SUPREME COURT OF THE UNITED STATES

No. 91–948

CHURCH OF THE LUKUMI BABALU AYE, INC. AND ERNESTO PICHARDO, PETITIONERS *v.* CITY OF HIALEAH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 11, 1993]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

The Court analyzes the "neutrality" and the "general applicability" of the Hialeah ordinances in separate sections (Parts II–A and II–B, respectively), and allocates various invalidating factors to one or the other of those sections. If it were necessary to make a clear distinction between the two terms, I would draw a line somewhat different from the Court's. But I think it is not necessary, and would frankly acknowledge that the terms are not only "interrelated," *ante*, at 9, but substantially overlap.

The terms "neutrality" and "general applicability" are not to be found within the First Amendment itself, of course, but are used in *Employment Div., Dept. of Human Resources of Oregon* v. *Smith*, 494 U. S. 872 (1990), and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a "law . . . prohibiting the free exercise" of religion within the meaning of the First Amendment. In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.*, a law excluding members of a certain sect from public benefits, cf. *McDaniel* v. *Paty*, 435 U. S. 618 (1978)), see *Bowen* v. *Roy*, 476 U. S. 693, 703–704 (1986) (opinion of Burger, C. J.); whereas the defect of lack of general applicability applies primarily to those laws which, though neutral

in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment, see *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953). But certainly a law that is not of general applicability (in the sense I have described) can be considered "nonneutral"; and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability. Because I agree with most of the invalidating factors set forth in Part II of the Court's opinion, and because it seems to me a matter of no consequence under which rubric ("neutrality," Part II–A, or "general applicability," Part II–B) each invalidating factor is discussed, I join the judgment of the Court and all of its opinion except section 2 of Part II–A.

I do not join that section because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*, *i.e.*, whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually impossible to determine the singular "motive" of a collective legislative body, see, *e.g.*, *Edwards* v. *Aguillard*, 482 U. S. 578, 636–639 (1987) (SCALIA, J., dissenting), and this Court has a long tradition of refraining from such inquiries, see, *e.g.*, *Fletcher* v. *Peck*, 6 Cranch 87, 130–131 (1810) (Marshall, C. J.); *United States* v. *O'Brien*, 391 U. S. 367, 383–384 (1968).

Perhaps there are contexts in which determination of legislative motive *must* be undertaken. See, *e.g.*, *United States* v. *Lovett*, 328 U. S. 303 (1946). But I do not think that is true of analysis under the First Amendment (or the Fourteenth, to the extent it incorporates the First). See *Edwards* v. *Aguillard*, *supra*, at 639 (SCALIA, J., dissenting). The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." This does not put us in the business of invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibi[t] the free exercise" of religion. Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.