No. 12-1191

IN THE

Supreme Court of the United States

BIG SKY COLONY, INC., ET AL.,

Petitioners,

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,

Respondent.

On Petition for a Writ of Certiorari
to the Montana Supreme Court

BRIEF OF *AMICUS CURIAE* AMERICAN ISLAMIC CONGRESS IN SUPPORT OF PETITIONERS

James A. Sonne
Counsel of Record
STANFORD LAW SCHOOL
RELIGIOUS LIBERTY CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 723-1422
jsonne@law.stanford.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Proposed Legislation

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The American Islamic Congress (AIC) is a national civil-rights organization that was founded after the September 11, 2001 terrorist attacks to promote tolerance and the exchange of ideas among Muslims and between peoples. With the motto "Passionate about Moderation," the AIC leads initiatives around the world and in the United States to promote inter-faith understanding and to protect religious liberty. It opposes all acts of intolerance, particularly those aimed at religious minorities. Muslim Americans are frequent targets of unjust discrimination—sometimes overt, but all-too-often concealed. Because the AIC supports a Free Exercise standard that more effectively protects religious minorities against discrimination, both open and disguised, it supports the Hutterites' petition.

SUMMARY OF ARGUMENT

The Hutterites, though small in number, raise in their petition a constitutional question that affects millions of religious minorities and has deeply split the federal circuit courts and state supreme courts. As a general rule, our laws must be neutral to religion. But in crafting exemptions to neutral laws, can legislators ordinarily favor secular exemptions over religious ones?

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[1] No party's counsel authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made any monetary contribution intended for the brief's preparation or submission. Letters reflecting the consent of the parties to the filing of the brief have been filed with the clerk.

Four circuits and at least one state supreme court have rightly said no, reasoning that when government crafts exemptions to neutral laws to protect secular interests but refuses to craft parallel exemptions to protect religious interests, it makes an impermissible "value judgment in favor of secular motivations." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3rd Cir. 1999). Unfortunately, four other circuits (and now the Montana Supreme Court) have held that as long as there is no apparent anti-religious animus, a law is constitutional regardless of any disparity in exemptions. Barring action from this Court, not only will governments in the respective circuits be held to different constitutional standards but, more distressingly, religious minorities—the likely victims of hidden animus—will continue to suffer in the nineteen states where the Montana view prevails.

The festering court split stems from competing interpretations of two landmark cases: *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). In *Smith*, the Court held the Free Exercise Clause does not require religious exemptions to "valid and neutral law[s] of general applicability." 494 U.S. at 879 (internal quotation marks omitted). Three years later, the Court held in *Lukumi* that laws are not neutral if they "infringe upon or restrict practices because of their religious motivation." 508 U.S. at 533. The Court's approach to general applicability was minimalist; the Court explained that it "need not define with precision the standard used to evaluate whether a prohibition is of

general application, for [the laws at issue fall] well below the minimum standard necessary" as the government pursued its purported interest "only against conduct motivated by religious belief." *Id.* at 543, 545.

In the wake of *Smith* and *Lukumi*, the lower courts are understandably in broad agreement that strict scrutiny applies to laws with a discriminatory motive or that single out religious conduct because of its religious nature. But they are hopelessly divided on the central question here—i.e., whether strict scrutiny likewise applies to statutory exceptions that treat secular conduct more favorably than religious conduct.

No less than other religious minorities in the United States, Muslims unduly suffer from the restrictive reading of *Smith* and *Lukumi*. Where this reading prevails, governments are permitted to favor secular conduct over religious conduct, without good reason, simply by granting exemptions (to otherwise neutral laws) for secular interests without doing likewise for religious interests. This is a particular problem for religious minorities, because their views are often outside the mainstream, their practices may be considered strange, and their small numbers naturally limit their political influence. It is yet a more profound problem for Muslims, as their Free Exercise claims are rejected more frequently than those of any other religious group.

Whether the product of disguised animus, ignorance, or indifference, laws that show special latitude toward the non-religious but no such favor toward the religious simply cannot be said to be

"generally applicable." And where these laws are upheld under the more restrictive reading of *Smith* and *Lukumi*, the Free Exercise Clause provides little solace to religious minorities against the corrosive prejudices of an artful majority.

ARGUMENT

I. The Circuit Split Arising From *Lukumi* Has Festered Too Long.

Two decades ago, this Court famously held in *Smith* and *Lukumi* that a law is subject to strict scrutiny under the Free Exercise Clause if it is not "neutral" and "generally applicable." *Smith*, 494 U.S. at 879; *Lukumi*, 508 U.S. at 531. Since then, however, the lower courts have divided over how to interpret this holding, particularly on how to give force to the dual command of neutrality and general applicability. Eight circuits and two state supreme courts have weighed in, four within the past year. Sadly, no consensus has emerged and as a result, free exercise has suffered.

Five courts have alluded to general applicability but otherwise accorded exclusive force to neutrality, by applying strict scrutiny only when a law singles out religious conduct or has a discriminatory motive. *See Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999); *Skoros v. N.Y.C.*, 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); *Big Sky Colony, Inc. v. Montana Dep't of Labor & Indus.*, 291 P.3d 1231, 1240 (Mont. 2012). This standard forbids only the

most direct forms of persecution, namely laws that aim to suppress religiously motivated conduct *because of* its religious nature.

This, of course, was the standard applied by the Montana Supreme Court in the present case. The state high court upheld Montana's imposition of an arguably neutral worker's compensation law that plainly burdened the Hutterites' religious exercise even though the law exempts from compliance no fewer than twenty-six types of secular employment, including cosmetology and petroleum work. *Big Sky Colony*, 291 P.3d at 1251-52 (Rice, J., dissenting); *see also* Mont. Code Ann. § 39-71-401(2)(a)-(z) (2013) (listing exemptions). The court based its holding solely on its conclusion that the Montana scheme did not appear on its face to single out religious conduct or regulate conduct because of its religious motivation. *Big Sky Colony*, 291 P.3d at 1240. This standard leaves believers vulnerable to targeted discrimination, because cleverly drafted laws may appear neutral even though they were written to discriminate.

Fortunately, five other courts give equal force to *Lukumi*'s dual command, applying strict scrutiny not only to laws that lack neutrality but also to laws that treat substantial categories of secular conduct more favorably than religious conduct. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-66 (3d Cir. 1999); *Ward v. Polite*, 667 F.3d 727, 738-40 (6th Cir. 2012); *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 144-45 (10th Cir. 2006); *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, 3 (Iowa

2012). This standard appreciates that non-neutrality is sufficient—but not necessary—to trigger strict scrutiny. Strict scrutiny rightly also applies to laws that are not generally applicable, namely laws that are under-inclusive enough to be "sufficiently suggestive of discriminatory intent." *Fraternal Order of Police*, 170 F.3d at 365.

The Third Circuit's decision in *Fraternal Order of Police* exemplifies this approach and its benefits. There, two devout Muslim police officers sought an exemption from their police department's no-beard policy based on their religious obligation to wear a beard. *Id.* at 360. The department exempted officers who wore beards for medical reasons. *Id.* at 361. The court applied strict scrutiny because the policy's exemptions (or lack thereof) embodied "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." *Id.* at 365-66. The more searching inquiry demanded by this standard better protects religious believers from the discrimination embodied in impermissible value judgments and, in so doing, also flushes out animus that might be concealed in skillfully crafted legislation.

In *Lukumi*, the Court found it unnecessary to "define with precision the standard used to evaluate whether a prohibition is of general application." 508 U.S. at 543. Twenty years later, the meaning of the Free Exercise Clause remains unclear. The matter must be resolved, and in favor of the standard urged in *Fraternal Order of Police*.

II. Each Time America Has Encountered New Religions, It Has Rightly—If Not Immediately—Protected Their Freedoms.

As new faiths have come to America's shores or sprouted up from its soil, mainstream society has struggled to understand and accommodate them. Their unfamiliar practices often fit awkwardly within existing legal frameworks. And the majority, confronted by strange and perhaps seemingly threatening practices, has frequently been quick to condemn and slow to accommodate. But "[f]ortunately, the history of religious liberty in America is a history of an ever expanding circle of inclusion, both social acceptance and legal protection." Douglas Laycock, *The Religious Exemptions Debate*, 11 RUTGERS J.L. & RELIGION 139, 174 (2009).

In colonial New York, for example, Catholics were harshly persecuted—it was a crime punishable by death for a Catholic priest to enter the colony. *See* People v. Philips, Court of General Sessions, City of New York (June 14, 1813), *excerpted in Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 207 (1955). But by 1813, a New York court had refused, on free exercise grounds, to force a Catholic priest to break the confessional seal, noting the law already included exceptions like the spousal and attorney-client privileges. *See id.* at 201.

In the 1930s and 1940s, the Jehovah's Witnesses were the unpopular new religious minority. Douglas Laycock, *A Survey of Religious Liberty in the United States*¸ 47 OHIO ST. L.J. 409, 419 (1986). They were evangelists, proselytizing on

street corners and doorsteps. *Id.* Cities attempted to clamp down on the Witnesses' evangelism by enacting licensing schemes and bans on solicitation. *Id.* But these attempts also gave way to religious liberty, often when these laws were successfully challenged based on their discriminatory exemption schemes. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 106 (1943) (holding unconstitutional an ordinance imposing a license tax on solicitation, but exempting salespersons selling by sample to local businesses); *Fowler v. Rhode Island*, 345 U.S. 67, 68-69 (1953) (holding unconstitutional a law banning from any public park "political or religious meetings" but not church services).

In the 1970s, an Amish family challenged Wisconsin's compulsory education law. *Wisconsin v. Yoder*, 406 U.S. 205 (1971). Although the Amish may not have faced systemic discrimination like Catholics and Jehovah's Witnesses, enforcement of the Wisconsin law would have caused "the destruction of the Old Order Amish church community." *Id.* at 212. The law contained several exceptions, as it did not compel attendance by students with mental or physical disabilities, or students with "good cause" for not attending. *Id.* at 207 n.2. The Court held that the Free Exercise Clause precluded enforcement of the law against the Amish. *Id.* at 234-35.

In short, the problem presented by the Hutterites has been presented to American courts for two centuries. Time and again, the courts have needed to respond by mandating accommodation of religious exercise, providing minorities with the freedom to practice their faiths. With the courts' assistance, faiths new to American shores have

ultimately flourished. The need for such corrective action has again arisen, both for the Hutterites and all other presently disfavored religious minorities.

III. The *Lukumi* Split Is Particularly Harmful To Muslim Americans.

A. Many Muslim Practices Differ From Mainstream Culture, Bringing Them Into Conflict With Neutral Laws.

Because Islam is a minority faith in the United States, many of its practices fall outside the mainstream of American culture. Some of these practices can involve outward, visible expressions of faith. For example, some Muslim women cover their head or face to comply with the Qu'ranic direction not to "display their beauty and ornaments," QU'RAN 24:31, while many Muslim men wear beards in accord with *hadith*—the Islamic equivalent of a Jewish midrash, BUKHARI, SAHIH AL-BUKHARI 7:781. Moreover, some Muslims draft legal documents for their private affairs with references to unique traditional practices that may differ from default rules in typical common-law contracts. Finally, like most other religious groups, Muslims build houses of worship. But mosques tend to contain distinct architectural elements that make them stand out from other buildings, including other houses of worship, in many American towns.

Each of these divergences from mainstream culture and practice can bring Muslims into conflict with facially neutral laws, making them particularly

vulnerable to discriminatory opposition in seeking exemptions from those laws.

1) Muslim Dress And Grooming Practices Often Diverge From Public Protocols.

There are many circumstances where dress and grooming requirements conflict with some Muslims' understanding of their religious obligations. Muslim women who wear headscarves or veils have been denied identification cards, entry to courtrooms, or access to public accommodations. Muslim men who wear religious headgear or beards have been denied the ability to do so when working for public employers.

Muslim women who wear head or facial coverings often come into conflict with governmental regulations regarding identity. Some states deny driver's licenses to veil-wearing women unless they relinquish their religious dress, even as the same states exempt others from providing a full-face photograph. *See, e.g., Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 57 (Fla. Dist. Ct. App. 2006) (permitting revocation of a Muslim woman's driver's license unless she removed her veil, even though Florida issued 800,000 no-photo licenses in the same period).[2] Similarly, some courts have

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[2] *See also* COUNCIL ON AMERICAN-ISLAMIC RELATIONS RESEARCH CENTER, RELIGIOUS ACCOMMODATION IN DRIVER'S LICENSE PHOTOGRAPHS: A REVIEW OF CODES, POLICIES AND PRACTICES IN THE 50 STATES 1 (2005).

prevented Muslim women from testifying unless they remove their veils, effectively requiring them to choose between their right to participate in the judicial process and their right to exercise their religion. *See, e.g., Muhammad v. Paruk*, 553 F. Supp. 2d 893 (E.D. Mich. 2008) (denying plaintiff the opportunity to testify unless she unveiled).

In addition to the conflicts that Muslim dress can create with government regulations, many Muslim women also face difficulties accessing public accommodations for the same reason. For example, Muslim women have been denied entry to public pools—even if they were not intending to swim—for refusing to remove their religious head coverings, when other headwear was permitted in the pool area. *See, e.g.,* Compl., *Hussein v. City of Omaha*, No. 8:04-cv-00268 (D. Neb. filed June 9, 2004). Muslim women have also been forced to leave public spaces, such as shopping malls, unless they remove their headscarves. *See, e.g.,* Press Release, CAIR, Muslim Ejected from Louisiana Mall Over Hijab (Mar. 3, 2008), *available at* http://www.reuters.com/article/2008/02/29/idUS243459+29-Feb-2008+PRN20080229 (54-year-old Muslim woman was escorted out of the mall because she refused to remove her religious headscarf).

Dress and grooming practices can also bring Muslim men and women into conflict with seemingly neutral jail and prison codes. Veils and headgear are often forbidden in prisons, such that Muslims who wish to maintain their religious garb have to seek exemptions from the general policy. *See, e.g.*, *Khatib v. Cnty. of Orange*, 2008 WL 822562 (C.D. Cal. Mar. 26, 2008), *rev'd and remanded on other grounds*, 639

F.3d 898 (9th Cir. 2011) (Muslim woman not permitted to wear headscarf in jail due to choking concerns when other women were permitted to wear garments presenting similar risks). Similarly, Muslim men who believe they must maintain a beard have to seek exemptions from policies regulating facial hair in prison. *Cf. Kuperman v. Wrenn*, 645 F.3d 69 (1st Cir. 2011) (prison regulation prohibiting inmates from growing facial hair longer than one quarter of an inch did not violate the Free Exercise Clause even though a medical exemption existed).

Finally, many Muslim civil servants encounter problems when faced with workplace grooming or dress codes. In the seminal case on this subject, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), Muslim police officers were denied a religious exemption from the departmental policy requiring all officers to be clean shaven, despite a policy exempting officers with medical conditions. The Third Circuit held this denial violated the officers' free exercise rights because it privileged secular concerns over religious ones. *Id.* at 366.

These dress and grooming examples present precisely the types of situations where the *Lukumi* split yields divergent outcomes. In each of the examples, the existence of secular exemptions would, under the Montana test, be insufficient to demonstrate that the regulation was not neutral and generally applicable, subjecting Muslims and other individuals to disfavored treatment without requiring the application of heightened scrutiny.

2) Use Of Muslim Principles In Private Contracts Has Become A Popular Target.

Some devout Muslims enter into private contracts or draft legal documents in accordance with Islamic rules. Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363, 391-92 (2012). When interpreting such contracts, courts and arbitrators generally give effect to the parties' intent by looking to the referenced religious codes, as they would with any other choice-of-law provision.[3] ASIFA QURAISHI-LANDES, SHARIA AND DIVERSITY: WHY SOME AMERICANS ARE MISSING THE POINT 17 (2013). But unlike other common-law contracts, Muslim contracts may incorporate terms from Islamic religious texts, which has created unwarranted controversy in the mainstream culture.

Whether because of the seemingly foreign nature of Islamic contract terms, ignorance, or outright prejudice, legislation has been proposed in at least thirty-three states—and enacted in six[4]—

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[3] Any choice-of-law provision is, of course, subject to common law exceptions, including public policy. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). For a discussion of how sharia-compliant wills have been limited by the public policy exception, see, for example, Omar T. Mohammedi, *Sharia-Compliant Wills: Principles, Recognition, and Enforcement*, 57 N.Y.L. SCH. L. REV. 259, 271-81 (2012-2013).

[4] Okla. Const. art. 7, § 1(b) (enjoined pending judicial review); Ariz. Rev. Stat. § 12-3101 (2013); H.R. Con.

that would prohibit courts from considering such law in making these judgments. *See* David L. Nersessian, *How Legislative Bans on Foreign and International Law Obstruct the Practice and Regulation of American Lawyers*, 44 ARIZ. ST. L.J. 1647 app. (2012). At least one of these bills exempts references to "principles on which the United States was founded." S.B. 1026, 49th Leg., 3rd Spec. Sess. (Ariz. 2010). Several also exempt corporations and business entities entirely from the law's provisions in order to foster a "favorable business climate," demonstrating a preference for secular interests. *See, e.g.*, S.B. 33, 2012 Leg., Regular Sess. (Ala. 2012); Gen. Assemb. B. A3496, 214th Leg. (N.J. 2010). And at least two enacted laws carve out this exception. La. Rev. Stat. Ann. § 9:6001(g) (2013); Chap. 983, 2010 Tenn. Pub. Acts 550 § 5 (2010).

Federal courts have thus far refused to legitimize these "anti-foreign law" statutes when they specifically single out sharia law. The leading case on the issue is *Awad v. Ziriax,* 670 F.3d 1111 (10th Cir. 2012), which struck down Oklahoma's "Save Our State" Amendment. That law specifically "forb[ade] courts from considering or using Sharia Law." *Id.* at 1118. The court struck it down on Establishment Clause grounds without reaching the merits of the plaintiff's Free Exercise claim. *Id.* at 1119. But the district court had applied the Third Circuit Free Exercise test, and found that the plaintiff made "a strong showing of a substantial

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Res. 44, 60th Leg., Reg. Sess. (Idaho 2010) (enacted); Kan. Stat. § 60-5103 *et seq.* (2013); La. Rev. Stat. Ann. § 9:6001 (2013); Chap. 983, 2010 Tenn. Pub. Acts 550 (2010).

likelihood of success on the merits" of that claim. *Awad v. Ziriax,* 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010).

In the wake of *Awad*, "anti-Sharia advocates have become stealthier." Robert K. Vischer, *The Dangers of Anti-Sharia*, FIRST THINGS, Mar. 2012, at 27. Subsequent statutes have been drafted to avoid singling out sharia. *See, e.g.*, Kan. Stat. § 60-5103 (2013). Thus, if a future case is brought challenging these purportedly neutral statutes, the less favorable interpretation of *Lukumi* may have a substantial impact on the outcome of the case. Louisiana's statute, for example, appears neutral on its face because it does not in any way specifically single out sharia law. *See* La. Rev. Stat. Ann. § 9:6001. But, it exempts juridical persons, while natural persons remain subject to its constraints. *Id.* If this law were to be challenged, it might be subject to rational basis review because of its apparent neutrality, even though an entire category of secular parties are exempted. In the First, Second, Fourth, and Eighth Circuits, therefore, legislatures can hide from Free Exercise scrutiny through mere artful drafting.

The *Awad* plaintiff may have been able to prove evidence of animus in the Oklahoma amendment given the law's history, but with the Tenth Circuit ruling on the books, future advocates of anti-sharia laws are aware they cannot single out sharia law. This gives them the necessary notice to hide any illicit intentions behind alternative, facially legitimate justifications, such as national security or the consistent interpretation of contract terms within a given state's courts, making it far more challenging for future plaintiffs in similar cases to prove animus.

If these laws are allowed to stand, agreements informed by religious principles, including wills, divorces, and private contracts, could be banned, preventing believers from using religious principles to guide and shape their interpersonal affairs.

3) Muslims Frequently Face Discriminatory Applications Of Land-Use Regulations.

When a city or county does not want a new religious group in their midst, the land-use process presents one of the easiest ways to use neutral laws of general applicability to push out the group. Because the entire array of zoning and land use regulations applies, theoretically, to all new building applications, the laws are not discriminatory on their face. But most local governments have a vast array of regulations surrounding land use in their community, so prejudiced lawmakers can make disfavored minority groups jump through a myriad of hoops to gain entry in the neighborhood.

Under the Third Circuit standard, plaintiffs can expose underlying bigotry by showing that exceptions to the general land-use codes were granted to other organizations but not to religious ones. *See, e.g., Albanian Associated Fund v. Twp. of Wayne*, 2007 WL 2904194 (D.N.J. Oct. 1, 2007) (finding that a Muslim community seeking to build a mosque demonstrated a strong likelihood of success on the merits of a Free Exercise claim when "exceptions that were granted to at least one of the [other] properties . . . were not extended to the Mosque"). Allowing plaintiffs to utilize this concrete means of exposing hidden animus would avoid the

need to meet the more amorphous standard of "intentional discrimination." *See Irshad Learning Ctr. v. Cnty. of Dupage*, 2013 WL 1339728 (N.D. Ill. Mar. 29, 2013) (finding that plaintiffs had failed to demonstrate evidence of intentional discrimination in zoning practices even when they had successfully shown that the city board's decision was arbitrary and capricious).

Although the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2000), should theoretically subject most discriminatory land-use practices to strict scrutiny when they place a substantial burden on religious exercise, a statutory remedy is insufficient to protect this important constitutional right. A statute may be repealed or amended at any time, leaving Muslims and other minorities vulnerable to popular discrimination by the majority. A positive resolution of the *Lukumi* split would provide minorities with much more enduring protection.

B. Anti-Muslim Animus After 9/11 Increases The Difficulty Of Obtaining Parallel Exemptions To Facially Neutral Laws.

Ever since the tragic events of September 11, 2001, our country has been divided by suspicion and fear of Muslims. 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, 277-78 (2012). Simply by virtue of acknowledging their faith in public, whether through the wearing of religious garb, the recitation of prayers, or other activities, Muslims have come

under intense scrutiny and have been suspected of terrorism. *See e.g.*, PEW RESEARCH CENTER, MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM 43-52 (2011) (reporting that nearly half of Muslim Americans had experienced intolerance or discrimination within the previous year).

This atmosphere of hostility and mistrust puts the Muslim community at particular risk of being targeted by animus-driven regulations that on their face appear neutral. In modern society, overt discrimination is both illegal and socially unacceptable, so even those who harbor prejudicial beliefs are unlikely to declare them as such. R. Randall Rainey, *Law and Religion: Is Reconciliation Still Possible?,* 27 LOY. L.A. L. REV. 147, 186 (1993) ("antireligious bigotry is largely hidden, and will not readily be admitted"). Instead, the animus comes out in less obvious ways. *See supra* Parts II-III.

There has been limited empirical research on the impact of post-9/11 animus on Muslims in the legal system, making it difficult to demonstrate its effects on a systemic level. A recent study, however, demonstrates that Muslim plaintiffs bringing a Free Exercise claim in federal court between 1996 and 2005 succeeded only 21% of the time, compared to a nearly 38% success rate for non-Muslim plaintiffs; simply by virtue of being Muslim, a plaintiff's chances of success were nearly halved. Sisk & Heise, *Muslims and Religious Liberty*, *supra*, at 251.

These findings strongly suggest that the approach adopted by the Montana Supreme Court will render Muslim Americans uniquely vulnerable

to discrimination. Implicit "[s]tereotypes about Muslims as security risks and Islam as a religion of violence" will likely color the determination of whether a law is motivated by animus and thus merits the application of strict scrutiny. Sisk & Heise, *Muslims and Religious Liberty*, *supra*, at 283. The Third Circuit approach, which looks to whether the law exempts or fails to regulate substantial categories of secular conduct is objective and thus less likely to be colored by popular misconceptions about Islam.

CONCLUSION

The lower courts have struggled for almost two decades to parse the *Lukumi* decision, resulting in a deep circuit and state split that profoundly affects religious minorities. Because of the pressing threat that this split poses to the free exercise rights of Muslim Americans, we respectfully request that the Court grant the petition for certiorari and clarify *Lukumi*'s requirements.

Respectfully submitted.

James A. Sonne
Counsel of Record
STANFORD LAW SCHOOL
RELIGIOUS LIBERTY CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 723-1422
jsonne@law.stanford.edu

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