Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, ET AL.,
Petitioners,

v.

SYLVIA BURWELL, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

BRIEF OF *AMICI CURIAE* CHURCH OF THE LUKUMI BABALU AYE, INC., INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ISLAMIC CENTER OF MURFREESBORO, AND PASTOR ROBERT SOTO AND OTHER MEMBERS OF THE LIPAN APACHE TRIBE, SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection may not fulfill its regulatory objective—namely, the provision of no-cost contraceptives to the objector's employees?

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INTEREST OF *AMICI CURIAE*[1]

Amici represent diverse minority religious organizations with a common and profound interest in robust protections for the free exercise of religion. To protect those

[1] All counsel of record consented to the filing of this brief by filing blanket consents with the Clerk. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici*, their counsel, or their members made a monetary contribution intended to fund the preparation or submission of this brief.

interests, they have litigated some of the landmark First Amendment and Religious Freedom Restoration Act (RFRA) cases decided by this Court and the lower federal courts. Some of the *amici* have filed *amicus* briefs in other important religious-freedom cases before this Court in recent years. *E.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S. Ct. 694 (2012).

The Church of the Lukumi Babalu Aye, Inc. is a religious organization that has suffered discrimination in the United States. *Amicus* has successfully pressed before this Court its constitutional right to engage in religious practice. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993).

The International Society for Krishna Consciousness, Inc. (ISKCON) is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. ISKCON has suffered discrimination in the United States and has sought judicial relief based on the First Amendment. ISKCON has successfully pressed before this Court its constitutional rights to engage in religious practice. See, *e.g.*, *Lee* v. *Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (per curiam).

The Islamic Center of Murfreesboro (ICM) is an Islamic community organization located in the town of Murfreesboro, Tennessee. ICM has been subjected to religious discrimination, relying on judicial intervention to ensure its members would be able to worship in their Tennessee mosque.

Pastor Robert Soto is a Lipan Apache religious leader and feather dancer. The Lipan Apache tribe has lived in Texas and Northern Mexico for over 300 years. Pastor Soto and his tribe have been subject to religious discrim-

ination by the federal government related to their use of eagle feathers in a traditional Lipan Apache religious ceremony. See *McAllen Grace Brethren Church* v. *Salazar*, 764 F.3d 465 (5th Cir. 2014).

SUMMARY OF ARGUMENT

Amici represent religious traditions that claim relatively few American adherents compared to those of the Catholic and Protestant petitioners in this case. *Amici* are strongly interested in ensuring that RFRA is interpreted in a manner that does not disadvantage minority religions unfamiliar to the typical judge or government official. After all, RFRA was enacted precisely to restore and expand upon this Court's pre-1990 free-exercise precedents that protected the rights of minority faiths against generally applicable laws that burdened their religious practices.

While *amici* do not necessarily share the specific religious convictions at the heart of this case, they are particularly concerned about two aspects of the Court of Appeals' opinions under review. First, in assessing whether RFRA's substantial-burden test was met, the lower courts improperly second-guessed the accuracy or reasonableness of Petitioners' sincerely held religious belief that participating in the contraceptive mandate would make them complicit in sin. Second, in determining whether the mandate furthers a compelling government interest, the Court upheld the HHS's arbitrary decision to grant exemptions from the mandate to some religious organizations, while denying exemptions to other equally religious organizations (like Petitioners) that share the same religious objections.

If upheld, these errors would undermine RFRA's protections for everyone. But *amici*'s experience and this Court's case law teach that adherents of minority religions would have the most to lose. Time and again, lower courts and government officials have improperly second-

guessed the reasonableness of minority religious beliefs and practices, thus discounting the burden imposed by ostensibly neutral laws. Likewise, government actors often disfavor minority faiths by arbitrarily refusing their requests for the same exemptions granted to others. A proper interpretation of RFRA bars courts from inquiring into the veracity of religious beliefs and prohibits the government from favoring some religious organizations over others that are similarly situated relative to the government's alleged compelling interest.

ARGUMENT

I. THE COURTS BELOW IMPROPERLY APPLIED RFRA'S SUBSTANTIAL-BURDEN AND COMPELLING-INTEREST TESTS IN A MANNER THAT UNIQUELY THREATENS MINORITY RELIGIONS

RFRA provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). If a rule substantially burdens a person's exercise of religion, that person is entitled to an exemption from the rule unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). The courts below erred at multiple steps in their analysis in ways that prompt grave concern for *amici*.

A. As Petitioners have shown, HHS's "convoluted regulatory scheme" imposing the contraceptive mandate on Petitioners creates a substantial burden on the exercise of their religious belief. Pet. Br. 41 (Nos. 15-35, 15-105, 15-119, & 15-191) (*E. Tex.* Br.); see *id.* at 41-46; Pet. Br. 37-40 (Nos. 14-1418, 14-1453, & 14-1505) (*Zubik* Br.). In holding to the contrary, the courts below improperly evaluated the veracity—as opposed to the sincerity—of

Petitioners' religious beliefs. See *E. Tex.* Br. 46-51; *Zubik* Br. 41-52. In short, Petitioners object to authorizing the use of their insurance plans' infrastructure to deliver contraceptives to their employees. They believe doing so would make them morally complicit in sin. Petitioners must therefore either violate their consciences or face crushing fines. The courts below nonetheless found no substantial burden on Petitioners' religious practice. They assured Petitioners that they are not in fact complicit in sin. Indeed, according to the courts below, complying with the HHS regulatory mechanism actually "relieves them from complicity." See, *e.g.*, *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, 794 F.3d 1151, 1173-1174 (10th Cir. 2015). Other courts reasoned that the burden on Petitioners' conscience was surely minimal because they merely had to fill out "a bit of paperwork" to comply. See, *e.g.*, *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 237 (D.C. Cir. 2014).

It is far outside the competence of federal courts—or indeed any government official—to determine whether a person's religion deems him morally complicit in sin if he does certain acts. Nor may courts re-weigh whether even an easy "paperwork" task carries grave religious implications. Those are exclusively theological questions, not legal ones. The proper legal question, as Petitioners have demonstrated, is only whether the objector's belief is sincere and whether the Government proposes to substantially burden that belief through coercive action, such as the heavy fines threatened here. That four federal appellate courts would so openly second-guess—and badly misconstrue—the religious contours of mainstream Christian doctrine is bad enough. If government actors have carte blanche to re-examine the veracity of religious

beliefs, the rights of adherents to minority religions will be in even greater peril.

B. The courts below compounded their error—and the threat to minority religious rights—by upholding HHS's scheme even though it draws impermissible lines between similarly situated religious groups, totally exempting some while burdening others. Under HHS's current scheme, churches and their "integrated auxiliaries" are wholly exempted from the contraceptive mandate, while other religious nonprofits—including those that hire only co-religionists—must comply through the regulatory mechanism. Thus, as Petitioners have explained, equally religious groups with the same religious objections may be treated quite differently based on nothing more than their formal organizational structure or affiliation. See *E. Tex.* Br. 64-68.

Because its distinction between exempt and nonexempt religious organizations is arbitrary, HHS's scheme cannot be the least restrictive means of furthering a compelling governmental interest. See *E. Tex.* Br. 72-78; *Zubik* Br. 72-82. To hold otherwise would allow the government to grant or deny a request for religious accommodation based on an arbitrary distinction between similarly situated religious objectors. RFRA does not bestow upon anonymous bureaucrats the discretion to pick and choose which believers to exempt from substantially burdensome requirements. Indeed, RFRA was aimed directly at foreclosing such arbitrary line-drawing that had long infringed the rights of adherents to minority religions that often lacked the familiar structure or affiliations favored by governmental decisionmakers.

II. THE EXPERIENCE OF *AMICI* AND THIS COURT'S CASES TEACH THAT ALLOWING THE GOVERNMENT TO SECOND-GUESS RELIGIOUS BELIEFS AND FAVOR SOME RELIGIOUS GROUPS OVER OTHERS UNIQUELY HARMS THE VERY MINORITY RELIGIONS THAT RFRA WAS DESIGNED TO PROTECT

Petitioners are Catholic and Protestant Christians whose co-religionists include many judges at every level of the federal judiciary and whose teachings are otherwise relatively familiar among the cognoscenti. They have plenty to fear from the lower courts' improper RFRA analysis. But whatever fears they may have are amplified for adherents of minority religions like *amici*.

The tragic irony of the special risk faced by minority religions is that Congress passed RFRA *precisely* to protect minority religious practices. After all, adherents of widely held beliefs can typically obtain protection through the political branches. Thus, RFRA set as its express legislative purpose "to restore the compelling interest test * * * and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). The compelling interest test adopted by RFRA seeks to "preserv[e] religious liberty to the fullest extent possible in a pluralistic society." *Emp't Div., Dep't of Human Res. of Ore.* v. *Smith*, 494 U.S. 872, 903 (1990) (O'Connor, J., concurring in the judgment). A pluralistic society is a society that protects religious minorities. By seeking to preserve religious pluralism, then, RFRA promotes the liberties of religious minorities. It would betray RFRA's legacy to use its substantial-burden requirement to subject adherents of minority religions to judicial scrutiny of their often-misunderstood religious practices or to short-circuit its compelling-interest test by allowing arbitrary govern-

mental line-drawing that is most likely to victimize minority religions.

A. 1. Courts are less likely to understand the practices of minority religions, which poses a particular problem for their adherents: When courts do not understand a religious practice, they are more likely to undervalue the substantiality of burdens placed on that practice. And to the extent that a religious minority's rights depend on a court's understanding of the religion, adherents might reasonably "be concerned that a judge would not understand its religious tenets and sense of mission." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987); see *id.* at 343 (Brennan, J., concurring) ("While a church may regard the conduct of certain functions as integral to its mission, a court may disagree."). Questions of prayer and worship may prove "relatively easy in some contexts," but "they might prove more difficult when dealing with religions whose practices do not fit nicely into traditional categories." *Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 732 n.8 (9th Cir. 2011) (O'Scannlain, J., concurring). Thus, if courts are free to evaluate the veracity or reasonableness of religious beliefs, unfamiliar beliefs will fare the most poorly.

Consider adherents of *amicus* International Society for Krishna Consciousness (ISKCON), whose practice of Sankirtan "enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion." *Heffron* v. *Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 645 (1981). Even this Court has struggled in multiple, splintered opinions to understand how that unfamiliar practice fits within our constitutional structure. Compare *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 685 (1992) (holding that an airport could

ban ISKCON adherents from soliciting funds), with *Lee* v. *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992) (per curiam) (holding that an airport could not ban ISKCON adherents from distributing literature).

2. The lower courts' substantial-burden reasoning in *Holt* v. *Hobbs* demonstrates the danger that judicial second-guessing of religious beliefs poses for an adherent of a minority religion. See 135 S. Ct. 853, 862-863 (2015). *Holt* should have been an easy substantial-burden case. See *id.* at 862. By the time it wended its way to this Court, even the government conceded the existence of a substantial burden. *Ibid.* And yet what should have been simple was not, in the District Court's eyes. It concluded "that the grooming policy [prohibiting beards] did not substantially burden petitioner's religious exercise because 'he had been provided a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays.'" *Ibid.* (quoting *Holt* v. *Hobbs*, No. 5:11-cv-00164, 2012 WL 994481, at *7 (E.D. Ark. Jan. 27, 2012) (magistrate judge's report & recommendation)). Because the court second-guessed the importance of a religious belief with which it was unfamiliar, the court improperly discounted the burden imposed on the prisoner's religious practice by the challenged grooming policy. The error was analogous to the lower courts' refusal in these cases to accept that merely "signing a form" could have grave religious implications for Petitioners.

Prohibiting such governmental excursions into unfamiliar doctrinal matters is precisely why "Congress defined 'religious exercise' capaciously to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Holt*, 135 S. Ct. at 860 (quoting 42 U.S.C. § 2000cc–5(7)(A)). As Judge Sutton

has explained, the law does not "permit[] governments or courts to inquire into the centrality to a faith of certain religious practices—dignifying some, disapproving others." *Haight* v. *Thompson*, 763 F.3d 554, 566 (6th Cir. 2014). By limiting courts to testing the sincerity—rather than the accuracy or importance—of religious beliefs, RFRA "protects a broad spectrum of sincerely held religious beliefs, including practices that non-adherents might consider unorthodox, unreasonable or not 'central to' a recognized belief system." *Ibid.* (quoting 42 U.S.C. § 2000cc–5(7)(A)).

A proper understanding of RFRA thus safeguards the unfamiliar beliefs of minority religions from judicial re-weighing or second-guessing. As one dissenter below correctly observed, "no precedent hold[s] that a person's free exercise was not substantially burdened when a significant penalty was imposed for refusing to do something prohibited by the person's sincere religious beliefs (however strange, or even silly, the court may consider those beliefs)." *Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, 799 F.3d 1315, 1318 (10th Cir. 2015) (Hartz, J., dissenting from the denial of rehearing en banc). This Court should reverse the judgments below, which rest upon forbidden governmental assessment of the correctness of religious beliefs.

B. The lower courts' analysis also uniquely threatens the adherents of minority religions by allowing the government to grant or deny religious exemptions based on arbitrary criteria such as organizational structure or affiliation. Governmental decisionmakers are less likely to be familiar with the institutions, practices, and beliefs of minority religions and, as a result, they may be more likely to make arbitrary eligibility distinctions when adherents of minority religions seek religious accommodations. This may take the form of denying legal protec-

tions afforded to other similarly situated religious adherents—much like the HHS action did here. Or it may even result in religious adherents being denied exemptions that are afforded to nonreligious entities. The Court should cast a jaundiced eye on any legal rule that allows the government latitude to determine *which* religious groups are favored over others.

Indeed, history "amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish." *Emp't Div.*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment). RFRA's protections push back against that historical tide by requiring the government (*i.e.*, the majority) to grant exemptions to *all* religions absent satisfaction of the compelling-interest test. Properly understood, that test prohibits the government from making arbitrary distinctions that favor some religious groups over others. If this protection is lessened, adherents of minority religions are uniquely vulnerable to arbitrary governmental line-drawing that excludes them from RFRA's protections.

1. Upholding arbitrary governmental distinctions among religious groups like those at issue here would inevitably lead to the government playing favorites—smiling on "recognized" religions, while dismissing the pleas of less familiar, but equally sincere, believers.

That is what happened to *amicus* Pastor Robert Soto. He is a member of the Lipan Apache Tribe of Texas. *McAllen Grace Brethren Church* v. *Salazar*, 764 F.3d 465, 468 (5th Cir. 2014). Soto's religious practices include worship using eagle feathers. *Id.* at 472. The problem for Soto is that federal law prohibits the taking or possessing of any part of a bald or golden eagle. See 16 U.S.C. § 668. That law, however, has an exception for taking or possessing eagle parts "for the religious pur-

poses of Indian tribes." *Id.* § 668a. Soto is a member of an "Indian tribe[]," and he sought to possess eagle feathers for "religious purposes," so it would seem that the exception applied to him.

The federal government did not think so. It interpreted the religious-purposes exception to apply only to "federally recognized Indian tribes," and the Lipan Apaches are not federally recognized. *Salazar*, 764 F.3d at 470. So although Soto "is without dispute an Indian and a member and regular participant in the Lipan Apache Tribe," *id.* at 480 (Jones, J., concurring), and although Soto's "sincerity in practicing his religion [was] not in question," *id.* at 472, the federal government refused to grant him the same religious exemption that it had granted to other similarly situated religious believers because of the "historical accident[]" that the Lipan Apaches are not federally recognized. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 Stan. L. & Pol'y Rev. 271, 274 (2001); cf. *Salazar*, 764 F.3d at 473 ("While the Lipan Apache Tribe is not federally recognized, the Texas Senate has recognized the Lipan people as having lived in Texas and Northern Mexico for 300 years and that they have had a 'government to government' relationship with the Republic of Texas, the State of Texas, and the United States government.") (footnote omitted).

Soto brought a RFRA challenge to the federal government's arbitrary decision not to grant him a religious-purposes exemption. *Salazar*, 764 F.3d at 468. The government did not dispute that "any scheme that limits the access that Soto, as a sincere adherent to an American Indian religion, has to the possession of eagle feathers [would have] a substantial effect on the exercise of his religious beliefs." *Id.* at 472. The government nonetheless defended depriving one group of religious adherents

of the same exemption it had afforded to others. It attempted to justify its arbitrary distinction between federally recognized and unrecognized tribes under RFRA's compelling-interest test. See *id.* at 472-480. The government relied on its interests in protecting eagles and "fulfilling [its] 'unique responsibility' to federally recognized tribes." *Id.* at 473.

Fortunately, the Fifth Circuit did not sanction the arbitrary line-drawing in Pastor Soto's case that it allowed here. Because the government had failed to give a persuasive reason for conditioning the religious-purposes exception on federal recognition, the Fifth Circuit vacated the District Court's grant of summary judgment to the government. *Id.* at 480. By limiting the application of the religious-purposes exception to federally recognized Indian tribes, the federal government in effect told Soto that he was a disfavored practitioner of his religion. The lower courts upheld similarly misguided governmental action here, when they allowed HHS to favor churches and their "integrated auxiliaries" over equally religious organizations that share the same religious objections.

2. The federal government committed a similar violation of RFRA in *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006). There it refused to grant an exception to the Controlled Substances Act ban on all uses of Schedule I drugs to the Uniao do Vegetal (UDV) for its religious use of *hoasca*—a hallucinogenic tea. *Id.* at 430. It did so on the ground that the Act "simply admits of no exceptions." *Ibid.* But, the Court pointed out, "in fact an exception has been made to the Schedule I ban for religious use," for the Native American Church to use peyote in its religious services. *Id.* at 433. According to the Court, it was "difficult to see" why the rationale for that exception did not also apply to the UDV. *Ibid.* The Court held that RFRA pro-

tected the UDV from the arbitrary decision to deny it the same religious exemption that had been granted to other believers. See *id.* at 433-437. To hold otherwise would allow the government to arbitrarily determine which religions are "legitimate enough" to warrant accommodation.

In a different, but analogous, religious-exemption context, members of this Court have expressed concern about the danger posed by privileging one particular religious organizational structure over another. See *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S. Ct. 694, 711 (2012) (Alito, J., concurring). Justice Alito (joined by Justice Kagan) argued that the ministerial exception to federal antidiscrimination law should not place too much emphasis on the concept of formal ordination. *Id.* at 711-712. The diversity of religious life in the United States animated his concern. *Ibid.* He noted that "the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions." *Id.* at 711. To condition the ministerial exception on a particular conception of formal ordination would place religious groups that did not share in that conception at a severe risk of having their religious structures and beliefs disfavored by the government. The proper approach was instead a "functional" one, that does not "second-guess [the] assessment" of the religious body about how to organize itself, rather than one that allows arbitrary distinctions to be made based on formal structures or labels. *Id.* at 711, 716.

Allowing distinctions that favor religious groups with a particular structure or affiliation—as the HHS regulations do—often harms minority religions with organizational structures that differ from more familiar entities. Many American Indian religions, for example, tend to be

"less formal than many western religions." *Stately* v. *Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858, 867 (E.D. Wis. 2004). They "place far less emphasis on the structure of a 'church' and more emphasis on nature, community, and the individual." *Ibid.* Courts must skeptically examine distinctions that favor form over substance when evaluating religious accommodations.

3. Absent strict enforcement of RFRA's compelling interest test, governments may simply declare disfavored groups not to be "religions" at all or treat minority religious adherents even worse than similarly situated secular citizens. France provides one striking example from a Western democracy. After decades of national concern about cults, the government in 2001 enacted strict anti-cult legislation.[2] That law gave the French government the power to dissolve groups that it deemed to be cults instead of religions.[3] French Baptists quickly saw the dangers the law posed to them as a minority. The French, unfamiliar as they were with the term "Baptist," might have thought the denomination to be a cult and banned its existence. As a result, many Baptist congregations began referring to themselves as "Protestant" Baptist Churches, hoping that the addition of the more familiar term would protect them from legal scrutiny.[4]

Our Nation is not immune from the human impulse to favor the familiar over the unknown. *Amicus* Islamic

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[2] Paul Webster, *France to Crack Down on Sects*, The Guardian (June 13, 2001), http://www.theguardian.com/world/2000/jun/14/paulwebster.

[3] See Int'l Religious Freedom Report, U.S. Dep't of State (2006), http://www.state.gov/j/drl/rls/irf/2006/71380.htm#.

[4] Mike Creswell, *Baptists Weigh "Protestant" Label to Boost Identity Among Wary French*, Baptist Press (Feb. 26, 2002), http://www.bpnews.net/12840/baptists-weigh-protestant-label-to-boost-identity-among-wary-french.

Center of Murfreesboro (ICM) encountered shocking treatment when it sought to construct a new mosque after decades of peacefully worshipping in its Tennessee community.[5] Some neighbors' desire to exclude ICM was explicit: On the sign announcing the new mosque's building site, someone spray-painted the words "Not Welcome." ICM was also the victim of more serious crimes, including arson and a bomb threat.[6] After the physical threats came the legal ones. ICM's opponents sued the county in state court, alleging irregularities in the procedures for approving ICM's plan to build the new mosque. They argued in part that "Islam is not a religion and that the mosque therefore lacks protection under the First Amendment."[7] As the Lieutenant Governor of Tennessee put it: "[Y]ou could even argue whether being a Muslim is actually a religion, or is it a nationality, a way of life or cult, whatever you want to call it? We do protect our religions, but at the same time, this is something that we

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[5] For a full account of ICM's story, see *Islamic Center of Murfreesboro* v. *Rutherford County, Tennessee*, The Becket Fund for Religious Liberty, http://www.becketfund.org/murfreesboro/ (last visited Dec. 24, 2015).

[6] Laura J. Nelson, *A Week Before Ramadan Ends, Disputed Tennessee Mosque Opens Doors*, LA Times (Aug. 10, 2012), http://articles.latimes.com/2012/aug/10/nation/la-na-nn-tennessee-mosque-20120810. The bomb threat resulted in a federal indictment and a guilty plea. Brian Haas, *Texas Man Apologizes, Pleads Guilty to Phoning in Bomb Threat to Murfreesboro Mosque*, The Tennessean (June 4, 2013), http:// archive. tennessean.com/article/20130604/NEWS03/306040029/Texas-man-apologizes-pleads-guilty-phoning-bomb-threat-Murfreesboro-mosque.

[7] *Tennessee Mosque Sues in Federal Court for Right to Celebrate Religious Holiday*, The Becket Fund for Religious Liberty (July 18, 2012), http://www.becketfund.org/tennmosquepr/.

are going to have to face."[8] Ruling that the county improperly approved the mosque, the state court voided ICM's building plan.

That decision to void ICM's building plan was arbitrary. In the decade prior to ICM's request for approval of its building plan, the county had followed the same procedures it used for ICM on 20 other occasions.[9] On each of those occasions, the county was reviewing a Christian church's request for approval of its building plans. And on each of those occasions the county approved the church's plan. But on none of those occasions was there even a suggestion of procedural irregularity. The state court arbitrarily decided that those procedures were inadequate only when they were used to advance the cause of an already unpopular religious minority. The arbitrariness of the state court's decision to void ICM's building plan was indicative of the hostility towards ICM harbored by the community. (Fortunately, the state-court decision was reversed on appeal.)

4. Arbitrary treatment of religious minorities can also relate to a community's attempts to define who is and who is not a legitimate member of the community. And those attempts will often threaten the religious rights of minorities. This was true, for example, in one of this Court's seminal free-exercise cases involving an *amicus* here. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). The Church in *Lukumi* sought "to bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open," but "[t]he prospect of a Santeria church in their

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[8] *What Local Candidates & Elected Officials Say on Controversy*, The Tennessean (Oct. 25, 2010), http://www.tennessean.com/article/20101025/NEWS01/10250341.

[9] Verified Compl., *Islamic Ctr. of Murfreesboro* v. *Rutherford Cnty., Tenn.*, No. 3:12-cv-0738, ECF No. 1 ¶ 47 (M.D. Tenn. July 18, 2012).

midst was distressing to many members of the Hialeah community." *Id.* at 526-527. So the city began enacting a series of ordinances that severely restricted the killing of animals within city limits under the auspices of promoting public health and preventing cruelty to animals. *Id.* at 527-528, 543. To those ordinances, however, the city added exemptions for certain secular, small-scale slaughtering operations. *Id.* at 527-528. Because of those exemptions, the ordinances no longer "prohibit[ed] nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice does." *Id.* at 543. The ordinances were, in a word, underinclusive. *Ibid.* That underinclusivity meant that the ordinances arbitrarily singled out only "conduct motivated by religious belief." *Id.* at 545.

The residents of Hialeah thus improperly attempted to use an ordinance that arbitrarily applied only to adherents of Santeria to express their sentiment that Santeria was not welcome in their community. While the *Lukumi* example presents an extreme case of targeting religious believers, it nonetheless illustrates the danger that minority religions face from a legal regime that would permit the government to draw arbitrary lines between favored and disfavored groups that are otherwise similarly situated vis-à-vis the government's purported compelling interest.

CONCLUSION

These cases allow this Court to correct two grave errors committed by the Courts of Appeals, each of which uniquely threatens the religious liberty of adherents of minority religions. First, the Court can reiterate that the substantial-burden inquiry begins and ends with the believer's sincerity and the penalties imposed by the Government. Upholding the lower courts' deeper probing into the correctness of religious convictions or the moral

harm inflicted by complying with a governmental mandate would leave religious minorities especially vulnerable to officials and courts who misunderstand or simply dislike their practices and beliefs.

Second, the Court should clarify that a governmental distinction between religious groups must be subject to especially searching scrutiny under RFRA's compelling-interest test. Arbitrary lines like the one drawn here must be invalidated. Upholding HHS's irrational attempt to favor some religious groups over others that have the same religious objections would give governments undue discretion to bestow legitimacy upon some religious groups and not others. RFRA requires exceedingly careful analysis of any line-drawing that purports to identify "favored" religious groups based on structure or affiliation. Without such exacting examination, minority religious rights will be most likely to suffer.

Amici respectfully request that the judgments of the Courts of Appeals be reversed.

Respectfully submitted.

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