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

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

BRIEF OF *AMICUS CURIAE* STATE OF MICHIGAN IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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.

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INTEREST OF *AMICUS CURIAE*[1]

The State of Michigan recognizes the importance of religious liberty to American citizens. One way it works to protect this freedom is by avoiding entanglement in the internal matters of religious communities.

Michigan, like many states, has citizens belonging to communal religious groups that have renounced private property and that share all of their belongings in common. Similar groups, which range from Catholic monastic orders to Buddhist monks, are spread across the United States, with some of them having immigrated to America precisely for the freedom to pursue this religious calling.

The Hutterites, for example, moved around Europe for centuries before settling in the United States in the late 1800s.[2] They currently have settlements in six states: Minnesota, Montana, North Dakota, Oregon, South Dakota, and Washington. The Bruderhof, another Christian communal group, fled Nazi Germany in the 1940s and later immigrated to America in pursuit of religious freedom. See The Bruderhof, *Foundations of Our Faith and Calling* 21–22.[3] Like the Hutterites, the Bruderhof commit to living a communal life in which no individual owns private property, but

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[1] Counsel for Michigan notified the counsel of record for the parties ten days before the filing of this *amicus* brief.

[2] Http://www.hutterites.org/history/hutterite-history-overview/; http://www.hutterites.org/history/journey-to-america/.

[3] Http://www.bruderhof.com/_Utilities/Bruderhof/foundations/index.html.

instead gives all earnings to the church community, which provides necessities such as food, clothing, and housing. *Id.* at 65–67. The Bruderhof have communities in four states: New York, Florida, West Virginia, and Pennsylvania.[4] A variety of Catholic orders and Buddhists also live as communities throughout the states.

Michigan has a comprehensive regulatory scheme of workers' compensation insurance that governs disputes between employers and employees concerning workplace injuries. Yet it believes that there is no inevitable conflict between religious freedom and workers' compensation statutes. Indeed, as far back as 1931 Michigan's Supreme Court recognized that a member of a religious order is not an employee for workers' compensation purposes. Thus Michigan, like numerous other states, has implemented its workers' compensation regime in a manner that preserves religious liberty, without delving into and interfering with the internal governance of religious communal groups.

[4] Http://www.bruderhof.com/en/about.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States is a refuge for people pursuing the liberty to live out their religious convictions. The country's heritage includes a number of religious groups who feel called to live as a part of a community, working together, sharing all of their possessions in common, and resolving all disputes internally, according to religious precepts.

At least 12 states have protected religious liberty by expressly including religious exemptions in their workers' compensation laws. And in other states the courts have recognized that communal religious groups do not fall within the scope of workers' compensation.

Indeed, there is no good reason to cover members of groups like the Hutterites: the members already are insured by the community's obligation of mutual care. Even more, it makes no sense to pay a compensation award to someone who has renounced private property, because that individual will just give the award back to the community (i.e., back to the supposed employer). In short, it serves no governmental purpose to impose workers' compensation on groups like the Hutterites, especially when doing so violates fundamental First Amendment rights.

ARGUMENT

I. Communal religious groups like the Hutterites are not "employers," nor their members "employees," for the purposes of workers' compensation.

A. Workers' compensation regulates the commercial relationship between the employer and the employee.

Before 1910, state common-law rules governed employee attempts to recover from employers for workplace injuries. "Under these laws an injured worker's only recourse was through the courts and his chances of recovery were slight." Nat'l Comm'n on State Workmen's Compensation Laws, *Compendium on Workmen's Compensation* 11 (1973) (hereinafter "*Compendium*"). According to some estimates, "not more than 15 percent of injured employees ever recovered under the common law, even though 70 percent of [workplace] injuries were estimated to have been related to working conditions or employer's negligence." *Id.*

This low rate of recovery for employees stemmed from a number of factors: the standard of care for employers was low, "extend[ing] only to proper diligence"; "fellow workers . . . were reluctant to testify against the employer"; the employer benefitted from a number of defenses, including contributory negligence, the fellow-servant rule, and assumption of risk; and "the expense of litigation" was an obstacle to employees. *Id.* at 12. Conversely, employers faced the risk of "pay[ing] out large sums of money for defense of these claims and for satisfaction of verdicts." *Id.* at 14.

Between 1911 (when Wisconsin passed its workers' compensation act) and 1948 (when Mississippi did), each of the 48 states and the territories of Alaska and Hawaii enacted workers' compensation regimes to address these problems arising from the common-law approach. *Compendium* at 18; see also *Anderson* v. *Hawaiian Dredging Co.*, 24 Haw. 97 (1917) (noting that the territory enacted workers' compensation); *Haman* v. *Allied Concrete Prods., Inc.*, 495 P.2d 531, 533 (Alaska 1972) (same). These regimes specifically sought to "reduce court delays, costs and workloads arising out of personal injury litigation" and to "[e]liminate payment of fees to lawyers and witnesses as well as time-consuming trials and appeals." U.S. Chamber of Commerce, *2008 Analysis of Workers' Compensation Laws* 6 (2008). In addition to alleviating litigation costs, state worker's compensation regimes were designed to make workers' compensation "the exclusive remedy of employees against employers, with the effect that injured employees ordinarily lost the right to seek a higher tort liability award than their compensation benefits." *Compendium* at 23.

Workers' compensation, in short, is a regime that exists to resolve a single aspect of the commercial relationship between the employer and the employee: disputes over workplace injuries. Like similar regulations governing employees' wages or working conditions, the government regulates to provide an efficient way to resolve a particular type of commercial dispute.

B. The relationship between a communal religious group and its members, in contrast, is an internal matter of church governance.

In contrast, many communal religious groups do not have a commercial relationship with their members, but instead govern this aspect of their internal affairs—dealing with workplace injuries—according to religious principles. There are many examples beyond the Hutterites, such as Catholic orders and Buddhist monks, that govern their internal affairs according to religious principles and thus would be affected by decisions like Montana's. But it may be useful to focus on a small sect, the Bruderhof, because of how clearly their beliefs are spelled out.

As part of their communal life, the Bruderhof have committed to resolve disputes—including disputes about who injured whom—among themselves, rather than turning to secular authorities. Bruderhof, *Foundations* 48 ("In accordance with Scripture, [all conflicts within the community] may never be taken to any adjudicator outside the church community, certainly not to a court of law." (citing 1 Corinthians 6:1 ("Dare any of you, having a matter against another, go to law before the unjust, and not before the saints?"))). The Hutterites follow the same tenet. Pet. 4.

In addition to this obligation to resolve disputes internally, the Bruderhof assume an obligation of mutual care: "to 'bear one another's burdens, and so fulfill the law of Christ.'" *Id.* at 70 (quoting Galatians 6:2). This commitment of mutual care extends to medical care. *Id.* at 70–71 (discussing caring for "the disabled and sick" and "support[ing] patients who

require attention in a hospital"). The Hutterite communities similarly incur the cost of their members' medical expenses, if one becomes injured. See Pet. 4 (discussing the Hutterite communal obligation to provide medical care). This mutual care is made possible by their commitment to live their faith by renouncing private property, a commitment based on the biblical example identified in Acts 2:44: "[a]ll the believers were together and had everything in common."

Indeed, the obligation of mutual care shouldered by these groups provides more extensive coverage for medical benefits than workers' compensation provides, because these communal groups do not limit their obligation of mutual care to only those injuries that occur in the course of employment; instead, the community also bears the cost of caring for non-workplace injuries that would not be covered by workers' compensation statutes. Pet. 4.

C. Numerous states have avoided interfering with the internal workings of religious groups by exempting them from workers' compensation regimes.

Just last term this Court reiterated the principle that the First Amendment protects the rights of religious organizations to govern their own internal relationships without government interference. *Hosanna-Tabor Evangelical Lutheran Church* v. *EEOC*, 132 S. Ct. 694, 704–06 (2012). As this Court explained, interference with "the internal governance of the church" can infringe on "a religious group's right to shape its own faith and mission." *Id.* at 706.

Religious freedom thus includes the freedom to decide how to resolve internal disputes and how to interpret principles governing daily life. This Court's cases recognize that religious organizations must have the "'power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Hosanna-Tabor*, 132 S. Ct. at 704 (quoting *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)). Indeed, this Court has cautioned against government intervention in internal church disputes, such as disputes about property, because "there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Serbian Eastern Orthodox Diocese for U. S. of America and Canada* v. *Milivojevich*, 426 U.S. 696, 709 (1976).

This Court has also recognized that when a particular way of life "is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living," then forcing the group to violate that way of life infringes on the group's religious liberty. *Wisconsin* v. *Yoder*, 406 U.S. 205, 216 (1972) (addressing whether the Amish could be required to send their children to public schools). In *Yoder*, the Court explained that a compulsory school requirement "carrie[d] with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." *Id*. at 218.

Imposing workers' compensation on communal religious groups creates the same threat to religious liberty. Indeed, states across the country already recognize that imposing workers' compensation on religious organizations raises First Amendment issues. For that reason, a number of states have statutes excluding either religious organizations or people working for religious organizations without pay:

- Arkansas, ARK. CODE ANN. § 11-9-102(11) (excluding "[a] person performing services for any nonprofit religious, charitable, or relief organization" from the definition of "employment");

- California, CAL. LAB. CODE § 3352 (excluding "[a]ny person performing services in return for aid or sustenance only, received from any religious, charitable, or relief organization" from the definition of "employee");

- Hawaii, HAW. REV. STAT. § 386-1 (excluding "[s]ervice for a religious, charitable, educational, or nonprofit organization if performed in a voluntary or unpaid capacity" from the definition of "employment");

- Kentucky, KY. REV. STAT. ANN. § 342.650 (excluding from coverage "[a]ny person performing services in return for aid or sustenance only, received from any religious or charitable organization");

- Maryland, MD. CODE ANN. LAB. & EMPL. § 9-235 (providing that "[a]n individual is not a covered employee while performing a service only for aid or sustenance from a charitable or religious organization");

- Mississippi, MISS. CODE ANN. § 71-3-5 (excluding "nonprofit charitable, fraternal, cultural, or religious corporations or associations" from the definition of "employer");

- Missouri, MO. ANN. STAT. § 287.804 (excluding from coverage religious sects "conscientiously opposed to acceptance of benefits of any public or private insurance which makes payments in the event of death, disability, old age, or retirement or makes payments toward the cost of, or provides services for, medical bills);

- New York, N.Y. WORKERS' COMP. § 3 (providing that "a member of a religious order[] shall not be deemed to be employed or engaged in employment under the terms of this section");

- North Dakota, N.D. CENT. CODE § 65-01-02 (excluding from coverage "[a]ll members of the clergy and employees of religious organizations engaged in the operation, maintenance, and conduct of the place of worship");

- Ohio, OHIO REV. CODE ANN. § 4123.15 (allowing employers who are "conscientiously opposed to benefits to employers and employees from any public or private insurance that makes payment in the event of death, disability, impairment, . . . [to] apply to the administrator of workers' compensation to be excepted");

- Pennsylvania, 77 PA. CONS. STAT. ANN. § 484(a) (allowing employers who are "conscientiously opposed to acceptance of the benefits of any public or private insurance which makes payments in the event of death, disability" to apply for a waiver); and

- Washington, WASH. REV. CODE ANN. § 51.12.020 (excluding from coverage "[a]ny person performing services in return for aid or sustenance only, received from any religious or charitable organization").

As these statutes illustrate, numerous states have excluded even non-communal religious organizations from their workers' compensation statutes. And a number have excluded members of religious organizations even when they are provided with necessities (which could be viewed as a wage in a secular context).[5]

[5] See http://www.merriam-webster.com/dictionary/sustenance (defining "sustenance" as "a supplying or being supplied with the necessaries of life").

Other states have concluded through judicial decisions that members of communal religious groups are not employees. The Michigan Supreme Court, for example, considered whether a Catholic novitiate who was injured when her hands were caught in a laundry drum was entitled to workers' compensation. *Blust* v. *Sisters of Mercy*, 256 Mich. 1, 3 (1931) (Potter, J. dissenting).[6] The Michigan Supreme Court concluded that there was "no analogy between instances of work without pay in industrial and professional pursuits, in order to qualify for work with pay, and an instance of entering a charitable and religious order as a novitiate with intent to qualify for membership and a life devoid of pecuniary purpose." *Id*. at 11. In the latter instance, "there is no relation of master and servant, no hiring, and no commercialism, but a devotion to charitable purpose without hope of pecuniary reward." *Id*. at 12.

In short, context matters when determining whether an employment relationship exists. Consider, for example, a situation where Bob pays Charlie a set amount each week for accomplishing certain tasks. While that might initially seem like an employment relationship, adding a couple of facts—that Bob is Charlie's dad and that the payment is called an allowance—would make everyone agree that Charlie is not an employee. In a similar way, the relationships within a religious communal group are not employment relationships, but instead voluntary religious relationships.

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[6] The opinion in *Blust* begins with Justice Potter's dissent. 256 Mich at 1. The majority opinion, written by Justice Wiest and joined by five other justices, begins on page 10 of the reporter.

The Michigan Supreme Court also recognized a basic point about paying a compensation benefit to a member of a communal group: it accomplishes nothing, because the member simply returns that private property to the community as a whole. As the Michigan Supreme Court observed, if the novitiate were awarded money as a result of workers' compensation, the award "would not come to her but would belong to the order, and this by virtue of her relation to the order." *Blust*, 256 Mich. at 12. In other words, given her renunciation of pay and personal property, an award would have required the Catholic order "to reimburse itself for expenses." *Id*.

New Mexico has followed the same reasoning. In *Joyce* v. *Pecos Benedictine Monastery*, 895 P.2d 286 (N.M. Ct. App. 1995), the state court concluded that a Catholic novice was not a worker for purposes of the state's workers' compensation act. *Id*. at 288. The New Mexico court agreed that the novice, who had injured her back after slipping on a wet floor and sought a compensation award, *id*. at 286, "was not receiving a wage in exchange for her services," *id*. at 289. Although recognizing that payment "'need not be in money, but may be in anything of value,'" including room and board, the court concluded that the novice "rendered her services out of religious devotion and the room, board, training, and vestry were rendered to her to facilitate her spiritual development." *Id*. at 289 (quoting 1B Arthur Larson, The Law of Workmen's Compensation § 47.43(a) at 8–384 to 8–387 (1993), and omitting footnotes). In short, "the relationship between [the novice] and the monastery was one of religious devotion rather than a contract for service or apprenticeship." *Id*. at 289–90.

In fact, a federal district court has also recognized that members of communal religious groups are not employees under ERISA. In *Wollman* v. *Poinsett Hutterian Brethren, Inc.*, 844 F. Supp. 539, 540 (D.S.D. 1994), a group of former members of Hutterite communities alleged that they were employees and that the communities were employers within the meaning of ERISA. *Id.* at 540. Based on this allegation, they claimed they retained property interests in community assets. *Id.* at 540–41. The district court dismissed the ERISA claim because the plaintiffs "were voluntary members of a communal religious organization." *Id.* at 542; see also 99 C.J.S. *Workers* § 189 ("Generally, a volunteer is not entitled to the benefits of a workers' compensation act as an employer."). "They were not hired as employees by the colonies and they received no wages from the colonies, nor did they participate in social security or federal withholding, unemployment insurance, worker's compensation, or any other program affecting the employment relationship." *Wollman*, 844 F. Supp. at 542. And the district court recognized that "both the excessive entanglement test . . . and the Free Exercise Clause of the First Amendment prohibit this Court from inquiring into the relationship between individual members and the colony." *Id.*

This is not to say that religious organizations can not have employees or ever be subject to a state's workers' compensation law. To the contrary, many religious organizations, including colleges, churches, and charities, employ workers in the traditional commercial sense. But where a religious group creates a communal relationship like that of the Hutterites (renouncing private property, agreeing to handle

disputes internally, and committing to provide mutual care), religious freedom protects that relationship.

In sum, state interference with religious liberty is unwarranted and unnecessary in the workers' compensation context. The purpose of workers' compensation is to ensure that individuals injured in the workplace will receive swift and reasonable compensation. Religious groups like the Hutterites have already committed to provide medical care for injured members. Hutterite members are in effect self-insured, so the interest that workers' compensation seeks to protect is already provided. The only effect of the law, then, is to prevent the Hutterites from exercising their First Amendment rights. Certiorari is warranted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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