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 21 SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars[2] at American law schools who have devoted their academic careers at least in part to the study of religious freedom. *Amici* have no financial interest in the outcome of this case, but they have an academic interest in (1) the development of a coherent Free Exercise Clause doctrine that reflects as much as possible, under this Court's decisions, the purposes of that provision; and (2) the scope of a church's autonomy to govern its internal affairs as protected by both Religion Clauses and recently affirmed in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012).

This brief is filed in support of granting certiorari.

SUMMARY OF ARGUMENT

The Montana Supreme Court's decision applying the state workers' compensation regime to a religious community whose members work without pay and share goods in common violates this Court's decisions interpreting the First Amendment in two ways. On the first of these issues, the decision below also deep-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date. Written consent of the parties to the filing of this brief is being submitted contemporaneously with the filing of this brief.

[2] A full list of *amici* is provided in the appendix to this brief. *Amici* join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of positions advocated.

ens a split in lower courts over a vital question of Free Exercise Clause doctrine.

I. The lower courts are divided over the meaning of this Court's rule that a free-exercise claimant must prove that the law restricting his faith is not "neutral" or "generally applicable." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div. v. Smith*, 494 U.S. 872 (1990). As described in the petition, *Smith* and *Lukumi* involved factual situations at the ends of the spectrum of free-exercise cases. *Smith*, at one pole, stands for the notion that a law that applies "across-the-board" does not contravene the Free Exercise Clause notwithstanding an incidental burden on religion. *Lukumi* addressed the nearly opposite scenario—a rule designed to burden only religion—and concluded that it does deny free exercise. Between these two rulings is a wide swath of uncertain situations, in which a split among both federal circuit courts and various state supreme courts has developed over the meaning of neutrality and general applicability. This case provides an excellent opportunity for the Court to provide needed guidance in this important area of the law.

There are two ways in which the Court could use this case to expound on the *Smith-Lukumi* doctrine. First, lower courts differ over whether the "neutral" and "generally applicable" tests are parts of the same question or are analytically distinct. Second, the Court could resolve the split referenced above: whether the test for "general applicability" invalidates only those laws that target religion or reflect a discriminatory motive, or whether it is instead sufficient that the law in question creates a substantial category of exemptions for secular activity, but not

analogous religious activity, without a compelling interest for the differential treatment. As we discuss, the latter is the better rule because it is demanded by *Lukumi* and because it is vital if the Free Exercise Clause is to serve its purpose of protecting minority religions from unjustified restriction.

II. The decision below also violates First Amendment principles announced as recently as *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012). A State exceeds its power under these principles by enacting labor legislation that renders impossible the system of governance of a religious colony whose members take a lifelong vow to live a totally integrated life that entails holding property in commune and laboring entirely for the colony. Thus, the State has exceeded limits set by the Establishment and Free Exercise Clauses, which together reserve "internal church governance" as authority vested solely in churches and other religious societies.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS AND STATE SUPREME COURTS HAVE TAKEN CONFLICTING APPROACHES TO THE INTERPRETATION OF THIS COURT'S "GENERAL APPLICABILITY" TEST UNDER THE FREE EXERCISE CLAUSE

Smith and *Lukumi* involved fact situations at the ends of the spectrum of free-exercise cases. In *Smith*, the Court held that Oregon's ban on peyote was neutral and generally applicable because it was an "across-the-board" prohibition, providing virtually no exceptions for religious or secular use. 494 U.S. at 884. In *Lukumi*, the Court held that Hialeah's ordinances governing the killing of animals allowed so

many secular exceptions that in effect they burdened "Santeria adherents but almost no others." 508 U.S. at 536. In between these extremes are laws that burden religious conduct and some, but not all, secular conduct. Cases in this large and crucial gray area have been treated inconsistently by the lower courts. This case, too, falls in that gray area and presents a prime opportunity for addressing the inconsistencies.

A. This Case Presents An Excellent Vehicle For Resolving Questions Left Open By *Smith* And *Lukumi*

In *Smith*, the Court confronted a law of general applicability and found no occasion to address how the existence of secular exemptions from such a law would affect the Free Exercise Clause analysis. *See* 494 U.S. at 884. The Court did note 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.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Bowen v. Roy*, 476 U.S. 693 (1986)), but concluded that those precedents "have nothing to do with an across-the-board criminal prohibition" such as the one in *Smith*, *id.* *Lukumi* confronted the opposite situation: laws that appeared designed to target religious activity. The Court found the three ordinances at issue to have been "drafted with care to forbid few killings but those occasioned by religious sacrifice," observing that the city could not explain "why religion alone must bear the burden of the ordinances." 508 U.S. at 543-44. In view of the limited issue, the Court declined to "define with precision the standard used to evaluate whether a prohibition is of general application" because the ordinances at issue "fall well

below the minimum standard necessary to protect First Amendment rights." *Id.* at 543.

This case presents an excellent vehicle for defining that standard with greater precision. As acknowledged by this Court, *Lukumi* was an extreme case that involved ordinances burdening particular religious conduct "but almost no others." *Id.* at 536. In this case, the Hutterites are subjected to laws that regulate a substantial range of analogous secular activity, but have exceptions for 26 categories of such activities. As we detail in subpart B *infra*, these exceptions render the law not generally applicable. But because the Court treated *Lukumi* as an extreme case "well below the minimum standard" for neutrality and general applicability, review is necessary to provide more precise guidance on where to draw that line.

B. The Court Should Grant Certiorari To Resolve Questions That Have Been Addressed Inconsistently Since *Lukumi*

The circuit split is accurately described in the petition, and *amici* will not rehash it. We highlight two questions that have arisen in those circuit opinions and suggest how they might be resolved.

1. The Court Should Distinguish the "Neutrality" and "General Applicability" Tests

This Court should use this case to clarify the distinction between the "neutrality" and "general applicability" tests. Some lower courts have melded these two tests into one, or ignored the latter entirely, concluding that animus is the focus of the Free Exercise Clause. *See*, *e.g.*, *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548, 561 (4th Cir. 2013) (finding a county zoning reg-

ulation to be a "neutral law of general applicability" and upholding it for lack of evidence that "the object of [the regulation] was to burden practices because of their religious motivation"); *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) ("Absent evidence of an 'intent to regulate religious worship,' a law is a neutral law of general applicability.") (citation omitted). However, this reading is irreconcilable with the *Lukumi* opinions, where only two justices believed that discriminatory intent is necessary to trigger strict scrutiny review. *See* 508 U.S. at 540-42 (Kennedy, J., joined by Stevens, J.); *see also* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 28 (2000) ("[w]e have two votes for motive"). The clear implication of the lead opinion by Justice Kennedy was that the two tests, while "interrelated," are distinct: "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied," *Lukumi*, 508 U.S. at 531. Justice Kennedy also refers to "general applicability" as a "second requirement of the Free Exercise Clause." *Id*. at 542.

Moreover, neutrality and general applicability are analytically distinct ideas, each with its own purpose. Neutrality is primarily aimed at discrimination: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id*. at 532. The neutrality requirement is grounded in "'historical instances of religious persecution and intolerance.'" *Id*. (quoting *Bowen*, 476 U.S. at 703 (opinion of Burger, C.J.)). For example, laws that would disqualify clergy from

holding public office or forbid one religious sect from preaching in a park, but not others, are not neutral. *See id.* at 533 (citing *McDaniel v. Paty*, 435 U.S. 618 (1978), and *Fowler v. Rhode Island*, 345 U.S. 67 (1953)).

The neutrality analysis is itself grounded in two rationales. First, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Id.* (citing *Smith*, 494 U.S. at 878-79). In addition, neutrality has been defined in reference to the Court's equal protection jurisprudence: "'[n]eutrality in its application requires an equal protection mode of analysis.'" *Id.* at 540 (opinion of Kennedy, J.) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). Similar to the analysis under *Smith*, equal protection analysis is focused on "the question of discriminatory object." *Id.* (citing *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 n.24 (1979)). Under both the *Smith* and equal protection analyses, "the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion." *Id.* at 542 (majority). This discriminatory object is apparent when the law by its terms singles out religion for regulation, *see id.* at 533, and perhaps when evidence shows an anti-religious motive for its enactment, *see id.* at 540.

The "general applicability" test, by contrast, does not focus on a law's object in the sense of reflecting a discriminatory motive or "singling out" religion, but rather on whether the law's coverage is broad enough to ensure that religion is being treated equally with relevant secular interests. This inquiry recognizes that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment,'" *id.* at 542

(quoting *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in the judgment)) (second alteration in original), and that "in pursuit of legitimate interests" the government cannot unequally burden religion, *id.* at 543. Thus, laws that prohibit religious conduct that undermines a state interest, while allowing or failing to address secular conduct that undermines that same interest to a "similar or greater degree than" the religious conduct, are unconstitutional irrespective of whether they were enacted with particular religious conduct or discrimination in mind. *Id.*

Because several courts of appeals and the Montana Supreme Court below have misunderstood the differences between neutrality and general applicability, clarification is warranted. Viewed as a distinct inquiry, the "general applicability" requirement provides religion with protection beyond that provided by the "neutrality" requirement. A discriminatory intent or object, therefore, is sufficient—but not necessary—to trigger strict scrutiny.

2. The Court Should Adopt the "Substantial Secular Exemptions" Test Under the "General Applicability" Prong

The Court also should use this case to clarify the use of the "general applicability" test, which some lower courts have ignored or misinterpreted. For example, the court in *Olsen* committed the error identified in the previous section: depriving the "general applicability" requirement of distinct meaning by collapsing that distinct inquiry into the separate question whether a law intentionally discriminates against religion. The court cited *Lukumi*'s neutrality test, *see* 541 F.3d at 832 ("A law is not neutral if its object is 'to infringe upon or restrict practices because

of their religious motivation.'") (quoting *Lukumi*, 508 U.S. at 533), but then relied on a pre-*Lukumi* decision for the rule that, "[a]bsent evidence of an 'intent to regulate religious worship,' a law is a neutral law of general applicability," *id*. (quoting *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991)). Likewise, in *Bethel World*, the court relied solely on *Lukumi*'s neutrality test in denying Bethel's free-exercise claim for failure to show that the "object" of the county's zoning regulation was "to burden practices because of their religious motivation." 706 F.3d at 561.

By contrast, other courts have explained the distinct and broader meaning of the "general applicability" test. *See Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (concluding that "the Department's decision to provide medical exemptions while refusing religious exemptions" triggers heightened scrutiny); *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012) (Sutton, J.) (holding that university code of ethics violated the Free Exercise Clause because "implementation of the policy[] permit[ed] secular exemptions but not religious ones"); *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) ("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.") (citations omitted); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 (11th Cir. 2004) (reasoning that general applicability means that "governments should not treat secular motivations more favorably than religious motivations"); *Mitchell County v. Zimmerman*, 810 N.W.2d 1, 11 (Iowa 2012) ("[T]he Free Exercise

Clause appears to forbid the situation where the government accommodates secular interests while denying accommodation for comparable religious interests."). These cases hold that a law is not generally applicable if it creates one or more substantial exemptions for secular activity that are analogous to the affected religious activity without a compelling interest for the differential treatment. *Amici* believe that the Court should adopt this rule for two principal reasons: it is more consistent with *Smith* and *Lukumi* than the alternative, and it is more consistent with the Free Exercise Clause's intended purpose.

The "substantial secular exemptions" rule is illustrated by then-Judge Alito's opinion for the court in *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004). Pennsylvania's Game and Wildlife Code required permits for possessing wildlife, but allowed exemptions for zoos, circuses, and hardship or extraordinary circumstances. *Id.* at 205. Blackhawk's request for an exemption based on his use of the bears for religious ceremonies was refused. On appeal, the Third Circuit held:

> A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.

Id. at 209. The court found that the code contained "a regime of individualized, discretionary exemptions" that did not include a religious exemption, and "categorical exemptions" for zoos and circuses. *Id.* at 209-10. These exemptions undermined the state

interests of generating revenue and "discourag[ing] the keeping of wild animals in captivity" at least as much as an exemption for the keeping of animals for religious reasons. *Id.* at 211.

Blackhawk exemplifies sound readings of *Smith* and *Lukumi*. The principle behind *Smith* and *Lukumi* is that the State must treat religious and secular conduct equally. The rule governing the spectrum of cases falling between the facts of *Smith* and *Lukumi* also should be grounded in the equal treatment of religious and secular conduct.

In addition to consistency with this Court's jurisprudence, the "substantial secular exemptions" rule serves two purposes. First, a narrower rule would allow the State to make impermissible judgments valuing secular activity over religious activity. Second, the "substantial secular exemptions" rule provides vicarious political protection to religious minorities.

a. In *Lukumi*, the Court found that an ordinance providing "individualized exemptions," which allowed the killing of animals for secular reasons but not religious reasons, "devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons." 508 U.S. at 537-38. Some lower courts have followed that reasoning in interpreting the "general applicability" requirement. For example, in *Fraternal Order*, then-Judge Alito held that, when a police department's policy against officers wearing beards made an exception for officers with a medical condition, it also must provide an exception to Muslim officers who wore beards as a matter of religious duty. The medical exemption "indicate[d] 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." 170 F.3d at 366; *see also Midrash Sephardi*, 366 F.3d at 1234 (finding that municipal zoning ordinances "pursued only against religious assemblies, but not other non-commercial assemblies, . . . devalu[ed] the religious reasons for assembling").

Such a value judgment does not have to be explicit or even conscious. For example, in *Fraternal Order*, the city placed a higher value on medical needs than on uniformity; but it placed a higher value on uniformity than on its officers' religious practices. The city made a judgment that valued a secular reason higher than a religious reason. Then-Judge Alito correctly found that this value judgment violated the Free Exercise Clause. Treating religious exercise as less important to individuals than a significant non-religious interest or interests is flatly inconsistent with the status of religious exercise as a constitutional right.

The same is true here. Montana devalued the Hutterites' religious practices as compared to secular ones to the same end. While eliminating a religious exemption from the workers' compensation statute that directly affected the Hutterites, the State maintained exemptions for 26 categories of secular activity. By doing so, the State made a series of value judgments that placed a higher value on secular activity than the State's stated interest in the implementation of the workers' compensation statute, but in turn valued that statutory interest higher than the Hutterites' religious practices. This case squarely presents the issue of whether the Constitution permits the State to engage in such value judgments of religion.

b. Invalidating laws that exempt substantial categories of secular conduct but leave religion unprotected is a vital means of protecting politically vulnerable religious minorities. "The Free Exercise Clause protect[s] religious observers against unequal treatment." *Lukumi*, 508 U.S. at 542 (internal quotations omitted, alteration in original). Requiring that laws impose equal burdens on analogous secular interests provides vicarious protection for religious minorities that do not have enough political clout to affect the legislative process. "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *see Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (noting that equal treatment protects against government imposition by "requir[ing] the democratic majority to accept for themselves and their loved ones what they impose on you and me"). But "this vicarious political protection breaks down very rapidly if the legislature is free to exempt any group that might have enough political power to prevent enactment, leaving a law applicable only to small religions with unusual practices and other groups too weak to prevent enactment." Laycock, 40 CATH. LAW. at 36.

In this case, if the State had attempted to eliminate all, or substantially all, of the exemptions to the workers' compensation statute, there likely would have been enough resistance to prevent enactment. The State was able to avoid any political resistance by singling out a small religious minority, which, aside from its inherently diminutive political power,

in fact chooses to abstain from the political process on religious grounds. *See* Pet. 6. The Free Exercise Clause was intended, at the very least, to guard against just such arbitrary legislative decisions.

II. THE DECISION BELOW VIOLATES THE RULE IN *HOSANNA-TABOR* BY RENDERING IMPOSSIBLE THE HUTTERAN SYSTEM OF GOVERNANCE THAT THIS COURT HAS REGARDED AS A MATTER OF CHURCH AUTONOMY

A Hutterite *Bruderhof* (colony) is much like a monastery, in which the system of governance embraces the totality of life, temporal and spiritual, natural and revealed, and is marked by a mutual forbearance of asserting rights against other members. The Colony's rules or *Bund* would be exploded by the State's imposition of an employer-employee construct enforced by legal rights to wages and other compensation. Such a construct is alien to the Hutterite Vow of renouncing private property, of laboring without promise of wages, and of abstaining from legal claims against fellow members.

A. This Court's Distinction Between The Rule In *Smith* And The Rule In *Hosanna-Tabor* Needs Development, And This Case Is A Good Vehicle For Doing So

This case is a highly suitable vehicle to explicate this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), which found a constitutional warrant for the ministerial exception to antidiscrimination laws. There is vigorous debate over what other aspects of institutional "religious autonomy" *Hosanna-Tabor* protects. This case would be a cautious but constructive next step in answering that question.

Hosanna-Tabor stated, in a unanimous opinion, that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 706. The Court went on to say that, while the "interest of society in the enforcement of employment discrimination statutes is undoubtedly important[,] . . . so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 710. Accordingly, in a lawsuit that strikes at the ability of the church to govern itself, weighing of interests between a vigorous eradication of discrimination prohibited by the Americans with Disabilities Act of 1990 ("ADA"), on the one hand, and institutional religious freedom, on the other, is a balance already struck by the First Amendment. *See id.*

Before proceeding to the facts that convinced the Court that the schoolteacher in question was a "minister," Chief Justice Roberts had to explain why the "neutral and generally applicable" rule of *Smith* was not controlling. Chief Justice Roberts admitted that the ADA was a general law of neutral application that happened to have an adverse effect on Hosanna-Tabor's ability to fire a teacher. *Id.* at 707. But he then drew the following distinction:

> [A] church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the

> church itself. See [*Smith*, 494 U.S.] at 877 (distinguishing the government's regulation of "physical acts" from its "lend[ing] its power to one or the other side in controversies over religious authority or dogma").

Id. (third alteration in original, parallel citation omitted). *Hosanna-Tabor* recognizes a subject-matter class of cases to which the rule in *Smith* does not apply. The subject class is described as "an internal church decision that affects the faith and mission of the church itself." The firing of a teacher was characterized as "internal," meaning a decision of self-governance. The firing of the plaintiffs in *Smith* was characterized as "outward," meaning that the State's denial of unemployment did not regulate a decision of church governance. Moreover, the ingestion of peyote regulated in *Smith* was characterized as a "physical act," whereas the firing of a teacher regulated by the ADA was not a physical act but a "church decision."[3]

Obviously a sacrament is an important religious practice. The plaintiffs in *Smith* obviously suffered a burden on religious conscience that was unrelieved by the rule of *Smith*. But the point of *Hosanna-Tabor* was not to relieve burdens on religious conscience. If it were, then *Hosanna-Tabor* would have overruled *Smith*; rather, it distinguished *Smith*. *Hosanna-Tabor* remedied not a burden on individual conscience,

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[3] This passage in *Hosanna-Tabor* references *Smith* where it also says that the exercise of religion often involves "the performance of (or abstention from) *physical acts*: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Smith*, 494 U.S. at 877 (emphasis added).

but government interference with the organizational autonomy of a religious society. *See* 132 S. Ct. at 709 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason.").

In the indented quote above, *Hosanna-Tabor* provided a second example where *Smith* does not apply: in lawsuits over church property, the government must not take sides on the question of the rightful ecclesiastical judicatory to resolve the property dispute. These two examples—a church selecting its own minister and a church determining the rightful ecclesiastic body to solve property disputes—are contrasted with the sacramental ingestion of peyote. The Court distinguished *Hosanna-Tabor* from *Smith* because the decision to hire and fire a minister is about who governs the church.

Projecting the scope of *Hosanna-Tabor* requires determining what additional subjects fall into the description "internal church governance." Justice Alito's concurring opinion, joined by Justice Kagan, stated that this class of cases recognizes a "[r]eligious autonomy" found in the Establishment and Free Exercise Clauses, which together "protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.* at 712 (Alito, J., concurring); *see Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.") (Brennan, J., concurring in the judgment) (internal quotations omitted).

A survey of this Court's cases finds a few—but important—areas of church governance within which state officials have been barred from exercising authority: questions about correct doctrine and taking sides in doctrinal disputes;[4] a church's determination of governance system or polity;[5] the selection, discipline, and retention of clerics and other ministers;[6] and the admission, discipline, and expulsion of church members.[7] Of these four areas, the cases

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[4] *See*, *e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) (courts not arbiters of scriptural interpretation); *Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (per curiam) (avoid civil resolution of doctrinal disputes).

[5] *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976) (civil courts may not probe into church's system of governance); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (per curiam) (First Amendment prevents judiciary, as well as legislature, from interfering in governance system of Russian Orthodox Church); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107-21 (1952) (legislature not to interfere in ecclesiastical governance of Russian Orthodox Church); *Shepard v. Barkley*, 247 U.S. 1, 2 (1918) (aff'd mem.) (courts will not interfere with merger of two denominations); *cf. Order of St. Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914) (so long as member voluntarily joined the religious group and is free to leave at any time, religious liberty is not violated and members are bound to the rules consensually entered into such as vow of poverty and communal ownership of property).

[6] In addition to *Hosanna-Tabor*, see *Serbian E. Orthodox Diocese*, 426 U.S. at 715-20 (civil courts may not probe into church's defrocking of bishop), and *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (declining to intervene on behalf of petitioner who sought order directed to archbishop to appoint petitioner to ecclesiastical office).

[7] *See Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139-40 (1872) ("This is not a question of membership of the church, nor of the rights of members as such. . . . [W]e cannot decide who

collected under "governance system" and "members" are most pertinent to the facts here.

The types of lawsuits that fall into the *Hosanna-Tabor* category of internal church governance are likely circumscribed because no counterweight based on governmental interests could be considered. *See* 132 S. Ct. at 710 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us."). The Equal Employment Opportunity Commission missed the point of the ministerial exception:

> The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical"—is the church's alone.

Id. at 709 (citation omitted). The Court had power to determine whether the teacher in question was a minister. Given a finding that she was, that ended the lawsuit.

Because *Hosanna-Tabor* places a restraint on government authority, the decision rests partly on the Establishment Clause. As the Chief Justice wrote, "[T]he Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission" by controlling who are its ministers, and "the Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions." *Id.* at 706. Justice Alito pointed out one of the historic reasons for this separation of government from involvement

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ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off.").

in internal church governance: "[I]t is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws." *Id.* at 712 (Alito, J., concurring). Religious organizations working to check a government is one of the ways in which church-state separation does useful work.

Hosanna-Tabor's principle differs not only from the free-exercise approach to individuals' "outward physical acts" in *Smith*, but also from the *Lemon*[8] test, endorsement test, and entanglement analysis of ordinary Establishment Clause cases. Hence, the Montana Supreme Court went off course by ignoring *Hosanna-Tabor* while proceeding with irrelevant but well-worn *Lemon*, endorsement, and entanglement formulae. *See* Pet. App. 19a-27a.

B. The Workers' Compensation Regimen Will Render The System Of Governance In A Hutterite Colony Impossible

The petition (at 2-4) properly notes the essentials of a Hutterite *Bruderhof* (colony) of the Hutterian Brethren Church with its commitment to *Gütergemeinschaft* or community of goods, the covenant or *Bund*, and vow or Membership Declaration. Hutterites do not vote. They have as little as possible to do with the State, a practice traced to being persecuted in their formative years by the State. This renders Hutterites politically vulnerable as elected representatives can safely ignore their concerns.

There is no such thing as being a part-time Hutterite. Modernity's familiar division between vocational life and personal life is rejected by Hutterites. The State insisted below that workers'

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[8] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

compensation applies only when the Hutterites choose to engage in commercial activities with non-Hutterites for remuneration. *See* Pet. App. 21a, 23a. Further, the State's reason for imposing the law was that businesses competing with Hutterites complained that they operated at a disadvantage because they were subject to workers' compensation expenses. The problem is not that the State cannot have as its *purpose* to level the playing field between Hutterite labor and others, but that the State has chosen an unconstitutional *means* to pursue that objective. The State's chosen means will compel the Colony to sometimes treat members as "employees"—with all the rights to compensation from an "employer." But there can be no member who is half-time Hutterite half-time "employee"; there can be no entity that is half-time Colony half-time "employer." For Hutterites, when you are in the *Bruderhof*, you are all in.

> The Hutterites regard themselves as Christian believers maintaining the proper social order and not as a rationalized experiment in communal living. The continued existence of their society is secondary to obedience to God. They are, therefore, willing to become extinct as a society rather than compromise or lose the communal pattern of living, which is equated with the proper worship of God. The child is raised and the adult lives by a social pattern believed to be divinely ordained . . . .

J.A. HOSTETLER & G.E. HUNTINGTON, THE HUTTERITES IN NORTH AMERICA 63 (2002).[9] The State here demands something that is not possible, that is,

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[9] In addition to this excellent volume, useful information can be found at the website of the Hutterian Brethren. *See* http://www.hutterites.org.

something that is not possible without first destroying what it means to be Hutterite.

The State insisted below that nothing prevents the Colony from excommunicating a member who files a workers' compensation claim. *See* Pet. App. 29a. But the law prohibits terminating an employee for filing a claim (*see* Mont. Code Ann. § 39-71-317), and termination is a necessary consequence of excommunication. The State insisted below that nothing prevents a member from paying back to the Colony his or her compensation award. *See* Pet. App. 29a. But that assumes a claim was first made, and such an occurrence would do violence to the *Bund* and Membership Declaration. The State insisted below that nothing prevents Hutterites from waiving their claim to workers' compensation. *See id.* But the law prohibits employees from waiving their right to such compensation. *See* Mont. Code Ann. § 39-71-409(1). Further, it would make no sense within a Hutterite's worldview to conceive of him or her as having a "right" to waive, and likewise it would be incomprehensible to a Colony that it should regard itself as an "employer" with a legal duty that is being waived by one of its "employees."

This case transcends the situation with Hutterite colonies in Montana. Parallels to other totalistic communities, such as monasteries and religious orders are obvious. Monasticism is generally traced to St. Benedict and his publication of *Rule*, a detailed set of rules for the governance and daily regimentation of monks around an ascetical labor-life commanded by vows of obedience, humility, prayer, psalmody, and biblical readings. *See* C.H. LAWRENCE, MEDIEVAL MONASTICISM: FORMS OF RELIGIOUS LIFE IN WESTERN EUROPE IN THE MIDDLE AGES 18-36 (3d ed.

2001). Monastic orders, of course, are non-Christian as well as Christian, and are comprised of women as well as men. One need only think of Mother Teresa of Calcutta, founder of the Order of the Missionaries of Charity, to envision the impending loss if the decision below is not reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2, 2013

APPENDIX

List of Amici

Each of the individuals listed below has made the Religion Clauses of the Constitution an important part of his or her work as a teacher and scholar. Each joins this brief as an *amicus curiae*. Institution affiliations are for identification only; none of *amici*'s law schools takes any position on the issues in this case.

Lawrence A. Alexander is a Warren Distinguished Professor of Law and Co-Executive Director of the Institute for Law & Religion at the University of San Diego.

Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas School of Law in Minnesota.

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Teresa Stanton Collett is Professor of Law at the University of St. Thomas School of Law in Minnesota.

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