for summary judgment and agreed that no material facts were in dispute.

The Colony made two main arguments. First, it asserted that the Act was neither "neutral" nor "generally applicable" under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), because it was gerrymandered to apply to the Hutterites while exempting a wide variety of similar secular and religious conduct. App. 243a-249a, 261a. Second, it argued that the Act unconstitutionally regulated its "internal church decision[s]" in violation of *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 132 S. Ct. 694, 707 (2012). App. 247a-248a.

The Colony did not claim a general right to be free from regulation of its economic activities. In fact, its agricultural production has long been heavily regulated by the State, without complaint. App. 26a-27a. Nor did the Colony claim that the Act imposed a financial burden on its operations. The Colony's health insurance plan already provides members with significantly more comprehensive coverage than the Act requires, at great expense to the Colony; thus, the Act imposes "very little additional costs [on the Hutterites] * * * if it costs more at all." App. 270a.

Instead, the Colony objected to the fact that the Act regulates the internal relationship between the Colony and its members. For almost 500 years, Hutterite doctrine has required all members to renounce private property, to work freely without compensation, and to abstain from asserting legal claims against fellow members. Contrary to these teachings, the Act gives individual members a private,

unwaivable right to compensation; it compels the Colony to compensate its members for their work; and it creates a legal claim between the Colony and its members. The Act also forbids employers from terminating employees for asserting a claim, thus making it illegal for the Colony to discipline members who violate church teaching.

In response, the State acknowledged that the Act "admittedly is directed towards 'religious organizations,' * * * primarily the Hutterites." App. 326a. But it claimed that the Act was neutral and generally applicable "because it does not intentionally 'infringe upon or restrict practices *because of* their religious motivation.'" App. 311a (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993)). The State also acknowledged that "a law requiring Hutterites to buy consumer goods or pay its members a wage * * * would likely interfere 'with the internal governance of the [Colony]'" in violation of *Hosanna-Tabor*, 132 S. Ct. at 706. App. 282a. Nevertheless, it claimed that the workers' compensation requirement was different, because it "only affects the relationship between the [Colony] and the workers' compensation system." App. 275a (quoting *St. John's Lutheran Church* v. *State Comp. Ins. Fund*, 830 P.2d 1271, 1278 (Mont. 1992)). Finally, the State argued that the Act furthered a compelling interest in "creat[ing] a level playing field * * * between religious and secular organizations competing in [commercial activities]." App. 319a; see also App. 316a-317a.

The district court granted summary judgment to the Colony. It held that the Act was not "neutral and generally applicable," because it "was designed specifically to address Hutterites" and "drafted with such care to apply to only Hutterites." App. 75a-76a. It al-

so found that the Act impermissibly interfered in the internal governance of the Colony, by creating an "employer-employee relationship between members of the Colony and the Colony" and infusing "property rights concepts [that are] forbidden by the fundamental communal living and community of goods doctrine upon which the [Colony] is founded." App. 74a. Finally, the court held that the Act furthered no legitimate purpose, because Hutterites are forbidden by their religion from asserting a workers' compensation claim, and if any member did so, they would be required to relinquish any benefits to the Colony. App. 77a.

5. In a sharply divided, 4–3 decision, the *en banc* Montana Supreme Court reversed. According to the majority, the Act was neutral and generally applicable because it did not "single out religious beliefs," and did not "regulate or prohibit any conduct 'because it is undertaken for religious reasons'"; it merely included the Colony in a regulatory system that "generally applies" to other employers. App. 18a-19a Thus, the Colony "fail[ed] to establish evidence of discrimination." App. 19a.

The dissenters rejected the notion that the Colony was required to prove singling out or discriminatory motive. App. 42a-43a. Instead, it was enough to prove that the Act "applies to the religious structure of the Hutterites" but not to "other religious organization[s]." *Ibid.* It was also enough to prove that the Act, by exempting a wide variety of nonreligious employment, "fails to prohibit nonreligious conduct that endangers the State's purported government interests" just as much as the Hutterites' conduct would. App. 47a. "The failure to draft [the amendments] in a

generally applicable manner necessarily requires strict scrutiny review." App. 44a.

The dissent also concluded that the Act "interferes with the internal relationship between the Colony and its members." App. 49a. Specifically, "the Act requires injured employees to initiate and thus 'own' a claim against the employer," in direct violation of "the central tenets of the Hutterite faith." *Ibid.* This, according to the dissent, interferes in "the relationship between a religious entity and its members" in violation of *Hosanna-Tabor*, 132 S. Ct. 694. App. 49a-50a.

Finally, the dissent concluded that the Act could not survive strict scrutiny. Although the State claimed that the Act furthered its interest in creating a level playing field among Montana businesses, that interest had nothing to do with the actual purpose of the Workers' Compensation Act—"providing care and rehabilitation to injured workers." App. 46a-47a. The State also failed to show that the Act would address the level-playing-field concern, because the Colony already provided expensive, comprehensive, no-fault health insurance to its members. *Ibid.* Finally, the dissent concluded that the Act ultimately served no purpose at all, because the State admitted that Colony members would either refrain from filing claims or would be required to turn over all compensation to the Colony—"the very definition of illusory coverage that 'defies logic' and violates public policy." App. 50a.

REASONS FOR GRANTING THE PETITION

In *Smith*, 494 U.S. 872, and *Lukumi*, 508 U.S. 520, this Court held that a law is subject to strict scrutiny under the Free Exercise Clause if it is not "neutral" and "generally applicable." But in the wake of *Smith* and *Lukumi*, "[t]he federal circuits have

split on whether *Lukumi* requires an *object to infringe upon religious practice* before a law must be supported by a compelling government interest." Sarah Waszmer, *Taking It out of Neutral: The Application of* Locke*'s Substantial Interest Test to the School Voucher Debate*, 62 Wash. & Lee L. Rev. 1271, 1285 (2005) (emphasis added); see also Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25, 26 (2000) (noting "considerable disagreement over what exactly [*Lukumi*] means").

Five circuits or state supreme courts hold that a law is subject to strict scrutiny only if it singles out religious conduct for adverse treatment or has a discriminatory motive. *Strout* v. *Albanese*, 178 F.3d 57, 65 (1st Cir. 1999); *Skoros* v. *City of N.Y.*, 437 F.3d 1, 39 (2d Cir. 2006); *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013); *Olsen* v. *Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); App. 18a-19a. In these circuits, the plaintiff must prove that the law targets conduct for uniquely adverse treatment "because of [its] religious motivation," *Bethel*, 706 F.3d at 561; *Olsen*, 541 F.3d at 832; App. 19a, or that the law was motivated by "substantial animus against [religion]," *Strout*, 178 F.3d at 65. This approach focuses on the "neutrality" portion of *Lukumi*, without giving independent significance to the requirement of "general applicability."

By contrast, five other circuits or state supreme courts reject the requirement of singling out or discriminatory motive, instead holding that a law is subject to strict scrutiny if it treats a substantial category of nonreligious conduct more favorably than similar religious conduct. *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3rd Cir. 1999) (Alito, J.); *Ward* v. *Polite*, 667 F.3d 727,

738-40 (6th Cir. 2012) (Sutton, J.); *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, 1234-35 (11th Cir. 2004); *Mitchell Cnty.* v. *Zimmerman*, 810 N.W.2d 1 (Iowa 2012). These circuits maintain that the requirements of "neutrality" and "general applicability" are distinct.

In this case, the Montana Supreme Court sided with the circuits that require singling out or discriminatory motive, thus widening a square and well-developed split. This case presents an ideal vehicle for resolving that conflict.

The decision below also warrants this Court's review because it conflicts with a long line of cases protecting the right of churches to govern their internal affairs. As this Court held most recently in *Hosanna-Tabor*, 132 S. Ct. 694, even when a law is neutral and generally applicable, it cannot regulate "an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. Here, however, the decision below authorizes the government to create individual property rights and an adversarial right of compensation between Hutterite colonies and their members—in direct violation of 500 years of internal Hutterite governance. That decision cannot be squared with *Hosanna-Tabor* or the long line of decisions protecting internal church governance.

I. The decision below deepens a conflict over the legal standard governing whether a law is "neutral" and "generally applicable" under the Free Exercise Clause.

Federal circuits and state supreme courts are evenly divided over the legal standard governing

claims under the Free Exercise Clause. Five jurisdictions hold that a showing of singling out or discriminatory motive is a *necessary* prerequisite for strict scrutiny. Five others hold that a showing of singling out or discriminatory motive is not necessary; instead, it is enough to show that a law treats a substantial category of nonreligious conduct more favorably than similar religious conduct. The conflict is deep, well-developed, and entrenched, and it has produced conflicting results in indistinguishable cases.

A. The federal circuits and state supreme courts are evenly divided over whether a free exercise plaintiff must demonstrate singling out or discriminatory motive to prove that a law is not "neutral" and "generally applicable."

The Montana Supreme Court has now joined the First, Second, Fourth, and Eighth Circuits in holding that a law is subject to strict scrutiny under the Free Exercise Clause only if singles out religious conduct or has a discriminatory motive. *Strout*, 178 F.3d at 65; *Skoros*, 437 F.3d at 39; *Bethel*, 706 F.3d at 561; *Olsen*, 541 F.3d at 832; App. 18a-19a. Under this approach, the plaintiff must demonstrate that "the *object* of [the law] was to burden practices *because of their religious motivation*," *Bethel*, 706 F.3d at 561 (emphasis added)—either by showing that the law targets religious conduct for a unique prohibition, or that it was driven by a discriminatory motive. See *Olsen*, 541 F.3d at 832 (plaintiff failed to demonstrate that the "object [of the law] is to infringe upon or restrict practices because of their religious motivation") (internal quotation omitted); *Strout*, 178 F.3d at 65 (plaintiff failed to prove "substantial animus against [religion] that motivated the law in question");

Skoros, 437 F.3d at 39 (plaintiffs "fail[ed] to demonstrate that the purpose of the defendants' challenged actions was to impugn [plaintiffs'] religious beliefs or to restrict their religious practices."); see also *St. Bartholomew's Church* v. *City of N.Y.*, 914 F.2d 348, 354 (2d Cir. 1990) (plaintiff failed to provide "evidence of an intent to discriminate against, or impinge on, religious belief"); *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991) (plaintiff failed to provide "evidence that the [government] has an anti-religious purpose").

By contrast, the Third, Sixth, Tenth, and Eleventh Circuits, along with the Iowa Supreme Court, have rejected the requirement that a plaintiff demonstrate singling out or discriminatory motive. *Fraternal Order of Police*, 170 F.3d at 359; *Ward*, 667 F.3d at 738-40; *Shrum*, 449 F.3d at 1132; *Midrash*, 366 F.3d at 1234-35; *Mitchell Cnty.*, 810 N.W.2d at 1. As the Tenth Circuit has explained: "Proof of hostility or discriminatory motivation may be *sufficient* to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." *Shrum*, 449 F.3d at 1145 (McConnell, J.) (emphasis added; citations omitted). In these circuits, it is enough to prove that the government exempts "a substantial category of [nonreligious] conduct" that "undermines the purposes of the law to at least the same degree as the [prohibited religious] conduct [would]." *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.).

The leading case adopting the latter approach is *Fraternal Order of Police*. There, a police department adopted a grooming policy prohibiting officers from growing beards; the purpose of the policy was to "foster[] a uniform appearance" among the police force.

170 F.3d at 366. Although the policy included an exception for beards grown for medical reasons, the department refused to grant an exception for beards grown for religious reasons. In an opinion by then-Judge Alito, the Third Circuit held that the no-beard policy violated the Free Exercise Clause. *Id.* at 364-66. Although there was no evidence of singling out or anti-religious motive, the court held that strict scrutiny was required because the exemption for medical reasons "undermines the Department's interest in fostering a uniform appearance" just as much as an exemption for religious reasons would. *Id.* at 366.

The reasons for this rule are twofold. First, granting an exemption for secular conduct, but not analogous religious conduct, represents a "value judgment in favor of secular motivations, but not religious motivations." *Ibid.* Such a value judgment requires strict scrutiny. *Ibid.*; cf. *Lukumi*, 508 U.S. at 537-38 (ordinance was subject to strict scrutiny because it "devalues religious reasons * * * by judging them to be of lesser import than nonreligious reasons"). Second, part of the rationale for *Smith* is that if burdensome laws apply to secular and religious conduct alike, religious minorities are more likely to be protected through "the political process." *Smith*, 494 U.S. at 890. But if the government can make exemptions for favored political groups, the "vicarious political protection [for religious groups] breaks down." Laycock, 40 Cath. Law. at 36. The law becomes "a prohibition that society is prepared to impose upon [religious adherents] but not upon itself," which is the "precise evil [that] the requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 545-46.

Following *Fraternal Order of Police*, three other circuits and one state supreme court have held that a

law is not generally applicable when it exempts non-religious conduct that undermines the government's interest just as much as the prohibited religious conduct would. See *Ward*, 667 F.3d at 738-40 (Sutton, J.); *Blackhawk*, 381 F.3d at 211 (Alito, J.); *Midrash*, 366 F.3d at 1234-35; *Shrum*, 449 F.3d at 1144-45 (McConnell, J.); *Mitchell Cnty.*, 810 N.W.2d at 3. None of these courts requires the plaintiff to demonstrate singling out or discriminatory motive. Contra *Hines* v. *S.C. Dep't of Corr.*, 148 F.3d 353, 356-57 (4th Cir. 1998) (upholding a grooming policy banning beards, despite an exemption for "medical condition[s]," on the ground that the Free Exercise Clause prohibits only "laws designed to suppress religious beliefs or practices").

This conflict is square and entrenched, and it has been recognized not only by courts but also by commentators. As one scholar has noted, "we have the *Smith*/*Lukumi* test, but we have considerable disagreement over what exactly that test means." Laycock, 40 Cath. Law. at 26. Similarly, other commentators have noted that "[t]he federal circuits have split on whether *Lukumi* requires an object to infringe upon religious practice before a law must be supported by a compelling government interest," and "the Supreme Court has not addressed this split." Waszmer, 62 Wash. & Lee L. Rev. at 1285.

B. The decision below conflicts with other state supreme courts and federal circuit courts.

In this case, the Montana Supreme Court sided with the circuits that require a showing of singling out or discriminatory motive. According to the majority, a law is subject to strict scrutiny "*only* when [it]

impermissibly singles out 'some or all religious beliefs or regulates or prohibits conduct *because it is undertaken for religious reasons*.'" App. 18a (quoting *Lukumi*, 508 U.S. at 532) (emphasis added). The majority held that "the workers' compensation requirement does not place the Colony members in a discriminatory position compared to other religious groups," and "[t]he legislature did not conceive of the workers' compensation system as a means to shackle the religious practices of Colony members," App. 8a-9a (emphasis added). Thus, the Colony "fail[ed] to establish evidence of discrimination against religious organizations." App. 19a.

This decision cannot be squared with the decisions of the Third, Sixth, Tenth, or Eleventh Circuits, or the Iowa Supreme Court, all of which reject the requirement of singling out or discriminatory motive. Under these decisions, the key question is whether the law exempts "a substantial category of [nonreligious] conduct" that "undermines the purposes of the law to at least the same degree as the [prohibited religious] conduct [would]." *Blackhawk*, 381 F.3d at 209 (Alito, J.).

Here, the Workers' Compensation Act exempts twenty-six different types of employment relationships, many of which undermine the State's alleged interests far more than an exemption for the Hutterites would. For example, the Act exempts domestic workers; independent contractors; sole proprietors; members of partnerships, LLPs, or LLCs; real estate, securities, or insurance salespersons; railroad workers; timers, referees, umpires, or judges at amateur athletic events; newspaper carriers; freelance correspondents; cosmetologists and barbers; horseracing jockeys and trainers; petroleum land profession-

als; officers or managers of ditch companies; certain common carriers or motor carriers; athletes; and musicians. Mont. Code Ann. § 39-71-401(2)(a)-(z). Beyond that, the Act exempts any person "performing services in return for aid or sustenance only," and any "member of a religious order in the exercise of duties required by the order." *Id.* at § 39-71-401(2)(h), (t).

These exemptions undermine the State's supposed interest in a "level playing field" even more than an exemption for the Colony would. For example, businesses organized as a partnership, LLP, or LLC can perform any commercial activity—including the activities performed by the Hutterites—without providing workers' compensation to their members. *Id.* at § 39-71-401(2)(d), (3). Secular communes can engage in farming just like the Hutterites without providing workers' compensation. *Id.* at § 39-71-401(2)(h). And a Catholic monastery or other religious order can engage in the same work as the Hutterites without providing workers' compensation. *Id.* at § 39-71-401(2)(t). All of these relationships are exempt from the Act, even if the employer—unlike the Hutterites—does *not* provide comprehensive medical care to its employees. As the dissenters pointed out: "These exemptions are contrary to the governmental interests asserted by the State," and prevent the State from establishing a "level playing field" across all areas of commerce. App. 46a-48a.

Under the legal standard employed by the Third, Sixth, Tenth, and Eleventh Circuits, and the Iowa Supreme Court, this would be an easy case. In *Fraternal Order of Police*, for example, the police department's prohibition on beards included only one exemption for a narrow slice of secular conduct that

undermined the government's interest—beards grown for medical reasons. 170 F.3d at 366. Growing a beard for other secular or religious reasons was prohibited. But here, the Act includes twenty-six exemptions for a vast swath of secular and religious conduct, including conduct identical to, and far more detrimental to the State's interests than, that of the Hutterites. Thus, even more than in *Fraternal Order of Police*, the State has made a "value judgment" in favor of secular conduct and against the Hutterites—a value judgment that requires strict scrutiny. *Ibid.*

Other circuits have likewise subjected laws to strict scrutiny, even when the secular exemptions were far narrower and more modest than those at issue here. See *Ward*, 667 F.3d at 738-40 (prohibition on referring counseling patients was not generally applicable where it exempted "multiple types of referrals" for secular reasons, but not religious reasons); *Blackhawk*, 381 F.3d at 211 (wildlife permitting fee was not generally applicable where it exempted zoos and circuses, but not Native Americans); *Midrash*, 366 F.3d at 1234-35 (zoning code was not generally applicable where it exempted private clubs, but not synagogues); *Mitchell Cnty.*, 810 N.W.2d at 3 (prohibition on steel wheels was not generally applicable where it exempted school buses, but not Mennonite tractors). The decision below cannot be squared with these cases.

C. The decision below conflicts with this Court's cases.

The decision below also conflicts with this Court's free exercise cases. Those cases establish that while a showing of singling out or discriminatory motive may be *sufficient* to merit strict scrutiny, it is not *neces-*

sary. Strict scrutiny is also required where the government treats a substantial category of nonreligious conduct more favorably than similar religious conduct.

1. The leading case is *Lukumi*. There, the Court considered four municipal ordinances that restricted the killing of animals. 508 U.S. at 526-28. The question was whether the ordinances violated the rights of a Santería priest, who sacrificed animals as part of his religious practice. In a 9–0 decision, this Court held that the ordinances were neither neutral nor generally applicable.

The Court's analysis proceeded in two parts. First, the Court held that the ordinances were not "neutral" because they "had as their object the suppression of religion." 508 U.S. at 542. This object was apparent, the Court said, because the ordinances "singled out [religious conduct] for discriminatory treatment." *Id.* at 537-38. In a separate section of the opinion, Justice Kennedy also considered "direct" evidence of "discriminatory object"—namely, comments by government officials expressing "significant hostility" toward Santería adherents. *Id.* at 540-42. But this section of the opinion was joined by only one other Justice.

Next, the Court held that the ordinances were not "generally applicable." *Id.* at 542-45. The Court said that it "need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall *well below the minimum standard* necessary to protect First Amendment rights." *Id.* at 543 (emphasis added). In particular, the ordinances were not generally applicable because they included exemptions for "[m]any

types of animal deaths or kills for nonreligious reasons." *Id.* at 543. Thus, they "fail[ed] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree than Santeria sacrifice does." *Ibid.*

2. The decision below, like the First, Second, Fourth, and Eighth Circuits, held that *Lukumi* requires strict scrutiny "*only* when the regulation impermissibly singles out 'some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.'" App. 18a (quoting *Lukumi*, 508 U.S. at 532) (emphasis added). According to this view, *Lukumi* requires affirmative "evidence of discrimination." App. 19a.

But this view ignores the second half of *Lukumi* (on general applicability) in favor of the first. In the first half, of course, the Court held that singling out religious conduct is *sufficient* to prove a lack of neutrality. 508 U.S. at 532; see also *ibid.* (Free Exercise Clause prohibits discrimination "*[a]t a minimum*") (emphasis added). But the Court did not stop there. It also held that the ordinances fell "well below the minimum standard" of general applicability, because they exempted "[m]any types of animal deaths or kills for nonreligious reasons." 508 U.S. 543. This holding depended *not* on singling out, but on "unequal treatment" of similar religious and nonreligious conduct. *Id.* at 542-45.

Nor did the Court require evidence of discriminatory motive. Only two Justices suggested that discriminatory motive was relevant. *Id.* at 540-42 (Kennedy, J., joined by Stevens, J.). Two Justices said that it was irrelevant, *id.* at 558-59 (Scalia, J., and Rehnquist, C.J., concurring), and five expressed no

opinion. Thus, the Third, Sixth, Tenth, and Eleventh Circuits, and the Iowa Supreme Court, have rightly held that *Lukumi* does not require a showing of discriminatory motive.

3. This Court's decision in *Sherbert* further confirms that the Free Exercise Clause does not require a showing of singling out or discriminatory motive. There, a state law denied unemployment benefits to any person who refused a job "without good cause." *Sherbert* v. *Verner*, 374 U.S. 398, 401 (1963). Applying this provision, the state denied benefits to a Seventh-day Adventist who refused to work on the Sabbath. *Id.* at 408-09. Although there was no evidence of singling out or discriminatory motive, this Court struck down the law on the ground that it created a mechanism of "individualized exemptions." *Smith*, 494 U.S. at 884. Justice Harlan dissented, arguing that there was no evidence "that the State discriminated against the appellant on the basis of her religious beliefs." *Sherbert*, 374 U.S. at 420.

This Court specifically preserved the holding of *Sherbert* in *Smith*, where it noted that the law permitted exemptions for "at least some 'personal reasons,'" but not religious reasons. 494 U.S. at 884. It also relied on that holding in *Lukumi*, where it said that the challenged ordinance involved an impermissible mechanism for "individualized exemptions." 508 U.S. at 537-38. As then-Judge Alito later held, if "individualized exemptions" require strict scrutiny in the absence of discrimination, then the same is even more true when, as here, "the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption." *Fraternal Order of Police*, 170 F.3d at 365.

Accordingly, the lower court's decision cannot be reconciled with either *Lukumi* or *Sherbert*. See also *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (striking down compulsory school-attendance law despite the absence of singling out or discriminatory motive).

II. The decision below conflicts with decisions of this Court, federal circuit courts, and state supreme courts protecting the right of churches to govern their internal affairs.

The decision below also conflicts with a long line of cases protecting the right of churches to govern their internal affairs. This right includes the right to choose religious leaders, *Hosanna-Tabor*, 132 S. Ct. 694, to decide "who ought to be members," *Bouldin* v. *Alexander*, 82 U.S. 131, 139-40 (1872), and to establish rules for "the ecclesiastical government of all the individual members." *Watson* v. *Jones*, 80 U.S. 679, 728-29 (1871). Even neutral and generally applicable laws cannot interfere with such "internal church decision[s]." *Hosanna-Tabor*, 132 S. Ct. at 707.

"Internal church decisions" are also at issue here. For 500 years, Hutterite communities have followed detailed rules governing their communal life—including requirements that members renounce private property, work without compensation, and relinquish any legal claim against the community. But the workers' compensation requirement changes all of this. Contrary to Hutterite teaching, it creates an unwaivable, individual right of compensation that members hold against their community; it compels the community to compensate members for their work; and it forbids the community from excluding members who assert that right.

The lower court's decision ignored this. Without mentioning *Hosanna-Tabor* or the right of internal church governance, it held that the Act does not impermissibly burden the community, because it simply regulates the Colony "in the same manner that [it] regulates the commercial activities of other employers in Montana." App. 8a. That decision cannot be squared with the decisions of this Court, federal circuit courts, or state supreme courts.

1. Last term, in *Hosanna-Tabor*, this Court reaffirmed what many courts have long recognized: that churches have a right to be free from interference in "the internal governance of the church." 132 S. Ct. at 706. There, a Lutheran church dismissed one of its school teachers, who sued for retaliation under the Americans with Disabilities Act. This Court held that the suit was barred by the First Amendment "ministerial exception," because the hiring of the teacher was a "strictly ecclesiastical" matter, not subject to government interference. *Id.* at 709.

The Court distinguished cases involving "internal church decision[s]," such as the hiring of a teacher, from cases involving "outward physical acts," such as the ingestion of peyote in *Smith*. *Id.* at 707. The government cannot interfere in "an internal church decision that affects the faith and mission of the church itself"—even by neutral and generally applicable laws. *Ibid.*

Federal circuit courts have long applied this rule in circumstances analogous to this case. For example, in *Schleicher* v. *Salvation Army*, 518 F.3d 472 (7th Cir. 2008) (Posner, J.), two former ministers sued the Salvation Army under the Fair Labor Standards Act (FLSA), claiming that they were unlawfully denied

minimum wage and overtime pay for their work managing thrift shops, which they asserted was an "ordinary commercial activity" under the FLSA. *Id.* at 476.

The Seventh Circuit rejected their claims. Although "[t]he sale of the goods in the thrift shop is a commercial activity," it also has a "spiritual dimension," because the ministers and the thrift shops were part of a "self-contained religious communit[y]." *Id.* at 476-77. Judge Posner likened the case to one where monks take a vow of poverty and support their monastery by producing and selling wine. *Id.* at 476. "No one could think the curious precapitalist economy of a monastery an ordinary commercial activity" subject to minimum wage requirements. *Ibid.* Thus, forcing the community to pay minimum wage "would plunge a court deep into religious controversy and church management." *Id.* at 477.

But that is precisely what the lower court did here. The Hutterites are a monastery of families. Like other monasteries, they are organized as an "apostolic association" under 26 U.S.C. § 501(d); their members take a vow of poverty; their daily life is organized around communal meals and worship; and their work is performed freely as an act of worship. Yet the lower court held that when they sell agricultural produce to non-members, they are engaged in purely "commercial activities," and their internal relationships can be regulated "like all other employers in Montana." App. 8a. This decision directly conflicts with *Hosanna-Tabor* and *Schleicher*. See also *Alcazar* v. *Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1293 (9th Cir. 2010) (First Amendment bars minimum-wage claim by Catholic seminarian); *Shaliehsabou* v. *Hebrew Home of Greater Wash., Inc.*,

363 F.3d 299 (4th Cir. 2004) (First Amendment bars overtime-wage claim by kosher supervisor at nursing home).

2. It is no response to say that *Hosanna-Tabor* involved "ministers," while this case involves mere "members." That distinction makes no sense in the context of a monastery or Hutterite colony, where every member is integral to the religious life of the community. See *Hosanna-Tabor*, 132 S. Ct. at 711 (Alito, J., concurring) ("[I]t would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one."). It also contradicts federal and state cases protecting the right of churches to establish rules for "the ecclesiastical government of all the *individual members*." *Watson*, 80 U.S. at 728-29 (emphasis added). Just as the state cannot interfere with the selection of church leaders, it cannot interfere with internal rules governing members.

This Court first recognized the right of churches to govern their members in *Bouldin*, 82 U.S. at 131 (1872). There, a minority faction of a church sought to excommunicate the church trustees and take control of the church property. This Court, however, concluded that it lacked authority to decide who was a member of the church: "[W]e have no power to revise or question ordinary acts of church discipline, or of excision from membership. * * * [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off." *Id.* at 139-140.

Since *Bouldin*, lower courts have repeatedly affirmed the right of churches to establish rules govern-

ing members. In *Paul* v. *Watchtower Bible & Tract Society of New York*, 819 F.2d 875 (9th Cir. 1987), for example, a former member of the Jehovah's Witnesses sued the church for infliction of emotional distress based on the church's practice of "shunning"—a form of social ostracism directed at former members. The Ninth Circuit, however, held that the suit was barred by the First Amendment: "Courts generally do not scrutinize closely the relationship among members (or former members) of a church." *Id.* at 883. Rather, "[r]eligious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be." *Ibid.* (quoting *Prince* v. *Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring)).

Consistent with *Watson*, *Bouldin*, and *Hosanna-Tabor*, state supreme courts have long affirmed the right of churches to establish rules for their members. See, *e.g.*, *C.L. Westbrook, Jr.* v. *Penley*, 231 S.W.3d 389, 400 (Tex. 2007) (rejecting "professional negligence" claim by former church member, because it would "impinge upon [the church's] ability to manage its internal affairs" and "to discipline members"); *Harris* v. *Matthews*, 643 S.E.2d 566, 572 (N.C. 2007) (rejecting claim by church members that would involve the court in "ecclesiastical decisions concerning church management and use of funds"); *Lott* v. *E. Shore Christian Ctr.*, 908 So.2d 922 (Ala. 2005) (refusing to interfere in dispute over discipline of church member); *First Born Church of the Living God, Inc.* v. *Hill*, 481 S.E.2d 221, 222 (Ga. 1997) (court-ordered meeting of church membership "would be totally inconsistent with the Church's fundamental religious freedom * * * to determine its own governmental rules and regulations").

State supreme courts have also rejected the application of workers' compensation laws to monasteries and similar religious communities. See, *e.g.*, *Blust* v. *Sisters of Mercy*, 239 N.W. 401, 404 (Mich. 1931) (rejecting workers' compensation for novitiate in a Catholic order, because "[t]he[ir] relation[ship] was far removed from pecuniary considerations"); *Dixon* v. *Salvation Army*, 201 S.W.3d 386, 388-89 (Ark. 2005) (rejecting workers' compensation for member of Salvation Army, because the Salvation Army "is a religious movement," and the member worked "out of a desire to improve himself"); see also *Joyce* v. *Pecos Benedictine Monastery*, 895 P.2d 286, 289-90 (N.M. Ct. App. 1995) (rejecting workers' compensation for member of monastery). The reason is obvious: Forcing a monastery to provide workers' compensation to its members fundamentally interferes with its internal governance.

The lower court's decision cannot be reconciled with these cases. The workers' compensation requirement directly interferes with the internal rules governing Hutterite members—specifically, the rules requiring all members to renounce private property, to work without compensation, and to relinquish all claims against the community. It also makes it illegal for the Hutterites to excommunicate a member who asserts a claim in violation of the community's rules. Mont. Code Ann. § 39-71-317. Even the State admits that this would "likely" violate *Hosanna-Tabor*. App. 272a. Thus, the Act regulates internal church governance in direct conflict with *Hosanna-Tabor*.

3. This Court's decision in *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), is not to the contrary. See App. 13a-15a. There, the Court upheld the application of the federal

minimum-wage law to a religious foundation, despite the foundation's religious objections. *Alamo*, 471 U.S. at 293. But that case differs in several key respects.

First, the foundation in *Alamo* was engaged in "ordinary commercial businesses" with "a common business purpose"—including service stations, clothing outlets, grocery stores, candy companies, and a motel. *Id.* at 295-99. The businesses just "happened to be owned by [a] religious [organization]." *Id.* at 298. Here, it is undisputed that the Hutterites are not operating "ordinary commercial businesses" animated by a "common business purpose," but are instead following a self-sustaining, 500-year-old religious tradition.

Second, the Court found that the members in *Alamo* worked "in expectation of compensation." *Id.* at 302. They were "'fined' heavily for poor job performance, worked on a 'commission' basis, and were prohibited from obtaining food from the cafeteria if they were absent from work." *Id.* at 301 n.22. Here, no member works "in expectation of compensation"; they vow never to receive it. And all members receive the same care regardless of their ability to work.

Finally, in *Alamo*, there were doubts about the foundation's religious sincerity. Those doubts proved well-founded when the foundation's leader was convicted of tax evasion and trafficking minors for sex, and sentenced to 175 years in prison. *Jury Convicts An Evangelist Of Tax Evasion*, N.Y. Times, June 12, 1994; Associated Press, *Evangelist Who Took Child 'Brides' Is Sentenced to 175 Years*, N.Y. Times, Nov. 13, 2009. Here, no one questions the sincerity of the 500-year-old Hutterite traditions.

In short, *Alamo* rested on the existence of an "ordinary" commercial relationship, which the government can regulate, and which the State concedes is not present here. 471 U.S. at 302. In fact, the State admits that "a law requiring Hutterites to * * * pay its members a wage * * * would likely interfere 'with the internal governance of the [Colony]" in violation of *Hosanna-Tabor*—thus conceding that *Alamo* is distinguishable. App. 282a.

4. If this Court does not grant plenary review on the question of internal church governance, it should nevertheless grant certiorari, vacate the judgment below, and remand the case (GVR) for reconsideration in light of *Hosanna-Tabor*, 132 S. Ct. 694. A GVR order is appropriate where (1) "recent developments" that "the court below did not fully consider * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and (2) "it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). Based on this standard, this Court has issued a GVR order when a plaintiff "clearly presented a federal constitutional * * * claim to the State Supreme Court," and "the dissenting justices discerned the significance of the issue raised," but the majority rendered its decision "without examining the specific constitutional claims [asserted]." *Youngblood* v. *West Virginia*, 547 U.S. 867, 869-70 (2006).

That is just what occurred here. While this case was pending in the Montana Supreme Court, this Court issued its decision in *Hosanna-Tabor*, 132 S. Ct. 694. Both parties briefed the issue, App. 248a, 257a, 272a-75a, 278a, 282a, and the State conceded

that some applications of the Act would "likely" violate *Hosanna-Tabor*, App. 272a, 282a. The dissenters also concluded that the Act regulated "the relationship between [the Colony] and its members" in violation of *Hosanna-Tabor*. App. 47a-49a. Yet the majority did not cite or discuss it. Thus, there is "reason to believe the court below did not fully consider [*Hosanna-Tabor*]," and a GVR order is appropriate. *Lawrence*, 516 U.S. at 167-68; see also *Stutson* v. *United States*, 516 U.S. 193, 195 (1996) (GVR where the "opinion below did not consider the import of a recent Supreme Court precedent that both parties now agree applies"); *Robinson* v. *Story*, 469 U.S. 1081 (1984) (GVR in light of a recent decision that predated the vacated decision).

III. The case presents recurring questions of vital importance for thousands of religious organizations across the country.

Review is also warranted because of the sweeping practical significance of the questions presented.

The first question presented, on the meaning of "neutral and generally applicable" under *Smith* and *Lukumi*, arises in almost every free exercise claim. Government defendants "routinely" argue that "religious claimants must prove that government officials acted out of an anti-religious motive." Laycock, 40 Cath. Law. at 27. Religious plaintiffs almost never concede that they must prove bad motive. Thus, the result frequently turns on which side of the split a court joins.

In recent years, free exercise cases have also arisen with greater frequency. In the ten years immediately following *Lukumi* (1993-2002), a Westlaw search for "Free Exercise Clause" yields 1179 cases.

In the next ten years (2003-2012), the same search yields 2616 cases—an increase of over 220%. This is due, in part, to the nation's increasing religious diversity. As religious diversity increases, so does the likelihood that any given law will conflict with minority religious practices. Not surprisingly, minority faiths tend to produce a disproportionate share of free exercise conflicts. Compare Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey: Summary Report* 5 (2009) (religious minorities compose 12% of population), with Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 Iowa L. Rev. 231, 246 (2012) (religious minorities bring 57% of federal free exercise claims). For these increasingly common conflicts, the scope of the Free Exercise Clause is of vital practical importance.

The 5–5 split on this question is also deep, square, and well-developed. This Court established the "neutral" and "generally applicable" standard over twenty years ago in *Smith* and *Lukumi*, and it has been debated by courts and commentators at length. The split is not based on the text of the Constitution, but on the meaning of *Lukumi*—specifically, whether the showing of discriminatory purpose in *Lukumi* is necessary in every free exercise case, or instead made *Lukumi* an easy case. Further percolation will do nothing to resolve that question.

Finally, the questions presented are particularly important for minority religious communities like the Hutterites. Unlike larger, politically active religious groups, minority communities are far less likely to obtain accommodations through the legislative process. Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J. L. & Religion 139, 163 (2009). In-

deed, in this case, the Hutterites were not consulted during the legislative process at all—which is not surprising, given that their religious convictions prevent them from voting. But the rule adopted by the court below allows legislatures to grant selective exemptions to favored secular groups, while ignoring severe burdens on minority religious conduct. The result is that religious minorities are painted into ever smaller corners of American society.

* * * * *

The decision below widens a square and well-developed split over the proper legal standard governing free exercise claims. It also conflicts with a long line of cases protecting internal church governance, overturning almost 500 years of Hutterite religious practice. The result is not only of immense practical importance to churches across the country, but also poses "a very real threat" to "the continued survival of [500-year-old Hutterite] communities." *Yoder*, 406 U.S. at 218-19, 235.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for plenary review. In the alternative, the petition should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Hosanna-Tabor*, 132 S. Ct. 694.

Respectfully submitted.

DOUGLAS LAYCOCK
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903

RON A. NELSON
MICHAEL P. TALIA
Church, Harris,
Johnson & Williams
114 3rd Street South
Great Falls, MT 59403

S. KYLE DUNCAN
LUKE W. GOODRICH
Counsel of Record
ERIC C. RASSBACH
HANNAH C. SMITH
JOSHUA D. HAWLEY
DANIEL BLOMBERG
The Becket Fund for
Religious Liberty
3000 K St., NW Ste. 220
Washington, DC 20007
(202) 955-0095
lgoodrich@becketfund.org

Counsel for Petitioner

April 1, 2013