No. 12-1191

In The Supreme Court of the United States

BIG SKY COLONY, INC., AND DANIEL E. WIFF,

Petitioners,

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Montana Supreme Court erred by not addressing the argument now raised by Petitioners – that the challenged law violates Free Exercise regardless of the lawmakers' intent because it supposedly "treats a substantial category of nonreligious conduct more favorably than religious conduct" – when Petitioners never presented that issue in the court below, but instead insisted that the "only one issue" presented in this case was whether Petitioners' religious beliefs were intentionally "targeted" by the Montana Legislature. Pet. App. 235a.

2. Whether the Montana Legislature has impermissibly regulated "an internal church decision" in violation of *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S. Ct. 694 (2012), by requiring religious organizations engaged in extensive commercial activity to comply with labor regulations generally applicable to all competitors in that marketplace.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF IN OPPOSITION

Every state has its industry leaders. Arkansas has Tyson Foods. Minnesota has Cargill. Massachusetts has Dunkin Donuts.

Montana has the Hutterites.

Undoubtedly, Montana's Hutterite colonies are religious organizations. They are also commercial business organizations. They are a dominant force – indeed, *the* market leader in some areas – in Montana's agricultural, construction, and manufacturing industries. It would be the rare Montanan who has never had direct or indirect business dealings involving the colonies, whether it be purchasing their farm-fresh produce or meat, buying eggs produced at one of their many commercial egg operations, or perhaps having a fence, steel building, or irrigation system installed by their members.

Notwithstanding their wide-spread business activity, the Hutterite colonies have been uniquely exempted from Montana's workers' compensation requirements for almost a century. This was never because of their religious beliefs. Rather, the colonies were exempted because at some point the Montana Department of Labor decided that, since colony members do not receive traditional "wages" for their work, there was no employer-employee relationship between the colonies and their members to trigger workers' compensation coverage. Pet. App. 227a. That interpretation was almost certainly wrong. *See* Mont. Code Ann. § 39-71-123 (defining "wages" broadly, to

include "board, lodging, rent, or housing"). But government agencies are understandably reluctant to change longstanding interpretations of the law, even if wrong.

As the Hutterite colonies began to expand their commercial operations into the construction and manufacturing industries, however, competitors began complaining to the Montana Legislature and Department of Labor that they were regularly being underbid by the colonies. Pet. App. 227a. These other employers believed the colonies had an unfair advantage because, unlike their competitors, they did not have to pay for workers' compensation insurance. *Id.* Eventually, this inequity led to the Montana Legislature passing the law that Petitioners are now asking this Court to review.

The Petition should be denied for five reasons.

First, "this Court does not decide questions not raised or resolved in the lower court." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). The main question Petitioners are asking this Court to consider – whether a law violates Free Exercise if it "treats a substantial category of nonreligious conduct more favorably than religious conduct" – was never presented by Petitioners to the Montana Supreme Court. Instead, they consistently argued below their now-disfavored standard: that the challenged law violated Free Exercise because of the legislators' supposed discriminatory motive. On the first page of their briefing before the Montana Supreme Court, Petitioners

declared: "This is a case about a religious group that was *targeted* for unfavorable special treatment by the Montana Legislature. . . ." Pet. App. 235a (emphasis added). The very first sentences of their brief emphasized that "[t]his case presents *only one issue*. Is it constitutional to pass a law, the *only intent* and effect of which is to make life difficult for a particular religious group?" *Id.* (emphases added). Nowhere did Petitioner's brief mention – much less discuss – any workers' compensation exemptions.

Because Petitioners never presented their now-preferred Free Exercise argument to the Montana Supreme Court, the majority never addressed it. Instead the majority applied precisely the standard that Petitioners urged, and correctly concluded that the Montana Legislature had not, in fact, "intended" to "target" Petitioners' religious beliefs. *See* Pet. at 10. Petitioners cannot now criticize the Montana Supreme Court for supposedly joining the wrong side in an alleged circuit split, when that was the side they asked the court to join.

Second, even if Petitioners had raised their "exemptions" argument in the Montana Supreme Court, their Petition would still have a fatal vehicle problem: they never properly presented that argument in the trial court either, and so they waived it under established Montana law. Petitioners asked the trial court to strike down the challenged law because it intentionally "targeted" the religious practices of the Hutterite colonies, so, not surprisingly, that was the only standard the trial court considered. *See, e.g.*,

Pet. App. 75a, 85a. Like most courts of review, the Montana Supreme Court will "not address issues raised for the first time on appeal." *Robinson* v. *Mont. Dept. of Rev.*, 281 P.3d 218, 225 (Mont. 2012) (citing cases). And this Court will not review an issue that Petitioners waived under settled state procedural rules. *See Lee* v. *Kemna*, 534 U.S. 362, 376 (2002).

Third, Petitioners are effectively asking this Court to render an advisory opinion. Even if the Court were to grant the relief sought by Petitioners, invalidating the challenged law, the colony-member relationship is best interpreted as an employer-employee relationship triggering workers' compensation obligations in any event. The Montana Supreme Court or Department of Labor would likely reach that conclusion on remand. This Court has consistently refused to exercise jurisdiction where it would not change the ultimate outcome of the case, explaining that "'if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.'" *Mich.* v. *Long*, 463 U.S. 1032, 1042 (1983) (quoting *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945)).

Fourth, there is no real "circuit split" or conflicting authorities on either of the questions raised in the Petition. Petitioners do not claim any split on their second question. And the supposed conflict with regard to Petitioners' first question is gossamer at best. None of Petitioners' ten cases make even a passing reference to any conflict – a curious omission

for a conflict that is allegedly "deep, well-developed, and entrenched." Pet. at 14. Indeed, the few times any of the cases on either side of the supposed split cite to each other it is to agree with the Free Exercise holding or standard applied in the other case. Cases on both sides of Petitioners' split ultimately expressed the same underlying Free Exercise concern: whether the action being challenged suggested a discriminatory "purpose," "object," "intent," or "targeting" against religious beliefs. The difference in Petitioners' cases is not the fundamental Free Exercise principles applied, but the broad disparity of factual and procedural situations addressed by the different courts.

Finally, the Court should deny certiorari because Petitioners' Free Exercise claims have no merit in any event. If the government violates Free Exercise by requiring a religious organization aggressively competing in the commercial marketplace to comply with generally applicable labor regulations, then it is questionable what, if anything, *isn't* "an internal church decision" exempt from regulation. Petitioners' attempt to extend *Hosanna-Tabor* to the facts in this case would swallow the rule of law, leaving "each conscience [a]s a law unto itself." *Emp't Div.* v. *Smith*, 494 U.S. 872, 889 (1990). And while Petitioners make much of the "twenty-six exemptions" in the Montana Workers' Compensation Act, Pet. at 7, 18, they cannot show that any of those exemptions "endangers [the State's] interests in a similar or greater degree" than a blanket exemption for Hutterite colonies would. *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508

U.S. 520, 543 (1993). Those twenty-six disparate exemptions are each supported by important state interests unrelated to the law challenged here. The only reason those interests are not reflected in the record is because Petitioners never squarely raised those exemptions until now.

STATEMENT

1. The more than 50 Hutterite colonies in Big Sky Country are, in addition to being religious organizations, "very successful business[es]." *Stahl* v. *United States*, 626 F.3d 520, 523 (9th Cir. 2010). Montana's Hutterites produce virtually all of the eggs sold commercially in the state, with some colonies selling up to 18,000 eggs every day.[1] According to Montana Department of Livestock statistics, 96% of the hogs and 93% of the poultry produced in Montana comes from the Hutterites. A lot of that pork is shipped to Asia, which is why the Hutterite colonies, together with Chinese investors, have made plans to build a $250 million meat processing plant in northern Montana.[2] And the Hutterites' business ventures are not just limited to agriculture. "Increasingly, in

[1] *See* http://helenair.com/news/state-and-regional/hutterites-chickens-produce-eggs-a-day/article_ccfd441a-11cd-52e0-bd8c-6156a5207cb4.html (last visited August 16, 2013).

[2] *See* http://billingsgazette.com/business/montana-pig-farmers-eye-asian-trade-deal/article_c9681c90-721b-5cf6-904e-b2f6c2989d78.html (last visited August 16, 2013).

the last two decades, many Hutterite colonies have turned to manufacturing to supplement their income and to provide work for colony members."[3] In considering the law now challenged by Petitioners, the Montana Legislature heard testimony that Montana's colonies regularly compete with other Montana employers to build fences, shops, irrigation systems, steel buildings, and septic systems for nonmembers.

The colonies do not pay traditional wages to their members when they engage in these commercial activities. Instead, they provide for their members' every need, including "food, shelter, clothing, and medical care." Pet. App. 11a (citing *Stahl*, 626 F.3d at 521). The colony members, who have "renounce[d] private property," expect and depend on such care. Pet. at 3-4; Pet. App. 237a.

2. Because of the Hutterites' substantial and increasing commercial activity, the Montana Department of Labor for more than a decade received numerous complaints about colonies competing with other Montana businesses, such as contractors, without having to provide workers' compensation insurance. Pet. App. 227a, 299a. The Department had never considered the Hutterite colonies to be subject to the Montana Workers' Compensation Act because they did not pay traditional wages to their working members. *Id*. But because of the inequity exposed by

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[3] http://www.hutterites.org/day-to-day/livelihood/manufacturing (last visited August 16, 2013).

the numerous complaints, and also out of concern that a catastrophic injury to a current or former colony member might expose Montana's Uninsured Employers' Fund to substantial liability, the Department began to think the blanket exemption enjoyed by the colonies was neither appropriate nor fair. *Id.*

Montana law already defined "wages" very broadly, to include "board, lodging, rent, or housing," so the Department could have simply revised its erroneous but longstanding interpretation to be more consistent with the statutory text and other authorities. Mont. Code Ann. § 39-71-123; *see also Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 301 & n.23 (1985) (recognizing "board, food, lodging, and similar benefits" as "wages in another form"); *Stahl*, 626 F.3d at 527 (accepting Hutterite members' argument that they are "common law employees"). Instead, however, the Department proposed that the Montana Legislature address the problem as part of a larger effort to update Montana's workers' compensation laws. Pet. App. 298a-300a.

Rather than simply remove the Hutterites' exemption altogether, the Montana Legislature and Department of Labor – in an attempt to accommodate the colonies' unique religious practices – crafted legislation that would require the colonies to participate in Montana's workers' compensation system only where they "receiv[ed] remuneration from nonmembers," and only then in the agricultural, manufacturing, or construction industries. Pet. App. 105a. The Legislature heard testimony that the colonies were

regularly competing with other Montana employers in these industries, and there was broad agreement during the legislative hearings about "the lack of a fair level playing field." Pet. App. 58a. Contrary to Petitioners' claim that "the Hutterites . . . were not consulted," Pet. at 6, Hutterite colonies were contacted during the legislative process, but never voiced any concerns. Pet. App. 301a-302a. During the legislative hearings, nobody contended that the Hutterites should continue to enjoy a blanket exemption from Montana's worker's compensation requirements. The only real debate was whether just their manufacturing and construction work would be covered, or also their agricultural work. *See, e.g.*, Pet. App. 59a (quoting Senator Stewart-Peregoy's concerns in the context of covering their agricultural work; she ultimately supported the legislation).

3. Ultimately, the Legislature enacted the law Petitioners now challenge, which defines as an "employer" for workers' compensation purposes any "religious organization . . . receiving remuneration from nonmembers for agricultural production, manufacturing, or a construction project conducted by its members. . . ." Pet. App. 105a. Covered employers – including the Hutterite colonies – have three different options for insuring their workers, including self-insurance. *See* Mont. Code Ann. §§ 39-71-401(1); 39-71-2101 *et seq*. Petitioners acknowledged in the courts below that they are "essentially self-insuring already" and could "use the Hutterite Medical Trust to self-insure for workers' compensation at low

cost. . . . , if it costs more at all." Pet. App. 242a, 250a. When a medical claim is made for a self-insured employer, the employer directly reimburses the healthcare provider for the medical services provided, much like the colonies already do through the Hutterite Medical Trust. *Compare* Mont. Code Ann. § 39-71-704(1), *with* Pet. App. 149a-150a. Reimbursement is not provided directly to the worker. *Id.*

Contrary to Petitioners' statements, Montana's workers' compensation laws do not require the Hutterites to "use . . . the legal system to assert claims against each other or the community." Pet. at 4. Nor is a workers' compensation claim "unwaivable." Pet. at 24. As the Montana Supreme Court has made clear, "nothing prevents an injured Colony member from refraining to file a workers' compensation claim or returning any workers' compensation claim award to the Colony." Pet. App. 29a (citing *Alamo*, 471 U.S. at 304); *In re Noonkester*, 2004 MTWCC 61, ¶ 15 (Mont. Workers' Comp. Ct.) ("a worker cannot be compelled to seek workers' compensation benefits").

4. Shortly after it was enacted, Petitioners challenged the law in state court. Petitioners brought three federal constitutional claims under the Free Exercise Clause, the Equal Protection Clause, and Establishment Clause. *See* Resp. App. 7a. In their motion for summary judgment in the trial court, Petitioners argued that the law violated Free Exercise because it specifically targeted the Hutterites' "'conduct motivated by religious beliefs.'" Resp. App.

8a; *see generally* Resp. App. 8a-14a. Petitioners' summary judgment brief nowhere mentioned, much less argued, that the challenged law violated Free Exercise because of other exemptions in Montana's workers' compensation law. *See* Resp. App. 1a-27a.

Consistent with their opening brief, Petitioners' trial-stage reply brief continued to press the argument that the challenged law unconstitutionally singled out Hutterite religious practices. *See*, *e.g.*, Resp. App. 34a ("A statute enacted because of a religious practice . . . is unconstitutional."). In that brief Petitioners did mention other workers' compensation exemptions as evidence that the Legislature had in fact targeted the Hutterites, but only in passing and not as the stand-alone argument now presented to this Court. The entirety of the discussion read:

> Why did the State only target Hutterites and not target any other group specifically exempted from workers' compensation compliance by Montana Code Annotated § 39-71-401. [sic] Of particular note, those performing services in return for aid or sustenance only are exempt from workers' compensation. The fact that the State only targeted Hutterites in HB 119 without targeting other groups that are not subject to workers' compensation regulation shows that the level playing field argument is a sham.

Resp. App. 38a. Because Petitioners never mentioned the other exemptions until their reply brief, the State had neither the opportunity nor obligation to respond.

The trial court granted summary judgment in favor of Petitioners. Consistent with the arguments properly before it, the court held that the challenged law violated Free Exercise because it "targets the Colony and the religious practice of their communal lifestyle." Pet. App. 75a. The argument that the challenged law might violate Free Exercise because of other workers' compensation exemptions is nowhere mentioned or addressed in the trial court's order. *See* Pet. App. 53a-85a.

5. The State appealed to the Montana Supreme Court. As in the trial court, Petitioners argued on appeal that their Free Exercise rights were violated because they were "targeted for unfavorable special treatment by the Montana Legislature." Pet. App. 235a. Petitioners, in their own words, raised "only" this "one issue," which consistently focused on the "intent" of the Legislature. *Id.* Nowhere in their discussion of Free Exercise – or anywhere else for that matter – did Petitioners argue that the challenged law was unconstitutional because of other workers' compensation exemptions. Section 39-71-401 of the Montana Code, which contains all of the workers' compensation exemptions Petitioners now point out, was never cited or discussed.

Addressing the issue as it had been presented by Petitioners, a majority of the Montana Supreme

Court held that the challenged law did not violate their Free Exercise rights. The court rejected the argument that the Montana Legislature in enacting the law had intended to target Hutterites' religious beliefs. The court concluded that the Legislature had merely "sought to include the colony's commercial activities," and that any incidental effect on the Hutterites' religious beliefs or practices was not the intent or purpose of the law. Pet. App. 11a. "The legislature did not conceive of the workers' compensation system as a means to shackle the religious practices of Colony members." Pet. App. 9a. Presumably because Petitioners never raised the issue in their brief, the court's majority never mentioned any workers' compensation exemptions in its opinion.

Three justices dissented. Justice Nelson wrote a short dissent which simply accepted the "targeting" argument Petitioners had made in their brief. Pet. App. 33a. In harmony with Petitioners' briefing, Justice Rice's dissent also primarily focused on whether the challenged law "has a targeting effect or a discriminatory object." Pet. App. 34a. But Justice Rice also presented a new Free Exercise argument – the one now embraced by Petitioners. Justice Rice squarely argued, for the first time since the inception of this case, that many of the other workers' compensation exemptions contained in Section 39-71-401 "endanger[ ] the State's purported government interests" as much or more than the Hutterites colonies' commercial activities. Pet. App. 47a-48a. Because that argument was raised *sua sponte* by Justice Rice

in his dissent, the State never had an opportunity to factually distinguish those exemptions.

REASONS FOR DENYING THE PETITION

I. PETITIONERS' FIRST QUESTION WAS NEVER PROPERLY PRESENTED IN EITHER OF THE COURTS BELOW, AND WAS WAIVED.

In their first Question Presented, Petitioners ask the Court to address whether the Montana Supreme Court erred by failing to consider whether "the challenged law treats a substantial category of nonreligious conduct more favorably than religious conduct." The reason for that supposed failure is very simple: Petitioners never properly presented that question to *any* Montana court. Instead, Petitioners consistently argued in every court below the Free Exercise standard they now belittle: that the challenged law "singles out religious conduct or has a discriminatory motive." Pet. at 14.

This Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997); *see also Youakim*, 425 U.S. at 234. Nor will the Court hear questions that have been waived under well-established state procedural rules. *See Lee*, 534 U.S. at 376 ("Ordinarily,

violation of 'firmly established and regularly followed' state rules . . . foreclose review of a federal claim.").

As the prevailing parties in the trial court, Petitioners filed one brief in the Montana Supreme Court. *See* Pet. App. 228a-264a. That brief did not mention any of the "nonreligious" workers' compensation exemptions now emphasized by Petitioners. Nor did it present any Free Exercise argument based on such exemptions. Instead, that brief by its own terms presented "only one issue" to the Montana Supreme Court: whether the Montana Legislature had impermissibly "inten[ded] . . . to make life difficult for a particular religious group" by "target[ing] them for unfavorable special treatment." Pet. App. 235a. In other words, Petitioners asked the Montana Supreme Court to address whether the challenged law "singles out religious conduct or has a discriminatory motive." Pet. at 14.

And that is what the court did. The majority of the court applied Petitioners' proffered Free Exercise standard, but determined that the Montana Legislature had intended to address Petitioners' commercial activities, not their religious beliefs. *See* Pet. App. 11a ("HB 119 does not lose its facial neutrality or shed its secular purpose due to the fact that it sought to include the colony's commercial activities, as opposed to its religious practices, within the scope of the workers' compensation system."). The majority never mentioned or considered other workers' compensation exemptions, nor did it have any obligation to do so under clear Montana procedural rules. *See*, *e.g.*, *State*

v. *Hicks*, 296 P.3d 1149, 1151 n.1 (Mont. 2013) (arguments "not raised in the appellate briefs" are "not addressed"); *Beery* v. *Grace Drilling*, 859 P.2d 429, 432 (Mont. 1993) (argument "waived because not raised or argued in their brief").

The central question Petitioners are asking this Court to consider was therefore never "properly presented to" or "addressed by" the Montana Supreme Court. *Adams*, 520 U.S. at 86. One dissenting justice did raise the other exemptions in his opinion, but that was obviously too late. Petitioners had already waived the argument by not briefing it, and by that point the State had already been deprived of the opportunity to factually distinguish those exemptions.

Even if Petitioners had properly presented their "other exemptions" argument to the Montana Supreme Court, their argument would still be waived under long-standing Montana precedent, and thus inappropriate for this Court's review. *See Lee*, 534 U.S. at 376. The only time Petitioners mentioned the other workers' compensation exemptions in the trial court was in their reply brief. Like most courts, Montana courts "do not address legal theories raised for the first time in a reply brief." *State* v. *Thompson*, 146 P.3d 756, 758 (Mont. 2006); *see also State* v. *Elldrege*, 2007 Mont. Dist. LEXIS 465, at *17 (Mont. Dist. Ct. Dec. 11, 2007) (refusing to consider "constitutionality issue" raised "for the first time in . . . reply brief"); *Bolen* v. *Ravalli Cnty.*, 2007 Mont. Dist. LEXIS 532, at *5-6 (Mont. Dist. Ct. Feb. 6, 2007)

(same). The trial court never addressed any Free Exercise claim based on the other exemptions in Montana's workers' compensation laws. *See* Pet. App. 53a-85a. Petitioners were thus barred from presenting their waived argument on appeal. *See Paulson* v. *Flathead Conservation Dist*., 91 P.3d 569, 578 (Mont. 2004) (holding an issue was not preserved where the "argument was not raised in the pleadings, fully briefed by the parties, nor addressed by the District Court").

II. THERE IS NO "WELL-DEVELOPED" CIRCUIT SPLIT ON PETITIONERS' QUESTIONS PRESENTED.

Citing ten cases, Petitioners claim there is a "deep, well-developed, and entrenched" conflict of authorities on their main question presented. Pet. at 14. Apparently nobody told the judges in those cases. None of the cases mention the supposed conflict presented by Petitioners. None of them express disagreement with any of the other cases. Indeed, none of them express disagreement with any other jurisdiction on the appropriate Free Exercise standard. At best, the conflict is ill-defined and could use more development in the lower courts; at worst, it is nonexistent.

In reality, all of the cases on both sides of Petitioners' "split" asked the same fundamental Free Exercise question this Court asked in *Lukumi*: whether "religious practice" had been "singled out for

discriminatory treatment." 508 U.S. at 538 (quoted by *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 364-65 (3d Cir. 1999) (Alito, J.)). They simply approached the question differently, depending on the unique factual circumstances presented in each case. Rather than presenting a genuine conflict, Petitioners' cases generally evince a continuum of discriminatory intent or targeting, running from clear evidence that lawmakers have intentionally targeted behavior because it is religiously motivated, to less blatant evidence of such impermissible intent.

This unifying theme is best illustrated by the cases on Petitioners' preferred side of the alleged split. Contrary to Petitioners' framework, these cases do not actually wholesale "reject[ ] the requirement that a plaintiff demonstrate singling out or discriminatory motive." Pet. at 15. For example, in *Fraternal Order* – Petitioners' "leading case," *id.* – after considering the plaintiffs' evidence of other medical exemptions to the challenged no-beard policy, then-Judge Alito concluded that the "decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of *discriminatory intent* so as to trigger heightened scrutiny." 170 F.3d at 365 (emphasis added). Likewise, in *Ward* v. *Polite*, after considering record statements by Ward's supervisors criticizing her religious beliefs, the Sixth Circuit concluded that those statements "permit the inference that Ward's religious beliefs *motivated* their actions." 667 F.3d 727, 738 (6th Cir. 2012) (emphasis

added). Thus, the school had failed to apply its "ad hoc" policy in an "even-handed, much less faith-neutral, manner." *Id.* at 739-40. *See also Shrum* v. *City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (addressing allegations that the plaintiff's supervisors had deliberately "singled out" his religious conduct because of retaliatory motives); *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214, 1234 (11th Cir. 2004) (invalidating a challenged zoning ordinance because it "improperly *targeted* religious assemblies for dissimilar treatment") (emphasis added).

Nor do any of the cases on the other side of Petitioners' "split" explicitly reject the potential relevance of other exemptions to a Free Exercise inquiry – they just don't address that issue at all. The worst that can be said about those cases is that their Free Exercise analysis is uniformly cursory and shallow. *See*, *e.g.*, *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013) (addressing plaintiffs' Free Exercise claim in three sentences). That may be, like here, a result of the limited arguments presented by the plaintiffs in those cases. *See*, *e.g.*, *Skoros* v. *City of New York*, 437 F.3d 1, 39 (2d Cir. 2006) (noting that plaintiffs' "Free Exercise claim is, in fact, simply a variation on [their] Establishment Clause challenge and, as such, requires less detailed discussion"). Or it may be that other legitimate considerations compelled less analysis. *See*, *e.g.*, *Olsen* v. *Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) (addressing the pro se litigant's Free

Exercise claim only briefly in dicta because the claim was independently barred by collateral estoppel).

In short, if Petitioners' suggested conflict exists at all, it is nascent and largely academic at this point. This is neither the time nor the case to address it.

III. PETITIONERS ARE ASKING FOR AN ADVISORY OPINION.

The Montana Legislature did not need to enact this challenged law in order to require the Hutterite colonies to provide workers' compensation insurance. Montana law already broadly defined "wages" to include "board, lodging, rent, or housing." Mont. Code Ann. § 39-71-123. The Montana Department of Labor could have simply corrected its overly narrow interpretation of already-existing law to include the colonies.

If it had done that, however, *all* of the Hutterite colonies' commercial activities would have been subject to workers' compensation requirements – not simply agricultural, manufacturing, or construction work where they "receive[ ] remuneration from nonmembers." Mont. Code Ann. § 39-71-117(1). By enacting the challenged law, the Montana Legislature and Department of Labor protected the Hutterite colonies from the more burdensome requirements of a correct application of preexisting law.

If this Court grants review of this case and ultimately invalidates the challenged law, Petitioners

will still be subject to the preexisting law, which they have not challenged. Consistent with the decisions of this Court and other courts, the Montana Supreme Court or Department of Labor will presumably interpret the Montana Code's broad definition of "wages" and "employer" to include the Hutterite colonies – especially since continuing to grant an unsupported, blanket exemption to the Hutterite colonies would open them to the charge of religious favoritism. *See Alamo*, 471 U.S. at 292-93 (holding that, even though they did not receive traditional wages, "volunteers" who worked in the commercial business of a religious organization and received "food, clothing, shelter, and other benefits" were employees); *Stahl*, 626 F.3d at 527 (accepting Hutterite members' argument that they are "common law employees").

Even if the Petition was not subject to multiple state-law procedural bars (which it is), and even if Petitioners' suggested circuit split was considerably more developed (which it isn't) – this Court does not allocate its limited resources to a case like this where, notwithstanding how it rules, "'the same judgment would be rendered by the state court after we corrected its views of federal laws.'" *Long*, 463 U.S. at 1042 (quoting *Herb*, 324 U.S. at 125). This "'could amount to nothing more than an advisory opinion,'" which this Court has always carefully avoided. *Id.*

IV. PETITIONERS ARE WRONG ON THE MERITS.

The Petition presents two criticisms of the challenged law: (1) it impermissibly interferes with the "right of churches to govern their internal affairs," Pet. at 24-32, and (2) other workers' compensation exemptions "undermine the State's supposed interest in a 'level playing field' even more than an exemption for the Colony would," Pet. at 19-20. Neither has merit.

A. *Alamo*, Not *Hosanna-Tabor*, Controls this Case.

1. Recently, in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S. Ct. 694, 706 (2012), this Court clarified and applied the First Amendment's so-called "ministerial exception." The Court held that a church school was not prevented by anti-discrimination laws from terminating a teacher considered by the church to be a "minister." *Id.* at 707-09. As the Court explained, applying the anti-discrimination laws to the church in this context would impermissibly "interfere[ ] with an internal church decision." *Id*. at 707.

Petitioners ask the Court to extend the ministerial exception to this case. Pet. at 24-32. That would be a serious mistake. *Hosanna-Tabor*'s rule that the government may not interfere with "an internal church decision" must have some limits – otherwise "professed doctrines of religious belief" will be "superior

to the law of the land" *in every instance*, which will "in effect . . . permit every citizen to become a law unto himself." *Reynolds* v. *United States*, 98 U.S. 145, 167 (1878). Precisely where those appropriate limits lie is an enormously difficult question in a society like ours equally committed to both the rule of law and religious freedom.

But whether those limits reach this case is not a difficult question. The law challenged here is a classic labor regulation – one that only applies to the Hutterites when they are paid by "nonmembers," Mont. Code Ann. § 39-71-117(1), and which is generally applicable to all competitors in the agricultural, manufacturing, and construction markets in Montana. *See* Pet. App. at 18a. If the Hutterite colonies cannot be required to comply with this externally focused, generally applicable labor regulation simply because they have decided it interferes with "an internal church decision," then what generally applicable laws are they subject to? Can the colonies' egg, poultry, and hog productions – including their planned $250 million meat processing plant – be required to comply with general health and safety laws? This should not be a hard case under any reasonable application of *Hosanna-Tabor*.

Moreover, while the State is reluctant to second-guess any religious organization's claims as to how a law might interfere with "an internal church decision," Petitioners' claims here are plainly exaggerated. Petitioners assert that the challenged law interferes because "it creates an unwaivable, individual right of

compensation that members hold against their community; it compels the community to compensate members for their work; and it forbids the community from excluding members who assert that right." Pet. at 24.

As to Petitioners' first concern: A Montana workers' compensation claim is not "unwaivable," and Montana's workers' compensation laws do not require the Hutterites to "use . . . the legal system to assert claims against each other or the community." Pet. at 4, 24. Just as every Hutterite member has long had the right to bring an intentional tort claim against other members or the colony under Montana law, Hutterite members covered by the challenged law also now have the right to file a claim for workers' compensation benefits. In both instances, however, nothing in Montana law requires members to exercise that right, as Montana courts have long recognized. *See* Pet. App. 29a ("nothing prevents an injured Colony member from refraining to file a workers' compensation claim or returning any workers' compensation claim award to the Colony") (citing *Alamo*, 471 U.S. at 304); *In re Noonkester*, 2004 MTWCC 61, ¶ 15 ("a worker cannot be compelled to seek workers' compensation benefits"). If this law violates Free Exercise merely because it *allows* (but does not require) colony members to assert a claim under certain circumstances, then so do most of Montana's tort laws.

Likewise, the challenged law does not "compel[ ] the community to compensate members for their

work." Pet. at 24. Since nothing in Montana law "compels" a member to seek workers' compensation benefits, nothing "compels" the colonies to compensate their members who, consistent with their religious beliefs, don't file claims. Moreover, under Montana's system, a workers' compensation claim is not made against the employer *per se*, but against the insurance fund. And as already explained, if the colonies self-insure, payment for medical claims will be made to the medical provider not the member, just as is already done through the Hutterite Medical Trust. Pet. App. 149a-150a. Finally, if members are eligible for lost-wage replacement – which is questionable, since members do not receive traditional wages and so have nothing to replace, *see* Pet. App. 36a (Rice, J., dissenting) – *and* if members seek and receive such payments, presumably they will "merely donate them back to [the colony] itself; their religious beliefs demand that." *Stahl*, 626 F.3d at 526.

Nor is it clear that Montana law could be interpreted to "forbid[ ] the community from excluding members who assert" a workers' compensation claim. Pet. at 24. Montana law prohibits an employer from "terminating" an employee for filing a workers' compensation claim. Mont. Code Ann. § 39-71-317. But as the State conceded in the courts below, it is "likely" that Montana courts would find this provision inapplicable to a Hutterite colony who excommunicated a member for filing a claim, especially in light of the ruling in *Hosanna-Tabor*. *See* Pet. App. 272a-273a; *see also Serbian E. Orthodox Diocese* v. *Milivojevich*,

426 U.S. 696, 724 (1976). Petitioners' third "interference" concern is thus wholly speculative at this point, and an inappropriate reason to grant review in this facial challenge. *See United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (explaining that in a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid").

One last point is worth addressing here. Both in their Petition and the courts below, Petitioners argue that the challenged law serves "no legitimate purpose, because Hutterites are forbidden by their religion from asserting a workers' compensation claim," and because the "Colony's health insurance plan already provides members with significantly more comprehensive coverage than the Act requires." Pet. at 8, 10. But the Montana Legislature need not assume that once a Hutterite, always a Hutterite. *See*, *e.g.*, *Wollman* v. *Poinsett Hutterian Brethren, Inc.*, 844 F. Supp. 539, 540 (D.S.D. 1994) (considering lawsuit brought against Hutterite colonies by "former members" of those colonies). Montana has an important interest in making sure *former* Hutterite members who were injured while working for a colony remain protected. *See Stahl*, 626 F.3d at 525 (observing that "an expelled member would take nothing away from the colony except his clothes").

2. While this case bears little resemblance to *Hosanna-Tabor*, it is directly on all fours with this Court's earlier decision in *Alamo*. In *Alamo*, this Court addressed whether "workers engaged in the

commercial activities" of a nonprofit "religious foundation" were covered "employees" within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, when those workers received "food, clothing, shelter, and other benefits" but "no cash salaries" from the foundation, and "considered themselves volunteers who were working only for religious and evangelical reasons." 471 U.S. at 291-93. Applying an "economic reality" test, the Court concluded that the workers were covered employees, because they "were 'entirely dependent upon the Foundation for long periods,'" and the in-kind benefits provided to the workers were simply "wages in another form." *Id.* at 301 (citation omitted).

The law in *Alamo* required that covered employees be paid a minimum wage. The workers argued that requirement violated Free Exercise, because any "receipt of 'wages' would violate the[ir] religious convictions." *Id.* at 303-04 & n.27. The Court rejected their Free Exercise claim, however, because "[e]ven if the Foundation were to pay wages in cash, . . . there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided that they do so voluntarily." *Id.* at 304. The Court also noted that there was "no evidence that the [government] was acting on the basis of hostility to petitioners' religious beliefs." *Id.* at 306 n.32.

The similarities between this case and *Alamo* are so glaringly obvious that Petitioners felt obligated to preemptively address *Alamo* in their Petition. Pet. at 29-30. Notably, Petitioners have not asked the Court

to overturn *Alamo*, but have tried to distinguish it instead. It is not distinguishable.

First, Petitioners argue that, unlike here, the "foundation in *Alamo* was engaged in 'ordinary commercial businesses' with 'a common business purpose.'" Pet. at 30.[4] According to Petitioners, this case is different because "the Hutterites are not operating 'ordinary commercial businesses,'" but are instead following a long-standing "religious tradition." *Id.*

Not true. Just like the Hutterites here, the *Alamo* petitioners argued that "the various businesses they operate differ from 'ordinary' commercial businesses because they are infused with a religious purpose." *Alamo*, 471 U.S. at 298. The Court rejected that false dichotomy, concluding that while there were undoubtedly "religious aspects to the Foundation's endeavors," its businesses also "serve[d] the general public in competition with ordinary commercial enterprises." *Id.* at 299. So too here. Just as in *Alamo*, "the admixture of religious motivations" in this case "does not alter a business' effect on commerce." *Id.*

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[4] Petitioners selectively list the Alamo Foundation's businesses as "including service stations, clothing outlets, grocery stores, candy companies, and a motel." Pet. at 30. Notably missing from Petitioners' otherwise complete list are "hog farms," "construction companies," and "grocery outlets," *Alamo*, 471 U.S. at 292 – all businesses the Hutterite colonies also operate.

Second, Petitioners argue that, while the *Alamo* workers worked "in expectation of compensation," Hutterites don't. Pet. at 30 (quoting *Alamo*, 471 U.S. at 302). But just like here, the "volunteer" workers in *Alamo* "vigorously" argued that they "were working only for religious and evangelical reasons," and that "no one ever expected any kind of compensation . . . the thought is totally vexing to my soul." *Alamo*, 471 U.S. at 293, 304 n.27. The legal conclusion that the workers in *Alamo* worked "in expectation of compensation" was based on the courts' application of the "economic reality" test, and the fact that "the associates were 'entirely dependent upon the Foundation for long periods.'" *Id*. at 293 (citation omitted). The same is true here. Petitioners cannot seriously contend that, 500 years of practice notwithstanding, the colony members don't expect to be fed, clothed, sheltered, and cared for by the colony. *See Poinsett Hutterian Brethren, Inc*., 844 F. Supp. at 541 (explaining that "[a]ll of the labors and services performed" by members can be considered "as compensation for the support and services provided by the colony and church to the member").

Finally, Petitioners argue that the *Alamo* petitioners were insincere and bad, whereas they are not. Pet. at 30. This is an anachronistic revision of the case based on later events. Nowhere in the *Alamo* decision is there even a single mention of any doubts about the sincerity or motives of the *Alamo* petitioners. Petitioners' only basis for their re-reading of *Alamo* – newspaper articles from decades after the

Alamo decision, *id.* – has no foundation in the decision itself.

In short, this case is squarely controlled by *Alamo*, not *Hosanna-Tabor*. Petitioners cannot distinguish *Alamo*, and wisely have not asked the Court to overrule it.

B. Even If It Had Not Been Waived, Petitioners' "Exemptions" Argument Would Likely Fail.

1. Petitioners contend that they should receive a blanket exemption from the Montana Workers' Compensation Act because it "include[s] twenty-six exemptions for various types of employment." Pet. at 7. But no court has ever invalidated a law on Free Exercise grounds merely because it contained exemptions for other activities. As Justice Alito explained in *Fraternal Order*, "the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing." 170 F.3d at 366. Thus, "not every secular exemption automatically requires a corresponding religious accommodation." *Mitchell Cnty.* v. *Zimmerman*, 810 N.W.2d 1, 12 (Iowa 2012). The mere *number* of exemptions is irrelevant to a proper Free Exercise inquiry.

Instead, where the question was properly presented, courts have considered whether other exemptions "endanger[the State's] interests in a similar or greater degree than" the conduct regulated by the

challenged law. *Lukumi*, 508 U.S. at 543; *see also Blackhawk* v. *Penn.*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (asking whether exempted conduct "undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated"). Here, because Petitioners never properly raised that argument below, the State was never given an opportunity to make that factual showing. Nor is it required to do so now, since Petitioners have twice waived that argument.

But there is no reason to think the State would have been unable to make that showing if the argument had been properly presented. Most of the twenty-six exemptions now pointed out by Petitioners are unrelated to the agricultural, construction, and manufacturing industries addressed by the challenged law. It is hard to see how exemptions for horse-racing jockeys, barbers, baby-sitters, news correspondents, insurance salesmen, cosmetologists, athletes, musicians, and the like should have any relevance to the State's interests in this case.

Even assuming a few of the exemptions were more relevant, none would endanger Montana's interests more than the Hutterite colonies' extensive commercial activity. Montana has an important interest in ensuring that its labor laws do not upset a "level playing field," as this Court has recognized in another context. *See Alamo*, 471 U.S. at 299 (recognizing that if religious organizations engaged "in competition with ordinary commercial enterprises" were exempt from minimum wage requirements, it

"would undoubtedly give [them] . . . an advantage over their competitors"). A blanket exemption for the Hutterite colonies – some of the State's most successful and prolific businesses – would likely "undermine" this state interest more than any other exemption.

The State was also legitimately concerned that a catastrophic injury to a colony member might expose Montana's Uninsured Employers' Fund to substantial liability. Pet. App. 227a, 299a. None of Montana's other workers' compensation exemptions present this same problem. Petitioners have argued that this concern is baseless, because Hutterites do not sue and will take care of their own. *See* Pet. App. 249a. But this does not address whether a *former* Hutterite might sue the Uninsured Employers' Fund for injuries incurred while previously a member of a colony.

2. One part of Petitioners' new "exemptions" argument bears a final response. Petitioners argue that a secular commune organized like the Hutterites would not have to provide workers' compensation. Pet. at 19. This is incorrect.

The State is not aware of any secular commune in Montana like the Hutterites. But if there was one, it would be subject to Montana's workers' compensation laws. If, like the Hutterites, a secular commune provided "board, lodging, rent or housing" to its working members, those "wages" would trigger workers' compensation obligations under Montana's broad statutory definition. Mont. Code Ann. § 39-71-123(1); *see also Alamo*, 471 U.S. at 301 & n.23. And if, like

the Hutterites, the commune provided more than mere room and board, that would also make it an "employer" for workers' compensation purposes. *See Carlson* v. *Cain*, 664 P.2d 913, 919 (Mont. 1983); *cf. Stahl*, 626 F.3d at 527.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MONTANA NINTH JUDICIAL DISTRICT COURT,
GLACIER COUNTY

BIG SKY COLONY, INC. and DANIEL E. WIPF, Petitioners, vs. MONTANA DEPARTMENT OF LABOR AND INDUSTRY, Respondent.	Cause No. DV 10-4 Judge: Laurie McKinnon **PETITIONERS' RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This is a unique case arising from the selective application of capitalist and secular laws to communal religious people. The Constitution was drafted to welcome and protect members of persecuted faiths. It is up to the majority groups in our society, the ones with the power to make, interpret, and execute laws, to protect the minorities among us. We owe it to our ancestors and decendents to keep that sacred political

covenant. Just because a group of people looks different and speaks another language does not mean they can be singled out. As members of a vastly different society than that of a Hutterite colony, it is difficult for us to suppress our own life experience to understand the importance to the Petitioners of the religious issues in this case. But we must.

The Petitioners are entitled to judgment as a matter of law that Sections 6 and 7 of House Bill 119 are unconstitutional and void. HB 119[1] was passed in the Montana Legislature's sixty-first session in 2009. It was enacted specifically to require members of the Hutterite denomination to comply with the Workers' Compensation Act. That requirement makes the Hutterite religious belief in communal living and community of goods illegal because it forces property rights upon individual Hutterites and forbids the church from excommunicating members that violate the religious doctrine against property ownership. The Petitioners are entitled to judgment as a matter of law because the undisputed facts show that HB 119 burdens the free exercise of their religion, denies their right to equal protection, and creates an excessive government entanglement with the Hutterite denomination.

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[1] References to HB 119 are references to Sections 6 and 7 of HB 119, not the entire bill.

UNDISPUTED FACTS

House Bill 119 was introduced in the 61st Montana Legislature by Representative Chuck Hunter and signed into law by Governor Schweitzer on April 1, 2009. Among other things, HB 119 was enacted to "**[include] religious organizations as employers for workers' compensation purposes under certain conditions.**" 1991 Mont. Laws 1439 (emphasis added). Section 6 of HB 119 amended Montana Code Annotated § 39-71-117(1) to add the following text to the definition of "employer" under Montana workers' compensation law:

> (d) a **religious corporation, religious organization, or religious trust** receiving remuneration from nonmembers for agricultural production, manufacturing, or a construction project conducted by its members on or off the property of the religious corporation, religious organization, or religious trust.

(emphasis added). Section 7 of HB 119 amended Montana Code Annotated § 39-71-118(1) to add the following text to the definition of "employee" under Montana workers' compensation law:

> (I) a member of a religious corporation, religious organization, or religious trust **while performing services for the religious corporation, religious organization, or religious trust**, as described in 39-71-117(1)(d).

(emphasis added).

Big Sky Colony, Inc. is a religious corporation under the Montana Nonprofit Corporation Act and is classified as a Religious and Apostolic Organization under Section 501(d) of the Internal Revenue Code. Affidavit of Daniel E. Wipf, ¶ 4 (Dec. 6, 2010). Daniel E. Wipf is a member of the Colony, its first minister, president of the corporation, and one of the elders of the collected 35 Lehrerheut Hutterite colonies in Montana. *Id.* at ¶ 1. He is involved in the corporation and its agricultural operations as well as the spiritual development of its members. *Id.* at ¶¶ 2-3. The Colony exists for the purpose of "[operating] a Hutterische Church Brotherhood Community, commonly known as a colony wherein the members shall all belong to the Hutterische Church Society and live a communal life and follow the teachings and tenets of the Hutterische Church Society . . . " *Id.* at ¶ 5.

The Hutterische Church, or Hutterian Brethren Church (the "Church"), was founded as a part of the Anabaptist movement by Jacob Hutter in the 1500s in Germany. Hutterites, as his followers are known, split from other Anabaptists. They split because Hutterites believe that they must live communally, based on the scripture at Acts 2:44-47 and Acts 4:32-35. *Id.* at ¶ 11. The communal religious lifestyle of the Colony and its members is referred to as communal living and community of goods. *Id.* Jacob Hutter was burned at the stake in 1536. *Id.* at ¶ 7. Hutterites fled Europe for North America in the 1800s seeking religious freedom. *Id.* The members of the Church live in communal colonies. *Id.* at ¶ 11;

see The Encyclopedia of Religion vol. 6, 542 (Mircea Eliade ed., MacMillan Publishing Co. 1987) (excerpts attached as Exhibit B); *Encyclopedia of the American Religious Experience* vol. I, 625-26 (Charles H. Lippy & Peter W. Williams eds., Charles Scribner's Sons 1988) (excerpts attached as Exhibit C).

The Colony is completely communal. The members share religious services, eat communal food together in the communal dining hail, educate their children in the communal school, wear the same clothing, and speak a dialect of German unique to Hutterites. *Id.* at ¶ 12. Members voluntarily provide all of their labor and support to the Colony for the good of the group as an exercise of their religious faith and without expectation of pay, wages, salary, or other compensation. *Id.* at ¶ 15. Membership is voluntary. *Id.* at ¶ 12. All members have executed an Acknowledgment conveying all property, now owned and later acquired, to the Colony. *Id.* at ¶ 13. Property ownership is forbidden by Church doctrine and if a member fails to convey all property to the Colony he or she will be excommunicated from the Church and his or her membership in the Colony will be terminated. *Id.* at ¶¶ 14-15. Consistent with the prohibition on property ownership, Hutterites do not make claims for injuries in the courts. *Id.* at ¶ 18.

The Colony, provides all the necessaries of life for its members including food, housing, clothing, and medical care. If a member is injured or falls ill, the colony cares for that member. *Id.* at ¶ 16. The Lehrerleut colonies in Montana, including Big Sky

Colony, participate in the Hutterite Medical Trust to help them provide modern medical care for their members at a manageable cost. *Id.* at ¶ 17. This pooling of resources helps individual colonies provide full medical care for their members. The terms of the Hutterite Medical Trust do not limit individual colony's provision of full medical care to each member regardless of the cause of the medical condition. *Id.*

Representative Chuck Hunter of House District 79 in Helena introduced HB 119 to the House Labor and Industry Committee on January 8, 2009. When he introduced the bill, he said, "So who really are we speaking of here? **In particular, we are speaking of, in this section, about Hutterite colonies** who frequently bid on and perform jobs often in the construction industry and often in direct competition with other bidders." Mont. H. Lab. & Indus. Comm. *Revise Employment Laws, Including Workers Compensation: Hearing on H.B. 119*, 61st Leg. Reg. Sess. 9:40-10:56 (Jan. 8, 2009) (emphasis added) (Legislative history hereafter cited in the following format for ease of reference to the transcript attached to the State's Summary Judgment Brief: "Tr. 4, Rep. Hunter (Jan. 8, 2009)"). Various other comments were made by legislators and lobbyists regarding their desire to apply the Workers' Compensation Act to Hutterite colonies because of a perceived inequity between Hutterite colonies and private construction businesses. There is no question that the new definitions in HB 119 were targeted at Hutterite colonies to subject

them to the impermissible government interference of the workers' compensation system.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In a motion for summary judgment the moving party has the burden of proving the absence of genuine issues of material fact. If the moving party meets that burden, the burden shifts to the nonmoving party to show the existence of genuine issues of material fact. Mont. R. Civ. P. 56.

ARGUMENT

The Petitioners will show that they are entitled to judgment as a matter of law, before addressing the State's misapprehensions of the facts and law.

I. PETITIONERS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE UNDISPUTED FACTS SHOW THAT HB 119 FAILS CONSTITUTIONAL SCRUTINY.

HB 119 is void under multiple doctrines of constitutional law. HB 119 is void under the Free Exercise Clause, denies Hutterites Equal Protection of the law, and creates an excessive entanglement between government and religion. Each is discussed in turn.

A. HB 119 prevents the Petitioners from exercising their sincerely held religious beliefs.

Neither Congress nor the State may make laws prohibiting the free exercise of religion. U.S. Const., Amend. I; Mont. Const. Art. II, § 5. At a minimum, the Free Exercise Clause prohibits a law that "regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). "When alleging a violation of free exercise, it must be shown that the religious belief is sincerely held and that there is or will be some government prohibition of the free exercise of that belief." *St. John's Lutheran Church v. State Compensation Insurance Fund*, 252 Mont. 516, 524-25, 830 P.2d 1271, 1277 (1992) (*citing Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981)). A law that is not neutral and generally applicable must be "justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc.*, at 531-32. A law is not generally applicable if the secular ends of the law "were pursued only with respect to conduct motivated by religious beliefs." *Id.* at 524. A law is not neutral if it burdens an adherent to modify his behavior in violation of his beliefs. *Griffith v. Butte School District No. 1*, 2010 MT 246, ¶ 62, ___ Mont. ___, ___ P.3d. ___.

In the *Lukumi* case, a Santeria church sued the city to challenge ordinances prohibiting the ritual

slaughter of animals, a Santeria ritual The district court denied relief, holding that the purpose of the ordinances was to end animal sacrifice, whether for religious purposes or not. *Church of the Lukumi Babalu Aye, Inc.*, at 529. The Eleventh Circuit affirmed, but the U.S. Supreme Court reversed, holding that the purpose of the ordinances only precluded conduct that was motivated by religious beliefs, namely ritual sacrifice. *Id.* at 545.

HB 119 does not affect secular conduct. It applies to religious conduct only. The new definitions of employer and employee are all about religious organizations and their members. The definitions were carefully crafted to describe Hutterite colonies and their members in religious terms. On its face, HB 119 is neither neutral nor generally applicable. A reading of the new definitions shows that HB 119 only regulates the conduct of religious organizations and their members in the performance of religious duties. The face of the definitions are enough to invalidate them. The legislative history is also relevant. *Church of Lukumi Babalu Aye, Inc.* at 540.

The legislative history of HB 119 paints a picture of invidious discrimination. Tr. 4, Rep. Hunter (Jan. 8, 2009) ("So who really are we speaking of here? In particular, we are speaking of, in this section, about Hutterite colonies . . . "); Tr. 10, Sen. Stewart-Peregoy (Mar. 11, 2009) (" . . . **if we're going to target a group, we should have just put Hutterite religious organizations and let's be done with it.** Because that's, you know, that's what it's about.")

(emphasis added). The legislative history shows that HB 119 was enacted "'because of', not merely 'in spite of'" the Hutterite religion. *Church of Lukumi Babalu Aye, Inc.* at 540 (internal quotes omitted). In other words, if Hutterites did not live in Montana, HB 119 would not have been enacted.

Communal living and community of goods are the defining religious characteristic of the Hutterian Brethren Church and the Petitioners' sincerely held religious beliefs. The followers of Jacob Hutter live communally, as they believe Christ did, based on the Biblical passages at Acts 2:44-47 (KJV) and Acts 4:32-35 (KJV). The longevity of the Hutterite denomination and its members' willingness to travel the world in search of religious freedom demonstrates the sincerity with which these beliefs are held. Aff. Wipf, ¶ 7. Every member of the Colony has executed an Acknowledgment conveying all of his or her property to the Colony to put this belief into practice under Montana law. *Id.* at ¶ 13. The Colony, in turn, uses its resources to care for its members. *Id.* at ¶ 16. Communal living and community of goods are such sincerely held religious beliefs that any member who fails to comply may be excommunicated from the Hutterian Brethren Church.[2] *Id.* at ¶ 14. These beliefs cannot be

[2] The Supreme Court of South Dakota recognized, "The religious communal system presented in this case involves more than matters of religious faith, it involves a religious lifestyle. Any individual Hutterian colony member's entire life – essentially from cradle to grave – is governed by the church." *Decker v. Tschetter Hutterian Brethren, Inc.*, 594 N.W. 2d 357, ¶ 22

(Continued on following page)

exercised if the Petitioners are required to comply with the Workers' Compensation Act because capitalist secular property rights are forced upon Hutterites who are prohibited from owning property by their communal religious doctrine. In particular, two provisions of the Workers' Compensation Act are especially restrictive of the Petitioners' religious exercise.

Montana Code Annotated § 39-71-409 prevents an employee from waiving his or her rights under the Workers' Compensation Act. The Acknowledgment executed by every member contains their promise to convey all property to the Colony as an exercise of their religion. Aff. Wipf, ¶ 13. That includes workers' compensation claims. *See* Mont. Code Ann. § 70-2-101 (a claim other than for personal injury is a chattel). This violates the prohibition against waivers of workers' compensation rights under Montana Code Annotated § 39-71-409. Even if the claim could be conveyed to the Colony, the Colony would then hold a claim against itself. This makes no sense.

Montana Code Annotated § 39-71-317 prevents an employer from terminating an employee for filing a workers' compensation claim. If a member does not convey the claim to the Colony in violation of Montana Code Annotated § 39-71-409, he will be excommunicated from the Church for failure to follow religious doctrine. Aff. Wipf, ¶ 14. This violates Montana Code

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(S.D. 1999) (*quoting Wollman v. Poinsett Hutterian Brethren, Inc.*, 844 F. Supp. 539, 543 (D.S.D. 1994)).

Annotated § 39-71-317's prohibition against employers terminating employees for making workers' compensation claims. Courts may not inquire into the propriety of church excommunication when analyzing a tort claim against a church. *Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286, 300-01, 852 P.2d 640, 650 (1993), *overruled on other grounds, Gliko v. Permann*, 2006 MT 30, ¶ 24, 331 Mont. 112, 130 P.3d 155. It follows that HB 119 unconstitutionally burdens the Petitioners' free exercise of the defining characteristic of their religion and they are entitled to judgment as a matter of law. Compliance with Hutterite doctrine cannot be reconciled with the Workers' Compensation Act. The Petitioners may only comply with one or the other.

The State cites *St. John's Lutheran Church* at page ten of its brief, but that case does not require Petitioners to participate in the workers' compensation system. In that case, the Workers' Compensation Division audited a church and determined that its pastor was required to be covered by workers' compensation insurance. The Workers' Compensation Court agreed and the Montana Supreme Court affirmed, saying that "[T]here is no internal impact or infringement on the relationship between the church and its pastor, or on their sincerely held religious beliefs" regarding the relationship between the church and its pastor. *St. John's Lutheran Church* at 526, 830 P.2d at 1278. The church did not show any particular impact on the relationship between the church and its pastor. *Id.* Nor did the church argue

that analysis of a workers' compensation claim requires an impermissible inquiry into the propriety of the religious duties assigned to the pastor. *Cf.*, *Malichi v. Archdiocese of Miami*, 945 So.2d 526, 530 (Fla. Dist. App. 2006) (priest's workers' compensation claim barred by the church autonomy doctrine of the First Amendment because inquiry into whether the priest was properly performing his assigned duties and injured as a result of employment would require an impermissible analysis of the church's ecclesiastical authority); *see also*, *Joyce v. Pecos Benedectine Monastery*, 895 P.2d 286, 289 (N.M. App. 1995) (novice monk was not employee of monastery in workers' compensation context because the monk's motivation for joining the monastery was service to God in furtherance of the monastery's mission of spiritual development of members even though monk performed work for monastery and received vestry, room, board, and training).

The facts of *St. John's Lutheran* are distinguishable from the Petitioners' case because the Petitioners have shown that they cannot exercise their sincerely held religious belief in communal living and community of goods in the workers' compensation system. A Lutheran pastor is paid for his work and Lutherans do not have the same fundamental beliefs as Hutterites. The Petitioners' case is more like the situation in *Miller v. Catholic Diocese of Great Falls, Billings*, where the Supreme Court held that analyzing whether a religion teacher's employment was terminated in good faith was prohibited because it

"would impinge upon elements of the teaching of religion, or the free exercise of religion." 224 Mont. 113, 118, 728 P.2d 794, 797 (1986). If a Colony member made a claim against the Colony, the Workers' Compensation Court would be required to analyze the propriety of the religious duties performed by the member in violation of the rules in *Miller* and *Davis.*

The State's alleged overriding government interest in a level playing field is a sham and HB 119 was not narrowly tailored to serve that interest. The playing field was already level because the colonies care for their members. *Id* at ¶ 16. The only thing HB119 was narrowly tailored for is targeting Hutterite colonies. Like the unconstitutional ordinance in *Lukumi*, HB 119 is unconstitutional because it was targeted at suppressing the central element of the Hutterian Brethren Church despite the State's general applicability argument. *Id.* at 521. The Petitioners are therefore entitled to judgment as a matter of law that HB 119 violates the Free Exercise clause of the constitutions of the United States and the State of Montana.

B. HB 119 violates the Petitioners' right to equal protection.

The Constitutions of the United States and State of Montana require that "no person shall be denied equal protection of the laws." *Wilkes v. Montana State Fund*, 2008 MT 29, ¶ 12, 341 Mont. 292, 177 P.3d 483 (citing U.S. Const. Amend. XIV; Mont. Const. Art. II,

§ 4). A statute violates the Equal Protection Clause if it: 1) creates a classification that treats two or more similarly situated groups unequally; and, 2) is not supported by a rational government purpose. *Id.* A class only needs one person if it challenges intentional discrimination for which there is no rational basis. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (*per curiam*); *see also Griffith*, 2010 MT 246, ¶ 44.

HB 119 violates the Equal Protection Clause because it treats Hutterites different than other religious organizations. The Hutterian Brethren Church is a Christian church. The Catholic Church, for example, is another Christian church. Theses two churches and their members are similarly situated because they are both religious organizations which excommunicate members under certain circumstances. The difference is in the doctrines. A member of the Catholic Church may be excommunicated for cooperating with an abortion. *Catechism of the Catholic Church*, 547-49. (2d ed., Libreria Editrice Vaticana 1997) (excerpts attached as Exhibit D). While abortion is a legal activity in Montana, the State does not tell the Catholic Church it cannot excommunicate its members for cooperating with an abortion. The State does, however, tell the Hutterian Brethren Church that it cannot excommunicate its members for violating the prohibition against property ownership. Mont. Code Ann. §§ 39-71-317 & 409. These statutes preclude the Church from regulating its own membership according to its doctrine for the sham purpose of a

level playing field. HB 119 is therefore void because it subjects Hutterites to the workers' compensation system for exercising their religion which is arbitrary and discriminatory state action. *Wilkes*, ¶ 12 (internal citation omitted).

If HB 119 is not discriminatory on its face (which it is), then it at least creates a disparate impact on the Petitioners. It prohibits communal living and community of goods and HB 119 has no rational basis because the "level playing field" purpose is a sham. *e.g. Califano v. Boles*, 443 U.S. 282, 295 (1979). HB 119 burdens the Petitioners' religious exercise without reason.

Even if the Petitioners are a "class of one," HB 119 violates their right to equal protection because HB 119 was enacted with the discriminatory purpose of inhibiting their right to live communally without any rational basis. *E.g. Village of Willowbrook* at 564. HB 119 was passed to pacify the construction lobby which is not a rational reason. The Petitioners are therefore entitled to judgment as a matter of law that HB 119 violates their right to equal protection.

C. HB 119 is void under the Establishment Clause because it fails the *Lemon* Test.

Neither Congress nor the State may make a law respecting an establishment of religion. U.S. Const., Amend. I; Mont. Const., Art. II, § 5. "The prohibition on establishment covers a variety of issues" including "comment on religious questions." *McCreary County.,*

Kentucky v. A.C.L.U. of Kentucky, 545 U.S. 844, 875 (2005). The three factor *Lemon* Test is used to evaluate Establishment Clause claims. To survive the *Lemon* Test, a statute must: 1) have a secular purpose; 2) have a primary effect of neither advancing nor inhibiting religion; and, 3) not excessively entangle religion and government. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). HB 119 fails each factor, addressed below.

i. The primary purpose of HB 119 is to burden the Petitioners' religious exercise.

HB 119 does not have any secular text or application, let alone a secular purpose. Analysis of statutory purpose "is a staple of statutory interpretation" upon which much constitutional doctrine is based. *McCreary County Kentucky* at 861. The purpose of a statute may be taken from the comments of its sponsor. *Id.* at 862. The legislature's stated purpose must be disregarded when it is an apparent sham to accomplish religious objectives. *Id.* at 865. Purpose must be determined from the perspective of an objective observer "presumed to be familiar with the history of the government's actions and competent to learn what history has to show," not an "absentminded objective observer." *Id.* at 866.

In *McCreary County*, the ACLU sued to enjoin two counties from displaying the Ten Commandments in their county courthouses for violation of the

Establishment Clause. The district court granted a preliminary injunction, so the counties added other secular legal texts to the display to dilute the religious purpose of the Ten Commandments. That display was also enjoined. The Sixth Circuit and the U.S. Supreme Court affirmed. *Id.* at 858-59. Despite adding secular texts to the display, the history of the litigation showed that the real purpose of the display was to celebrate the religious message in the Ten Commandments. Adding the secular texts was a sham to cover up the religious purpose of the display. *Id.* at 869-70.

The history of HB 119 shows that the State's "level playing field" purpose is a sham. The real purpose of HB 119 is to burden the Petitioners' communal religious exercise. An objective observer knows two things. First, that HB 119 was aimed at Hutterite colonies because the construction lobby complained about them. Tr., 4, Rep. Hunter (Jan. 8, 2009); Tr., 7, Dustin Stewart (Mar. 5, 2009); Tr.,14, Rep. Hunter (Mar. 5, 2009); Tr., 10, Sen. Stewart-Peregoy (Mar. 11, 2009); Tr., 5, Sen. Balyeat (Mar. 16, 2009). Second, that Hutterite colonies already provide better care for their members than what is available in the workers' compensation system. Tr., 3, Rep. Milburn (Jan. 20, 2009); Aff. Wipf, ¶ 17. The playing field has always been level. If the playing field was already level, the only remaining purpose of HB 119 is to illegally burden the Petitioners' religious practice by requiring them to pay for and own something they do not need or want.

The State has to show more than just any minimal secular purpose. *McCreary County* at 864-65. It has to show that the real purpose of HB 119 was secular. Only an "absentminded objective observer" can believe the State's "level playing field" argument. Like the alleged secular purpose in *McCreary*, the "level playing field" argument "'crumble[s] . . . upon an examination of the history of this'" legislation. *Id.* at 857 (*quoting Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*)).

ii. The primary effect of HB 119 is inhibition of the Petitioners' right to exercise their belief in communal living and community of goods.

The primary effect of HB 119 is to burden Petitioners' religious practices. The State's "level playing field" argument is a sham. Members of the Colony receive better care than a contractor provides for his or her employees with workers' compensation. Aff. Wipf, ¶ 16. The playing field was level before HB 119 and the State knows it. State's Brief in Support of Summary Judgment, 10 (Nov. 15, 2010) ("the Colony is already essentially [providing medical coverage] through its medical trust"). The only real effect then, is to push secular property rights on the Petitioners. This precludes them from exercising their sincerely held religious belief in communal living and community of goods as discussed above. HB 119 fails this prong of the *Lemon* Test because HB 119's primary

effect is an inhibition of the Petitioners' religious practices.

iii. HB 119 excessively entangles the State with the Petitioners' religious doctrine by requiring state analysis of the relationship between the Colony and its members.

HB 119 excessively entangles the State with the Hutterian Brethren Church. "'Administrative entanglement typically involves comprehensive, discriminating, and continuing state surveillance of religion.'" *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 567 F.3d 595, 607 (9th Cir. 2009) (*quoting Vernon v. City of Los Angeles*, 27 F.3d 1385, 1399 (9th Cir.1994)). HB 119 requires the State to constantly monitor the Colony for compliance with the workers' compensation system. This will require State monitoring of the religious duties performed by Hutterites as well as regulation of membership in the Church, both of which are purely ecclesiastic issues that the government is incapable of addressing.

The United States District Court for the District of South Dakota demonstrated a rare understanding of the Hutterite way of life when it denied a former colony member's ERISA claim against his colony. It said:

> This Court is unable to envision any set of facts which would more entangle the Court

> in matters of religious doctrine and practice. The religious communal system present in this case involves more than matters of religious faith, it involves a religious lifestyle. An individual Hutterian colony member's entire life-essentially from cradle to grave-is governed by the church. Any resolution of a property dispute between a colony and its members would require extensive inquiry into religious doctrine and beliefs. It would be a gross violation of First Amendment and Supreme Court mandates for this Court to become involved in this dispute.

Wollman v. Poinsett Hutterian Brethren, Inc., 844 F. Supp. 539, 543 (D.S.D. 1994).[3] The same is true here. The Petitioners live a religious lifestyle. Unlike most religions which involve "secular shades of gray," Hutterites deal in religious absolutes. *Decker v. Tschetter Hutterian Brethren, Inc.*, 594 N.W.2d 357, ¶ 23 (S.D. 1999). The State cannot inquire into the

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[3] A portion of the *Wollman* opinion was called into question days before this brief was filed in a federal taxation case. *Stahl v. U.S.*, 2010 WL 4840090, 7 n. 5 (9th Cir. Nov. 29, 2010). The *Stahl* case is not controlling law here. It also did not involve constitutional issues and the Court's holding was expressly limited to a determination of deductibility of certain expenses as employee expenses under federal tax law. *Id.* at 6. It did not involve an employment claim between private parties. The *Stahl* case may also be factually distinguishable and the Petitioners are investigating the facts of that case. Counsel has contacted the attorney for the United States who advised that a further appeal of that case may be filed but a final decision has not been made by the Department of Justice.

relationship between Hutterite colonies and its members without violating the Establishment Clause. But that is what HB 119 requires the State to do.

HB 119 fails the *Lemon* Test. The "level playing field" argument is a sham, HB 119's legislative purpose and primary effect is to inhibit the Petitioners' exercise of their sincerely held religious belief in communal living and community of goods. The State is excessively entangled with the Hutterian Brethren Church and the Petitioners are entitled to judgment as a matter of law that HB 119 is unconstitutional.

II. THE STATE'S ARGUMENT FAILS TO ADDRESS THE BURDEN ON THE PETITIONERS' RELIGIOUS EXERCISE.

HB 119 makes it illegal for the Petitioners to exercise the fundamental tenets of their religion. There are three distinct arguments in the State's Brief in Support of Summary Judgment. They are: 1) HB 119 is necessary to prevent catastrophic claims against the Uninsured Employer Fund; 2) HB 119 was necessary to "level the playing field" between the members of the construction industry and Hutterite Colonies; and, 3) that the Workers' Compensation Act does not restrict Hutterite religious activity. Each argument is refuted below.

A. There is no threat that Hutterite colony members will make catastrophic claims against the Uninsured Employer's Fund.

Hutterite adherents do not make workers' compensation claims. The State suggested that if members of Hutterite colonies are not subject to the Workers' Compensation Act, the Uninsured Employers Fund created by Montana Code Annotated § 39-71-503 would be catastrophically depleted. State's Brf. S.J., 3. After filing its brief, the State admitted that no member of any Hutterite colony had ever made such a claim. Respondent's Response to Petitioners' First Combined Discovery Request, RFA No. 1 (copy attached as Exhibit A). Colony members live a communal lifestyle and do not need the workers' compensation system. Aff. Wipf ¶ 16. If a member is injured or sick, the Colony takes care of him or her. *Id.*

As a part of its misplaced catastrophic claim argument, the State incorrectly implies that the workers' compensation system cannot function unless the Petitioners participate in the system. The State cites *State Farm Fire and Casualty Company v. Bush Hog, LLC*, 2009 MT 349, ¶ 13, 353 Mont., 173, 219 P.3d 1249 to imply that the workers' compensation system will fail if the Petitioners do not participate. State's Brf. S.J., 2. The system discussed in *Bush Hog* is an injured worker's right to a "no-fault recovery" that relieves the employer from potentially "enormous recoveries in the tort system." *Bush Hog, LLC*, ¶ 13 (*quoting Auto Parts v. Employment Relations Div.*, 2001 MT 72, ¶ 21, 305 Mont. 40, 23 P.3d 193).

Hutterites do not seek recoveries in the tort system. Aff. Wipf, ¶ 18. Colony members are better cared for by their colonies than they would be under workers' compensation. Neither colonies nor members need the protections of the workers' compensation system. Colonies take care of their own because it is part of their religion. Aff. Wipf, ¶ 16. They do not need the government in the middle of that.

B. HB 119's only purpose was to attack the communal Hutterite religion.

Parity between employers is not part of the workers' compensation system. The Workers' Compensation Act exists to protect workers from wage loss due to a work related injury at a reasonable cost to employers. Mont. Code Ann. § 39-71-105 (2009). The system does not exist to ensure employers each pay the same item of overhead. Premiums charged by the State Fund depend on multiple factors relating to the insurability of employers. Admin. R. Mont. 2.55.311 (2010).

The State argues that if the Colony is not subject to the requirements of the Workers' Compensation Act, the Colony has a competitive advantage over other businesses. The premise for this argument is that payment of Workers' Compensation premiums is an item of overhead that private employers must pay but the Colony does not. The State makes this argument because a lobbyist suggested it. State's Brf. S.J., 4 & 7. The lobbyist said that Hutterite colonies,

"have a significant competitive advantage because they're not paying the workers compensation policy that general contractors typically pay." Tr., 7, Dustin Stewart (Mar. 5, 2009). This argument defies logic because the Workers' Compensation Act exists to protect employees and Hutterite colonies already pay for full medical care for all of their members be they young, old, sick, or well.

It is the contractors, not the Colony, with the advantage. The Montana Building Industry Association thinks that the Colony has a competitive advantage because it does not pay workers' compensation premiums. Tr., 7, Dustin Stewart (Mar. 5, 2009). Whether anyone has an advantage is not relevant to workers' compensation, but it is the contractors with the advantage, not the Colony. The Colony is communal in every aspect. Every member in need of care receives it. That is expensive. Aff. Wipf, ¶ 16. The Lehrerleut Hutterite colonies in Montana created the Lehrerleut Hutterite Medical Trust to help them with the high cost of providing full medical care to all of their members. *Id.* at ¶ 17 & Ex. E (the "Plan Document"). Full communal support is better than the limited remedies available under the Workers' Compensation Act.[4] Hutterites were living communally centuries before the American Revolution. Aff. Wipf, ¶ 7. Any member of private industry can have

[4] The workers' compensation system is "not intended to make an injured worker whole . . . " Mont. Code. Ann. § 39-71-105(1). Workers' Compensation benefits are outlined in Montana Code Annotated § 39-71-701 *et seq*.

the perceived advantage of the Hutterites by living communally in the exercise of this centuries old Christian denomination. They just have to give up everything they own. Contractors also do not provide their employees with all the necessities of life, including full medical care. The Colony does that at substantial cost. *Id.* at ¶ 16. If anyone has an advantage it is the contractor who only has to meet the minimal demands of the market and the law, not the demands of scripture.

The State even admits that "the Colony is already essentially [self insuring] through its medical trust." State's Brf. S.J., 10. The "level playing field" argument is a rouse.

C. HB 119 interferes with Colony members' religious freedom.

The fundamental beliefs of the Hutterian Brethren Church cannot be exercised in the workers' compensation system. The workers' compensation system is designed for a capitalist secular world. Hutterites live in a communal ecclesiastical world. They cannot be reconciled, but they can coexist. The State is wrong when it argues that the Petitioners can comply with the Workers' Compensation Act without suffering any loss of religious freedom. As discussed in Section I, above, HB 119 burdens the Hutterite doctrines of communal living and community of goods.

CONCLUSION

The Petitioners are entitled to judgment as a matter of law that Sections 6 and 7 of HB 119 are unconstitutional and void. HB 119 makes the Hutterite religious belief in communal living and community of goods illegal because it forces property rights upon individual Hutterites and forbids the church from excommunicating members that violate the doctrine against property ownership. The only purpose of HB 119 is relief of political pressure and that is not a compelling government interest.

Dated this 3rd day of December, 2010.

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MONTANA NINTH JUDICIAL DISTRICT COURT,
GLACIER COUNTY

BIG SKY COLONY, INC. and DANIEL E. WIPF, Petitioners, vs. MONTANA DEPARTMENT OF LABOR AND INDUSTRY, Respondent.	Cause No. DV 10-4 Judge: Laurie McKinnon **REPLY TO RESPONSE TO CROSS-MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The Petitioners are entitled to judgment as a matter of law because the State's level playing field argument is a sham. The State's assertions to the contrary are Quixotic. Like Don Quixote's giants, the perceived competitive advantage of Hutterite Colonies is not real. The playing field was already level before HB 119. The real purpose is obvious even

though it was unstated. Its purpose is to deprive Hutterites of their right to freely exercise their religion. HB 119 was passed to relieve political pressure from lobbying organizations. Its only effect is to burden the Petitioners' religious freedom. This is unconstitutional.

ARGUMENT

Petitioners' motion for summary judgment must be granted. The parties may dispute the significance of certain facts. The material facts before the Court are undisputed in spite of that. The State's insinuation that the Petitioners waived their right to challenge HB 119 because they did not lobby the legislature has no effect. The Petitioners have shown that the applicable law protects their rights whether the Legislature is in session or not. Their motion for summary judgment must be granted.

I. PETITIONERS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE HB 119 UNCONSTITUTIONALLY BURDENS THE EXERCISE OF THEIR SINCERELY HELD RELIGIOUS BELIEFS FOR THE PURPOSE OF RELIEF OF POLITICAL PRESSURE.

If Petitioners' sincerely held religious beliefs are burdened for anything less than a compelling government interest, they are entitled to summary judgment. *Church of the Lukumi Babalu Aye, Inc. v.*

City of Hialeah, 508 U.S. 520, 533 (1993). The State argues that the Montana Supreme Court's citation to the *Thomas* test in *Griffith v. Butte School District No. 1*, 2010 MT 246, ¶ 62, 358 Mont. 193, ___ P.3d ___, was an anomaly. State's Response Brf. Cross-Mot. S.J. & Reply, 6 (Dec. 20, 2010). But the Montana Supreme Court has consistently cited to the more restrictive *Thomas* test. *Griffith*, ¶ 62; *Valley Christian School v. Montana High School Assoc.*, 2004 MT 41, ¶ 7, 320 Mont. 81, 86 P.3d 554; *St. Johns Lutheran Church v. Montana State Compensation Insurance Fund*, 252 Mont. 516, 524-25, 830 P.2d 1271, 1277 (1992). Below, the Petitioners show that their religious beliefs are sincerely held, that their exercise of those beliefs is burdened by HB 119, and that the purpose of HB 119 is not a compelling government interest.

A. The State does not dispute that the Hutterite religious doctrines of communal living and community of goods are sincerely held.

There is no dispute in the State's briefs that the Hutterite doctrines of communal living and community of goods are sincerely held religious beliefs. The State does dispute, however, whether HB 119 actually inhibits the Petitioners' ability to exercise those beliefs.

B. HB 119 burdens the Petitioners' right to exercise their belief in communal living and community of goods.

HB 119 interferes with the Petitioners' right to exercise their sincerely held religious beliefs. Citing to *St. John's Lutheran Church*, the State argues that there is no impact on the Colony's internal religious affairs. State's Response Brf. Cross-Mot. S.J. & Reply, 9. While there was no interference between that Lutheran pastor, a paid employee, and his church, the facts of that case are different from the facts of this case. In this case, we have the doctrines of communal living and community of goods, which prohibit property ownership. Affidavit of Daniel E. Wipf., ¶ 11 (Dec. 6, 2010). A Lutheran pastor may own property consistent with his beliefs.

Another difference is that in this case, the Petitioners argue that examination of a workers' compensation claim against a colony is unconstitutional under the law of the later decided case of *Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286, 852 P.2d 640 (1993) *overruled on other grounds, Gliko v. Perman*, 2006 MT 30, ¶ 24, 331 Mont. 112, 130 P.3d 155, regarding court analysis of church excommunication. The Petitioners also argue that HB 119 violates the church autonomy doctrine, *Cf., Malichi v. Archdiocese of Miami*, 945 So.2d 526, 530 (Fla. Dist. App. 2006), and Montana's prohibition on court analysis of religious instruction. *Miller v. Catholic Disocese of Great Falls, Billings*, 224 Mont. 113, 118, 728 P.2d 794, 797 (1986). Those arguments

were not addressed in *St. John's Lutheran Church*. The Petitioners have not only raised these arguments, they provided Daniel E. Wipf's un-refuted affidavit testimony that compliance with HB 119 will impact the ecclesiastical relationship between the Colony and its members in their exercise of communal living and community of goods. The State's argument that HB 119 only creates a regulatory relationship between the Colony is conclusory and fails to address the specific facts raised by the Petitioners. The undisputed facts show that the Petitioners' ability to practice their sincerely held religious beliefs is unconstitutionally burdened by HB 119.

The Petitioners' right to exercise their beliefs is burdened because a workers' compensation claim is a property right, HB 119 only burdens Hutterite colonies, and HB 119 requires the State to interpret and apply the Hutterite religious doctrines.

i. A workers' compensation claim is a property right.

HB 119 forces colony members to own property which violates Hutterite religious doctrine. Citing to *Wiard v. Liberty*, 2003 MT 295, ¶ 21, 318 Mont. 132, 79 P.3d 281, the State claims that a workers' compensation claim is not a property right, but a contract right. State's Response Brf. Cross-Mot. S.J. & Reply, 7. That may be true, but a contract right is property.

A property interest may exist in an obligation. Mont. Code Ann. § 70-1-104(3). Obligations arise by contract or operation of law. *Id.* at § 28-1-102. Therefore, a contract right, which is the right to receive performance of a contract, is a property right.[1] Medicare benefits may also be considered a property right in the context of due process, but that is a government entitlement created by statute. It is not created by contract. Generally, the rights arising out of an obligation may be transferred. *Id.* at § 28-1-1001. In contrast, Montana Code Annotated § 37-71-409 prohibits a colony member from conveying a workers' compensation claim to the Colony. The colony member is therefore required to exert ownership over his or her workers' compensation claim.

Making matters worse, the property right forced on colony members is a right to be enforced against the Colony. HB 119 drives a wedge between the Colony and its members by forcing members to own a right to be enforced against the Colony. This is the worst imaginable situation of property ownership because it puts the colony member in an adversarial relationship with the Colony. A church should not be adverse to its members, but that is what HB 119 does. HB 119 is unconstitutional.

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[1] A contract right is also referred to as a general intangible in the context of the U.C.C., which is to say that it is intangible property. Mont. Code Ann. § 30-9A-102(1)(pp).

ii. HB 119 only burdens conduct motivated by religious purposes.

The State argues that the purpose of HB 119 is purely secular. However, the State fails to harmonize this supposed secular purpose with the facially religious text of the statute. The new definitions of employer and employee contained in HB 119 only apply to persons engaged in religious activities. The new definition of employee only applies to members of religious organizations "while performing services for the religious" organization. Mont. Code Ann. § 39-71-118(1)(l). There is nothing secular in that statute. Nor is there anything secular about the new definition of employer. That definition is not only limited to religious groups, it is specifically limited to religious groups engaged in activities unique to Hutterite colonies. *Id.* at § 39-71-117(1)(d). It is no coincidence.

The State's argument fails to address the fact that a statute that regulates conduct which is only engaged in for religious reasons is unconstitutional. A statute enacted because of a religious practice, rather than in spite of it, is unconstitutional. *Church of the Lukumi Bablu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993). That is why this case and the *Lukumi* case are distinguishable from the earlier case of *Employment Div., Or. Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990). In that case, the challenged statute prohibited anyone from using peyote. The Supreme Court said that is OK, because the prohibition applied to everyone who used peyote and other illegal drugs regardless of the reason for their use.

In *Lukumi*, only ritual animal sacrifice was prohibited. The Supreme Court said that was unconstitutional because other methods of killing animals were not prohibited and only Santeria adherents were engaged in ritual animal sacrifice. Therefore, HB 119 is unconstitutional because it was enacted specifically for Hutterite adherents, not in spite of them.

iii. Application of workers' compensation laws to the Petitioners requires the State to interpret Hutterite religious doctrine.

If the Petitioners must comply with workers' compensation, the State must interpret their religious doctrine to ensure workers' compensation compliance. The State argues that if the Petitioners are subject to workers' compensation laws, the State only needs to regulate commercial activities. State's Response Brf. Cross-Mot. S.J. & Reply, 14-15. When a member performs work for the colony, he or she is engaged in a religious activity. Aff. Wipf, Exhibit D. How can the State determine which of the Petitioners' activities are commercial and which are religious? It cannot. The State cannot determine if a colony member's injuries were incurred as a result of his so-called employment without analyzing the colony member's religious duties in violation of the church autonomy doctrine. *Cf. Malichi*, at 530. Nor can the State analyze whether a colony member was excommunicated in violation of Montana Code Annotated § 39-71-317 without violating the prohibition of *Davis.* Life on the

Colony is purely religious. There are no secular shades of gray. *Decker v. Tschetter Hutterian Brethren, Inc.*, 594 N.W. 2d 357, ¶ 23 (S.D. 1999). Therefore, the State's application of workers' compensation laws to the Petitioners is unconstitutional.

C. The State's level playing field argument is a sham and not a compelling government interest.

The State continues to advance its level playing field argument without showing that the playing field was not level in the first place. Nor does the State explain how HB 119 leveled the playing field. The State argues that the more often the Legislative history refers to the sham level playing field purpose, the more likely that is the true purpose. State's Response Brf. Cross-Mot. S.J. & Reply, 1. No matter how much the level playing field is mentioned in the legislative history, it does not cover up the fact that the true purpose of HB 119 is to relieve political pressure by making it more difficult for the Petitioners' to exercise their religion. The State offered no evidence that the playing field was not level, nor did it explain how HB 119 could have even leveled the playing field.

The State implicitly admitted that the playing field was already level before HB 119 was passed. "As explained in the State's initial brief, the amendment was meant to level the playing field and take away a perceived competitive advantage held by religious

organizations, most prominently the Hutterites." State's Response Brf. Cross-Mot. S.J. & Reply, 5. By the same logic, the State could continue down the slippery slope to require the Colony to pay wages to its members. *If the competitive advantage was only perceived, how was the playing field be leveled by taking away the perception of an advantage?* The argument is a sham because there was no competitive advantage. The State did not even present evidence of one. If this imaginary playing field was already level, what purpose could possibly have been served by HB 119? The purpose was relief of political pressure at the expense of the Petitioners' religious freedom. The level playing field argument is a sham and the only purpose of HB 119 is the unconstitutional regulation of religious conduct.

The State also failed to show how this imaginary playing field is leveled by HB 119. Even assuming there was an un-level playing field, the Workers' Compensation Act does not exist to provide parity between employers. Employers are each charged different premiums based on the type of work they do and their history. The workers' compensation system exists to provide reasonable remedies for employees and to protect employers from crushing tort liability. *State Farm Fire and Casualty* Co. *v. Bush Hog, LLC*, 2009 MT 349, ¶ 13, 353 Mont. 173, 219 P.3d 1249. As explained in the Petitioners' opening brief, neither the Colony nor its members need the protection of the workers' compensation system. Colony members take care of one another. The State did not identify any

colony member that did not receive the care they needed.

The State suggests that Colony members may avoid the unconstitutional burden on their religious exercise by choosing not to file workers' compensation claims, if they have them. State's Response Brf. Cross-Mot. S.J. & Reply, 8. How then, is the playing field leveled by requiring a group that will not even participate in the workers' compensation system to be subjected to the regulation of that system? It is not. Our Legislature has more important business than to pass ineffectual laws.

HB 119 is invalid because Hutterite colonies are the only subject of HB 119. The State said, "the Hutterites were the best example of a distortion in the labor market caused by not requiring religious organizations to provide workers' compensation coverage when engaged in commerce." State's Response Brf. Cross-Mot. S.J. & Reply, 5. Why did the State only target Hutterites and not target any other group specifically exempted from workers' compensation compliance by Montana Code Annotated § 39-71-401. Of particular note, those performing services in return for aid or sustenance only are exempt from workers' compensation. The fact that the State only targeted Hutterites in HB 119 without targeting other groups that are not subject to workers' compensation regulation shows that the level playing field argument is a sham.

Furthermore, the State has not identified any other religious organization affected by HB 119. There are none. While the State says that HB 119 applies to all religious organizations, what other religious organizations are engaged in agricultural production? The members of most religious organizations are employed in the secular world for secular purposes. The only "employee" of most religious organizations is the minister, who is not subject to HB 119 because preaching is not agricultural production, manufacturing, or construction. There is no legitimate government purpose for HB 119. Summary judgment must therefore be granted for the Petitioners.

CONCLUSION

HB 119 is unconstitutional because it was specifically targeted at Hutterite colonies to restrain their conduct. HB 119 was not passed in spite of Hutterites, it was passed because of them. They were targeted. The State did not offer any evidence of an un-level playing field. This shows the true purpose of HB 119 to be relief of political pressure by depriving the Petitioners of their right to exercise sincerely held religious beliefs. That is not a compelling government interest. The Petitioners' cross-motion for summary judgment must be granted.

DATED this 7th day of January, 2011.

CHURCH, HARRIS, JOHNSON & WILLIAMS, P.C.

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