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 FOR THE CHURCH OF THE LUKUMI BABALU AYE, THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, O CENTRO ESPÍRITA BENEFICENTE UNIÃO DO VEGETAL, AND THE SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

GEOFFREY P. EATON
Counsel of Record
EIMERIC REIG-PLESSIS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
geaton@winston.com

Counsel for Amici Curiae

QUESTIONS PRESENTED

1. Did the Montana Supreme Court err in holding that, before a law may be subject to strict scrutiny, a claimant alleging that it violates the Free Exercise Clause must show that, regardless of its effects, the law singles out religious conduct as such or has a discriminatory motive?

2. Did the Montana Supreme Court err in upholding, as "generally applicable," a law that exempts a substantial category of nonreligious conduct that undermines the purposes of the law to at least the same degree as religious conduct that it fails to exempt and substantially burdens?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

The Church of the Lukumi Babalu Aye, the International Society for Krishna Consciousness, O Centro Espírita Beneficente União do Vegetal, and the Sikh American Legal Defense and Education Fund are minority faiths who well understand the sometimes harsh effects of the political process on unpopular and misunderstood religious beliefs. Like many minority religious groups, *amici* have been forced to seek protection from the judiciary. *E.g.*, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993); *Lee* v. *Int'l Soc'y for Krishna Consciousness*, 505 U.S. 830 (1992); *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

The decision of the Montana Supreme Court threatens to destroy that critical protection for minority religions by distorting this Court's free exercise precedents in two dangerous ways. First, with no basis in *Lukumi*, it holds that a law need not be subjected to strict scrutiny unless it "singles out" religious conduct (as almost no law ever does) or has a discriminatory motive. Second, the court upholds, as "generally applicable," a law that restricts religiously motivated conduct while exempting many kinds of analogous secular conduct—ignoring *Lukumi*'s analysis of such exemptions.

---

[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. See Rule 37.6.

Unfortunately, these holdings are not isolated or novel. Four federal courts of appeals—the First, Second, Fourth, and Eighth Circuits—have reached the same conclusion. By contrast, Iowa's Supreme Court and the Third, Sixth, Tenth, and Eleventh Circuits have correctly held that a free exercise plaintiff does *not* need to prove "singling out" or discriminatory motive, and that a law is *not* "generally applicable" if it exempts secular conduct that undermines the law's purposes to the same degree as covered religious conduct. These holdings, which protect minority groups from state governments that are ignorant of or indifferent to their religious beliefs, are consistent with this Court's precedents. In *Lukumi*, not one Justice took the view that a plaintiff must prove a discriminatory motive—only two considered the question even relevant. 508 U.S. at 540 (Kennedy, J., joined by Stevens, J.). By contrast, *six* Justices joined the Court's holding that the challenged law was underinclusive. See *id.* at 542-546. By granting the petition and reversing the decision below, the Court can (and should) reaffirm these holdings and ensure they apply nationwide to members of all religions.

As minority groups that are frequently sidelined by the political process, *amici* have a substantial interest in the Court's resolution of this circuit split. Indeed, the Church of the Lukumi Babalu Aye is directly affected by the pivotal issue in this case: the proper interpretation of the Court's decision in *Lukumi*, which struck down a law that prohibited the "unnecessary" killing of animals but exempted "almost all killings of animals except for religious sacrifice." 508 U.S. at 536. The Church's members practice a 4,000-year-old African religion known variously as Yoba, Yoruba, or Santeria, which is not popular

enough to gain meaningful representation in or protection from the political process. An integral part of Yoruba is the sacrifice of animals, which are usually cooked and eaten in a feast following their sacrifice. Many areas of state regulation affect how these animals are kept and how ritual sacrifice is carried out.

For different reasons, the International Society for Krishna Consciousness also has a strong interest in this case. Its members adhere to the principles of *Gaudiya Vaishnavism*, or Krishna Consciousness, which requires followers to regularly venture into public places to distribute religious literature, solicit funds to support the religion, and encourage members of the public to participate in Krishna Consciousness. Bound by this religious duty, known in the Sanskrit language as *sankirtan*, Krishna followers regularly seek access to public places where the largest numbers of people can be found—including airports and rail stations, where strict safety regulations often complicate their ability to engage in *sankirtan*.

O Centro Espírita Beneficente União do Vegetal, a Christian spiritist religion with origins in Brazil, will also be affected by the Court's resolution of this case. Central to its members' faith is the taking of communion through *hoasca*, a sacramental tea made in part from an Amazonian plant that contains a small amount of a naturally occurring compound that is listed in Schedule I of the Controlled Substances Act. Members believe *hoasca* connects them to God.[1] The

---

[1] In *Gonzales*, the Court affirmed that the Religious Freedom Restoration Act protects the religious use of *hoasca* from federal regulations that are not narrowly tailored to serve a compelling governmental interest. 546 U.S. at 439. While União do Vegetal agreed, in settling the *Gonzales* case, to conform to certain

centrality of a controlled substance to the sect's ritual places its members squarely at the intersection of religious expression and state regulation.

Finally, the Sikh American Legal Defense and Education Fund, a national civil rights and educational organization that seeks to protect the civil rights of Sikh Americans, is also invested in the outcome of this case. Sikhism, which originated in the fifteenth century in Punjab, India, is the fifth-largest religion in the world by number of followers. In the United States, however, Sikhs comprise a minority that is frequently discriminated against or marginalized. In addition to suffering overt discrimination, Sikhs are often subject to government regulations prescribing attire and personal appearance that conflict with Sikh religious requirements, such as growing long beards and wearing turbans.

STATEMENT

The petition asks this Court to consider the constitutionality of a Montana statute that forces a religious group to participate in the state's workers' compensation program in direct violation of its core religious beliefs. Petitioners are members of a small, centuries-old Christian community called the Hutterites, who live and work together in tightly knit *bruderhofe*, or colonies. Because of their religious beliefs, the Hutterites renounce private property and pool

---

administrative requirements that the U.S. Drug Enforcement Agency sought to apply, it reserved the right to litigate the extent to which government entities may regulate its religious conduct. That reservation is particularly salient in cases where, as here, it is a *state*'s law that infringes religious liberty. See *City of Boerne* v. *Flores*, 521 U.S. 507, 534-536 (1997) (holding that RFRA is unconstitutional as applied to the States).

their resources for the common good of the colony. Although Hutterite colonies operate farms, keep livestock, and engage in manufacturing and other trades, their members are not paid (and do not accept) wages, and they receive comprehensive, free medical care from the colony.

For almost 100 years, those religious practices led Montana to exempt the Hutterites from its workers' compensation laws. But for-profit construction companies that compete with the Hutterites successfully lobbied Montana's legislature to "level the playing field" by passing an amendment to the state's workers' compensation law whose only effect is to extend the program (and, along with it, the premiums it requires) to the Hutterites. It is impossible for the Hutterites to comply with the workers' compensation law without violating their religious beliefs, which forbid them from accepting compensation or holding legal claims against one another. While the law as amended no longer exempts the Hutterites, it continues to exempt twenty-six other types of employment relationships, including secular partnerships and even communes.

This action began when Petitioners sought a declaratory judgment that, as applied to them, Montana's workers' compensation law violates the First Amendment. The district court granted summary judgment to Petitioners, holding that the law is neither neutral nor generally applicable. By a 4-3 vote, Montana's Supreme Court reversed. The majority upheld the law because Petitioners were unable to prove that it "single[s] out religious beliefs" as such or that it "regulate[s] or prohibit[s] any conduct 'because it is undertaken for religious reasons.'" Pet. 18a-19a. By contrast, the dissent would have struck down the

law, in part because it "applies to the religious structure of the Hutterites" but not to "other religious organization[s]," and because it also "fails to prohibit nonreligious conduct that endangers the State's purported government interests" just as much as Petitioners' conduct would. *Id.* at 47a.

REASONS FOR GRANTING THE WRIT

In *Lukumi*, this Court held that a law is subject to strict scrutiny under the Free Exercise Clause if it is not both "neutral" and "generally applicable." 508 U.S. at 531-532; see also *Emp't Div.* v. *Smith*, 494 U.S. 872, 882-885 (1990). Twenty years later, the federal Courts of Appeals and state supreme courts are evenly divided over what that means. Four Courts of Appeals and the Montana Supreme Court apply mere rational basis review unless a plaintiff can prove that the "object" of a law is to infringe upon a religious practice. *E.g.*, *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013). Four other Courts of Appeals and the Supreme Court of Iowa, however, hold that a law is subject to strict scrutiny if it treats a substantial category of nonreligious conduct more favorably than similar religious conduct. *E.g.*, *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 364-366 (3d Cir. 1999) (Alito, J.).

This deep and broad split among jurisdictions raises questions about the meaning of both "neutral" and "generally applicable," two separate but "interrelated" constitutional requirements. *Lukumi*, 508 U.S. at 521. As we show in Part I, requiring a free exercise claimant to prove that a law explicitly singles out religious conduct or has a discriminatory motive

takes a crabbed, factually deficient view of neutrality. As we show in Part II, allowing states to selectively exempt nonreligious conduct from laws that burden religious conduct vitiates the general applicability requirement. Both approaches to the Free Exercise Clause threaten to diminish the First Amendment's vital protections for *amici* and other religious minorities. Only this Court's intervention can prevent that outcome.

I. Requiring proof that a law "singles out" religious conduct or has a discriminatory motive all but eviscerates the Free Exercise Clause.

This Court has never held that a claimant must prove that a law burdening religious practices explicitly singles out a particular religion or has a discriminatory motive. In fact, even the two Justices who analyzed the motivation behind the ordinances at issue in *Lukumi* did not take the view that free exercise claimants were required to establish a discriminatory motive—only that evidence of such a motive was relevant to the ordinances' constitutionality. 508 U.S. at 540-542 (Kennedy, J., joined by Stevens, J.). The remainder of the Court voted to strike down the ordinances in *Lukumi* without even considering the motivations of the legislators. Yet government defendants "routinely" argue that *Smith* and *Lukumi* require free exercise claimants to prove a discriminatory motive—even in jurisdictions that have not yet considered the issue. Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25, 27 (2000).

This is not only incorrect as a matter of doctrine, it has devastating consequences in practice—for two

reasons. First, burdensome laws that are enacted out of ignorance or indifference are far more common—but no less damaging—than those motivated by animus. Second, even when laws *are* intended to harm, such intent may be impossible to prove.

A. Laws that burden minority religions out of ignorance or indifference are just as dangerous to religious liberty as laws that are meant to discriminate.

1. It is no accident that we have Sunday closing laws and government holidays at Christmas. Legislatures "assure that governmental regulations do not interfere with the religious practices of the majority." *Azeez* v. *Fairman*, 795 F.2d 1296, 1300 (7th Cir. 1986). At present, that majority consists of mainstream Catholic and Protestant Christian denominations. Not surprisingly, until *Locke* v. *Davey*, 540 U.S. 712 (2004), "not a single religious exemption claim ha[d] ever reached the Supreme Court from a mainstream Christian religious practitioner." Eric Pruitt, *Boerne and Buddhism: Reconsidering Religious Freedom and Religious Pluralism After* Boerne *v.* Flores, 33 J. Marshall L. Rev. 689, 712 (2000). Instead, "the vast majority" of free exercise claims are brought by religious minorities, such as "Muslims, Native Americans, and members of Caribbean and Asian religions." *Ibid.*

Free exercise claims were relatively uncommon in the 18th and 19th centuries, when our country "was marked by a high degree of religious homogeneity." *Id*. at 699. Today, the United States is "a vastly different place" that is home to "a greater number of religious groups than any other country." *Id.* at 700-701. More than ever, we are "'a cosmopolitan nation

made up of people of almost every conceivable religious preference.'" *Smith*, 494 U.S. at 888 (citation omitted). But while we may seek to "value and protect that religious divergence," *ibid.*, it unavoidably brings with it "increased opportunities for the majority's ignorance of minority religions" to produce laws that contradict basic tenets of minority faiths. Pruitt, 33 J. Marshall L. Rev. at 701-702. Coupled with "the rise of the regulatory state in the United States," our "increasing religious pluralism" is thus a "key factor[] in the increasing number of free exercise challenges." *Id.* at 702 n.66.[2]

Most of these challenges concern laws that are "not motivated by any animus toward minor sects but merely insensitive to their interests—possibly even oblivious to their existence." *Sasnett* v. *Sullivan*, 91 F.3d 1018, 1021 (7th Cir. 1996) (Posner, J.), vacated on other grounds, 521 U.S. 1114 (1997). Predictably, "institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities." *Goldman* v. *Weinberger*, 475 U.S. 503, 523-524 (1986) (Brennan, J., dissenting). Government officials may fail to even "recognize certain conduct as 'religious'" at all. Pruitt, 33 J. Marshall L. Rev. at 699. Thus, "[t]he real problem is not blatant discrimination against religious minorities so much as it is a 'selective indifference' of legislatures to be-

---

[2] A Westlaw search for "Free Exercise Clause" in the ten years after *Lukumi* (1993-2002) returns 1,179 cases. The same search for the next ten years (2003-2012) returns 2,616 cases—more than twice as many. See also Craig Anthony Arnold, *Religious Freedom as a Civil Rights Struggle*, 2 Fall Nexus J. Op. 149, 151 (1997) (citing "systematic research of all published opinions in cases decided on religious freedom claims" to show "the growing number of conflicts between religion and regulation").

liefs and practices so incomprehensible to the majority that they cannot appreciate the impact on the individual of making their religious conduct criminal." *Id.* at 712 n.145.

The result is that "what appears to the majority as a 'neutral law of general applicability'" may be, "unwittingly, burdening religious minorities." *Id.* at 712. For example, it is "[c]entral to Sikh religious practice" to wear long hair covered by a turban and to carry a kirpan (small knife) at all times. *Id.* at 704. But that practice "often brings Sikhs into direct conflict with criminal laws and workplace safety regulations, because lawmakers never considered such behavior to be religious conduct deserving exemption." *Ibid.*

Religious minorities are also at risk from manipulation of the political process by well-organized special interests that stand to gain from interfering with religious traditions—not *because* they are religious, but because of their economic effects. That is exactly what happened in this case: Construction companies lobbied for, and the state legislature passed, protectionist legislation to end Petitioners' perceived economic advantage, which was a direct result of their deepest religious convictions. As the dissent below dryly remarked, "henceforth, 'no law' prohibiting the free exercise of religion does not actually mean 'no law' in Montana. Rather, it means no law, except to the extent that the law greases the squeaky wheel of a powerful industry." Pet. 33a.

Such laws are no less burdensome merely because their burdens are unintended or not directed at religion as such. To the contrary, they "coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at

religion," contributing equally to "the harsh impact" that the political process can exact "on unpopular or emerging religious groups." *Smith*, 494 U.S. at 901-902 (O'Connor, J., concurring). Indeed, even "repression and persecution of * * * minority religions" can be entirely "unintentional." David H.E. Becker, *Free Exercise of Religion Under the New York Constitution*, 84 Cornell L. Rev. 1088, 1091 (1999). Again, this case is a perfect example: although the law was motivated by economic interests, and not by religious animus, its effect is to force Petitioners to choose between obeying the law and remaining faithful to 500 years of religious practice.

2. Nor can this law, or others like it, accurately be called "neutral." "A regulation is not neutral * * * if, whatever its * * * intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities.'" *Lukumi*, 508 U.S. at 561 (Souter, J., concurring) (citation omitted). The fact that its motive is innocuous does not enter the equation: "The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Id.* at 558 (Scalia, J., concurring).

For that reason, even if the ordinances in *Lukumi* had "been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals * * * , they would nonetheless be invalid" because of their impact on religious conduct. *Id.* at 559. At most, motive is only part of the inquiry into whether a law is neutral, since it may be "religion neutral on its face or in its purpose [but] lack neutrality in its effect." *Id.* at 561 (Souter, J., concurring). Thus, while "[p]roof of hostility or discriminatory motivation may be *sufficient* to prove that a challenged governmental action is not neutral, * * * the

Free Exercise Clause is not confined to actions based on animus." *Shrum* v. *City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) (emphasis added) (internal citation omitted).

Jurisdictions that require plaintiffs to prove a discriminatory motive thus end up shielding from heightened scrutiny—for no good reason—the great majority of laws that infringe religious practices. In doing so, they betray "the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society." *Smith*, 494 U.S. at 903 (O'Connor, J., concurring). That "critical function" applies no more to intentional discrimination than to the "quiet erosion" of religious rights by political entities "that dismiss minority beliefs and practices as unimportant, because unfamiliar." *Goldman*, 475 U.S. at 523-524 (Brennan, J., dissenting).

B. Proving a discriminatory motive, when there is one, is impracticable, and creates too high a hurdle for free exercise claims.

Even when officials *do* act for improper reasons, "it is almost impossible to prove the anti-religious motive to the satisfaction of a judge." Laycock, 40 Cath. Law. at 27. Where exactly can a plaintiff turn to find such evidence? "It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such." *Lukumi*, 508 U.S. at 580 (Blackmun, J., concurring). Indeed, "few States would be so naive." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring). Protecting against laws that "single out" religion as such is thus little protection indeed.

Animus toward a minority religion is also easy to conceal because it is almost always "mixed in with a

range of other motives" for legislation. Laycock, 40 Cath. Law. at 27; see also *Lukumi*, 508 U.S. at 558 ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body.") (Scalia, J., concurring). Even when discrimination is the primary or only motive, "[l]egislative histories can be contrived and sanitized, favorable media coverage orchestrated, and postenactment recollections conveniently distorted." *Edwards* v. *Aguillard*, 482 U.S. 578, 638 (1987) (Scalia, J., dissenting). At a minimum, however, the First Amendment rejects the notion that "a majority of a community can, through state action, compel a minority to observe [the majority's] particular religious scruples so long as the majority's rule can be said to perform some valid secular function." *Sherbert* v. *Verner*, 374 U.S. 398, 411 (1963).

Moreover, it is even harder to prove a discriminatory motive when an otherwise constitutional law is *applied* improperly. "[S]uch discrimination will often be difficult to detect and prove"—if not "unverifiable"—because, unlike a legislative act, it "is likely to be dispersed in time and place" across multiple administrative actions, many of which may be hidden from public scrutiny. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 204-205 (2004).

For example, "new, small, or unfamiliar churches * * * are frequently discriminated against" in zoning and land use decisions, but "the highly individualized and discretionary processes" of approvals and variances "make it difficult to prove discrimination in any individual case." 146 Cong. Rec. 16,698-16,699 (2000). "More often" than not, "discrimination

against small and unfamiliar denominations" is "covert" and "lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'" *Ibid.*; see also H.R. Rep. No. 106-219, at 24 (1999) ("Land use regulation has a disparate impact" on "[s]maller and less mainstream denominations," but "discrimination can be very difficult to prove.").

In any event, requiring proof of "singling out" or a discriminatory motive turns the ordinary burden of proof for fundamental rights violations on its head: Instead of requiring the state to prove that a law impinging on religious liberty is narrowly tailored to achieve a compelling governmental interest, it requires aggrieved religious minorities to prove a fact that might exist only in an official's mind, if it exists at all. This evidentiary barrier allows state-court judges, often themselves elected by the very political process that enacted the challenged law, to quickly dispose of free exercise claims without fear of reversal.[3] Worse, it encourages governments "to deliberately forget about minority religions" or "to feign ignorance" of their needs. Kathleen Sands, *Territory,*

[3] Studies suggest that religious minorities also fare worse in the federal courts. *E.g.*, 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, 235 (2012) (Muslim claimants account for 15.6% of free exercise claimants but only 10.0% of successes); *id.* at 236 (predicted likelihood of success for non-Muslim claimants is approximately 38%, but only 22% for Muslim claimants."); see also Eduardo Peñalver, *The Concept of Religion*, 107 Yale L.J. 791, 793 n.16 (1997) ("Although plaintiffs from minority religious groups have won free exercise claims in lower courts, such victories are relatively rare.").

Wilderness, Property and Reservation: Land and Religion in Native American Supreme Court Cases, 36 Am. Indian L. Rev. 253, 304 (2012). That threatens to"make[] *Smith* and *Lukumi* close to worthless as a protection for free exercise." Laycock, 40 Cath. Law. at 27. This Court's review is urgently needed.

II. The political process will protect minority religious conduct only if laws that exempt analogous secular conduct are subject to strict scrutiny.

Review is also warranted to ensure that religious conduct is not treated *less favorably* than comparable secular activity. In *Smith*, this Court acknowledged that, to some extent, it was leaving "accommodation [of religious practices] to the political process." 494 U.S. at 890. As we have shown, that process is not, in fact, as "solicitous" toward minority religions as the Court had hoped. *Ibid.* But while *Smith* retreated from this Court's earlier, more robust readings of the Free Exercise Clause, it did not leave religious minorities defenseless. Most importantly, *Smith* reaffirmed 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.* at 884 (internal quotation marks omitted). In other words, a law must either be "generally applicable," or survive strict scrutiny. *Ibid.* The decision below threatens to eviscerate that protection for religious exercise, warranting this Court's intervention.

Put simply, the general applicability requirement prevents the enactment of a "'prohibition that society is prepared to impose upon [religious minorities] but not upon itself.'" *Lukumi*, 508 U.S. at 545 (citation

omitted). This is a formidable improvement to a political system that, left unchecked, naturally tends to overlook or suppress minority groups.

Indeed, "there 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." *Ry. Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). For that reason, a regulatory scheme's "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice," and thus "'[t]he Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'" *Lukumi*, 508 U.S. at 534, 542 (citation omitted). Moreover, "a law cannot be regarded as protecting an interest 'of the highest order' * * * when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547 (citation omitted) (alteration in original).

Five jurisdictions, consistent with *Smith* and *Lukumi*, have correctly grasped how the requirement of general applicability protects minority religions from the ignorance, indifference, or (in some cases) hostility of political actors. In the Third Circuit, for instance, "[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." *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (citing *Lukumi*, 508 U.S. at 543-546). Similarly,

the Sixth Circuit recognizes that "an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Ward* v. *Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (Sutton, J.).[4]

In these jurisdictions, any "burdensome proposed law" must, in fact, be "generally applicable," and thus "other interest groups will oppose it, and it will not be enacted unless the benefits are sufficient to justify the costs." Laycock, 40 Cath. Law. at 35-36. So applied, "[t]he general applicably requirement * * * allows religious groups to 'piggyback' on the battles fought for secular interests in the political branches," effectively "invert[ing] the political process to protect the very groups it is prone to ignore." Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Pol'y 627, 637-638 (2003).

Thus, "[t]he genius of general applicability" is that it allows "religious minorities [to] rely on the political advocacy of larger, more mainstream groups." Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 Tenn. L. Rev. 351, 360 (2010). By ensuring that laws "favor[]

---

[4] See also *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1234-1235 (11th Cir. 2004) (zoning code that exempted private clubs but not synagogues was not generally applicable); *Mitchell Cnty.* v. *Zimmerman*, 810 N.W.2d 1, 1-3 (Iowa 2012) (ban on use of steel wheels that exempted school buses but not Mennonite tractors was not generally applicable); *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 653 (10th Cir. 2006) ("[A] system of individualized exemptions trigger[s] strict scrutiny.").

neither one religion over others nor religious adherents collectively over nonadherents," this requirement addresses the "fundamental source of constitutional concern" that "legislature[s] * * * may fail to exercise governmental authority in a religiously neutral way." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 703 (1994). That comports with "the most common understanding of the Free Exercise Clause as a protection for religious minorities from the forces of majoritarian politics." Pruitt, 33 J. Marshall L. Rev. at 712.

"Even narrow secular exceptions," however, "rapidly undermine this interest" because "the effective secular opposition would be left with no reason to continue its opposition" if the state "can exempt those secular groups with the greatest motivation or ability to resist a proposed law." Laycock, 118 Harv. L. Rev. at 210. For example, in jurisdictions that mistakenly ignore secular exemptions in determining general applicability, "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 effect, officials in these jurisdictions can "pick and choose only a few to whom they will apply legislation" and thus "escape the political retribution that might be visited upon them if larger numbers were affected." *Ry. Express Agency*, 336 U.S. at 112-113 (Jackson, J., concurring). "This precise evil is what the requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 545-546.

The 5-5 circuit split among the lower courts thus turns on the meaning of "generally applicable."

Courts that apply strict scrutiny to laws that exempt substantial categories of analogous nonreligious conduct construe "'generally applicable' at its literal English meaning," which means "the law has to apply to everyone, or nearly everyone, or else the burden on religious exercise must be justified under the compelling interest test." Laycock, 40 Cath. L. Rev. at 26-27. Conversely, courts that disregard secular exemptions and instead focus solely (and, as we have shown, erroneously) on a law's underlying motive are apparently satisfied that "every law is generally applicable to whatever it applies to, * * * [a] tautology [that] would render the requirement of general applicability entirely vacuous." Laycock, 118 Harv. L. Rev. at 207. This leaves religious minorities at the mercy of an unchecked political process—usually, as we have shown, on the losing side.

Only this Court's review can resolve this intractable split among the lower courts and restore appropriate constitutional protection to our nation's "first freedom."

* * *

In sum, the decision below—like those of the four federal circuits it follows—threatens to dismantle the protections for minority religious groups that this Court recognized in *Smith* and *Lukumi*. In doing so, it allows majoritarian forces and well-organized special interests to infringe, even if inadvertently, on the basic freedoms of religious minorities.

Of course, we do not suggest that religious minorities *never* win political battles on their own—but that is beside the point. Minority religious groups should not be "forced to spend their political influence on protecting their right to practice their faith or to be

treated with respect by the state * * * to achieve a level of security and status that is typically provided to majoritarian religions at little or no cost." Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously*, 32 Cardozo L. Rev. 1701, 1725 n.74 (2011). Such "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943).

This Court's review is urgently needed to make that clear.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

GEOFFREY P. EATON
Counsel of Record
EIMERIC REIG-PLESSIS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
geaton@winston.com

MAY 2013