

No. 12-1191

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**In the Supreme Court of the United States**

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BIG SKY COLONY, INC., AND DANIEL E. WIPF,  
PETITIONERS

*v.*

MONTANA DEPARTMENT OF LABOR AND INDUSTRY

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF MONTANA*

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**REPLY BRIEF FOR THE PETITIONERS**

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**REPLY BRIEF**

Rather than address the split of authority, Montana compares the Hutterites to “Tyson Foods,” “Cargill,” and “Dunkin Donuts.” BIO 1. It claims that the Hutterites are “*the* market leader \* \* \* in Montana’s agricultural, construction, and manufacturing industries.” *Ibid.*

Only in fantasyland. Fewer than 5,000 Hutterites live in Montana. Their per capita “income” is \$7,050—compared with the statewide average of \$24,640.<sup>1</sup> Thus, Hutterites represent less than 0.5% of Montana’s population and 0.1% of its income.<sup>2</sup> Cargill’s revenues, by contrast, are quadruple Montana’s GDP.<sup>3</sup>

Although they produce much of Montana’s hogs, eggs, and poultry, BIO 6, that is because Montana produces hardly any—0.08% of the nation’s total.<sup>4</sup>

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<sup>1</sup> See Appendix A, *infra*. Financial data are from the Leherleut Hutterites—Montana’s largest and most successful branch. “Per capita ‘income’” is the sum of “Total Personal Expenses” and “Net Income” multiplied by 36 colonies and divided by population (3,726). See also United States Census Bureau, <http://quickfacts.census.gov/qfd/states/30000.html> (Montana per capita income).

<sup>2</sup> *Ibid.*  $((\$7,050 * 5,000) / (\$24,640 * 989,417)) = .001$ .

<sup>3</sup> See Cargill, <http://www.cargill.com/company/glance/> (\$134 billion revenue); Bureau of Economic Analysis, [http://www.bea.gov/newsreleases/regional/gdp\\_state/2012/pdf/gsp0612.pdf](http://www.bea.gov/newsreleases/regional/gdp_state/2012/pdf/gsp0612.pdf) at 7 (\$32 billion GDP).

<sup>4</sup> See National Agricultural Statistics Services, <http://quickstats.nass.usda.gov/results/C6B1A963-29EB-3D40-BEF9-E32DD84EF774> (\$7,975,000 Montana poultry and egg sales); <http://quickstats.nass.usda.gov/results/EC4B0533-8D7D-39DA-97D5-960D126BC000> (\$36,331,000 Montana hog sales); <http://quickstats.nass.usda.gov/results/9DCFC4C0-5B9A-320D->

The vaunted “meat processing plant” (BIO 6), if it ever materializes, would be owned solely by Chinese investors, who wanted “niche” pigs from “smaller-production farms.”<sup>5</sup> And the supposedly “aggressive[]” construction and manufacturing activities (BIO 5) account for only 3% of Hutterites’ meager “income.” Appendix A (“Sundry Income”).

Montana’s attempt to paint the Hutterites as wealthy magnates would be amusing if it were not so threatening. Like other religious minorities, Hutterites have suffered from exaggerated notions of their economic prowess before. Only decades ago, they were heavily persecuted for their supposedly too-prosperous “land expansion.” John Hofer, *The History of the Hutterites* 65 (1988).

Aside from an economic fable, Montana offers little in opposition to certiorari. First, it tries to manufacture a vehicle problem, claiming that the Hutterites “never presented their now-preferred Free Exercise argument” below. BIO 3. But this contention conflates an argument with a claim; the Hutterites plainly presented their free exercise claim below.

Second, Montana tries to minimize the split, arguing that all courts ask “the same fundamental Free Exercise question.” BIO 17-18. But the courts answer the question by two different methods—either requiring evidence of discriminatory motive or not. Thus, as

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A99C-26F9BE82E1DC (\$37,065,947,000 national poultry and egg sales); <http://quickstats.nass.usda.gov/results/FE10165A-B9E3-3285-AFDF-B6D827940B8A> (\$18,056,981,000 national hog sales).

<sup>5</sup> See Billings Business, [http://billingsgazette.com/business/montana-pig-farmers-eye-asian-trade-deal/article\\_c9681c90-721b-5cf6-904e-b2f6c2989d78.html](http://billingsgazette.com/business/montana-pig-farmers-eye-asian-trade-deal/article_c9681c90-721b-5cf6-904e-b2f6c2989d78.html).

the State later admits, lower courts do “approach[] the question differently.” BIO 18.

Finally, the State claims that there is no conflict with *Hosanna-Tabor*, because this case involves a “classic labor regulation.” BIO 23. But the State concedes that forcing the Hutterites to pay minimum wage would violate *Hosanna-Tabor*, App. 282a, and it offers no principled basis for distinguishing workers’ compensation from wages.

### **I. The State’s manufactured vehicle problems are illusory.**

1. Montana claims that the first question presented is “waived,” because the Hutterites “never presented their now-preferred Free Exercise argument” below—at least “not as [a] stand-alone argument.” BIO 3, 11. This argument fails for several reasons.

First, it conflates an argument with a claim. “Once a federal *claim* is properly presented, a party can make any *argument* in support of that claim; parties are not limited to the precise arguments they made below.” *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis added). Here, the *claim* is that the workers’ compensation law violates the Free Exercise Clause. Various theories about why the law is not generally applicable under *Lukumi* “are not separate *claims*,” but “separate *arguments* in support of a single claim.” *Ibid.*

Second, even the *arguments* are not new. In their first district court brief, the Hutterites argued neutrality and general applicability separately, maintaining that the law was “not generally applicable” because “the secular ends of the law ‘were pursued only with respect to conduct motivated by religious

beliefs.” Resp. App. 8a (quoting *Lukumi*), 9a (“[The Act] does not affect secular conduct.”).

They elaborated in their reply brief, noting that “[o]ther group[s] [were] specifically exempted from workers’ compensation compliance”—most notably, “those performing services in return for aid or sustenance only.” Resp. App. 38a. This, they said, was like the law in *Lukumi*, which “was unconstitutional because [secular] methods of killing animals were not prohibited.” Resp. App. 35a.

The district court addressed this argument, explaining: “[W]here the law provides *a series of exceptions*, *Sherbert*, it must accommodate religious practice unless there is a compelling state interest; [but] where the law is neutral and generally applicable, *i.e.*, *provides no exceptions*, *Smith*, then government may restrict religious practice.” App. 70a (emphasis added). And when a “law create[s] *[secular] exemptions*,” it must “afford the *same protection for religious practices*.” App. 65a (emphasis added). Although the court noted that the workers’ compensation law had “certain exemptions contained in section 39-71-401,” App. 57a, it did not analyze them because it held that the law targeted the Hutterites. App. 76a.

The argument was also raised in the Montana Supreme Court. There, the Hutterites argued that they were denied “the general exemptions of the Act,” App. 245a, and that they were treated differently from “[c]ommunal secular groups,” which are “exempt from the Act because they do not pay a wage.” App. 261a. As the brief asked: “Why should communal secular groups be exempt from the Act if communal religious organizations are not[?]” *Ibid.*



Even the “first page” of their brief highlighted this issue. Cf. BIO i, 2-3, 12, 15. It said that the “one issue” was whether the “intent *and effect* of [the law] is to make life difficult for a particular religious group.” App. 235a (emphasis added). “Intent” refers to invidious targeting, or neutrality; “effect” refers to unequal treatment, or general applicability.

Not surprisingly, the dissenters addressed exemptions, too. They argued that the law “currently exempts other areas of employment in agriculture, manufacturing, and construction” (listing six examples); that “[t]hese exemptions are contrary to the governmental interests asserted by the State”; and that these exemptions “lend further credence” to the arguments under *Lukumi*. App. 47a-48a. The majority responded by adopting a broad holding that necessarily rejects the exemptions argument—namely, that a law is subject to strict scrutiny “*only* when [it] impermissibly singles out some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” App. 18a (emphasis added; quotation omitted). In other words, because singling out or discriminatory motive is required, unequal exemptions are irrelevant.

All of this is more than enough to demonstrate not only that “petitioner’s federal *claim*” was “either addressed by, or properly presented to, the state court,” but that its arguments were, too. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (emphasis added). The trial judge and dissenters plainly considered the argument. That the majority rejected it without serious analysis does not mean it was not presented.

Indeed, this Court has frequently found federal claims preserved by far less precise arguments than

those here. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 623 (2001) (claim preserved even though the “argument was not pressed at trial”); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (claim preserved even though “petitioners did not pellucidly articulate this theory”); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980) (claim preserved even without “specific reference to the Federal Constitution”); *Taylor v. Kentucky*, 436 U.S. 478, 483 n.10 (1978) (claim preserved even though the state court “did not discuss federal decisions”); *Braniff Airways v. Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 598-99 (1954) (claim preserved even though petitioner “name[d] the wrong constitutional clause”).

Nor is the free exercise claim “waived under longstanding Montana precedent.” BIO 16. As noted above, it was raised and addressed at every stage of litigation. If the majority thought the argument relied on by the dissenters was waived, it easily could have said so. Instead, it adopted a broad rule rejecting it. If that court did not deem the argument waived under Montana law, neither can this Court. See Eugene Gressman et al., *Supreme Court Practice* 197-98 (9th ed. 2007).

2. Alternatively, Montana claims that “Petitioners are effectively asking this Court to render an advisory opinion,” BIO 4, because the State “could” change its interpretation of “employer” and “wages” on remand, and the Hutterites “have not challenged” this new interpretation. BIO 20-21.

But the Hutterites cannot challenge pure speculation. Montana has always interpreted “employer” and “wages” to exclude the Hutterites—and still does.

App. 4a. If this Court invalidates the challenged amendment, the Hutterites will receive full relief on every ripe claim. Of course, Montana “could” overturn 96 years of stable law to target the Hutterites on remand. BIO 20. But only then would a challenge to that new interpretation become ripe.

**II. The decision below deepens a conflict over the meaning of “neutral” and “generally applicable.”**

1. Montana’s attempt to minimize the split fares no better. First, Montana says there must be no split because “[n]one of [the cases] express disagreement with any of the other cases.” BIO 17. But this is simply wrong: As the Third Circuit explained, “in contrast to our decision in *Fraternal Order of Police*, two other circuit courts have stated that the Free Exercise Clause offers no protection when a statute or policy contains broad, objectively defined exceptions \* \* \*.” *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002). Since this recognition of the split, the Second, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, and Iowa Supreme Court, have deepened the conflict. Pet. 12-13.

Next, Montana says “all of the cases on both sides of Petitioners’ ‘split’ asked the same fundamental Free Exercise question”: whether religious practices have been “singled out for discriminatory treatment.” BIO 18-19 (quoting *Lukumi*, 508 U.S. at 538). That is only half true. *Of course*, every court asks whether there was evidence of singling out or discriminatory motive, because every court agrees that such evidence is “*sufficient* to prove that a challenged governmental action is not neutral.” *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.)

(emphasis added). But lower courts are divided over whether such evidence is *necessary*. Some say it is—that plaintiffs must prove “substantial animus against [religion] that motivated the law in question.” *Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999); Pet. 14-15. Others say it isn’t—that “the Free Exercise Clause is not confined to actions based on animus.” *Shrum*, 449 F.3d at 1145; Pet. 15. Because animus is difficult to prove even when it exists, this difference is usually dispositive.

Finally, Montana argues that the split is “largely academic,” because the opinions requiring singling out or discriminatory motive are “uniformly cursory and shallow.” BIO 19. But that is precisely the problem. Given the extreme facts of *Lukumi*, courts have often adopted a “cursory and shallow” interpretation that requires equally extreme facts in every case. *Lukumi* then becomes an excuse to dismiss free exercise claims without serious analysis.

2. Montana says even less about how this case can be reconciled with the decisions of the Third, Sixth, Tenth, or Eleventh Circuits, or Iowa Supreme Court—all of which have struck down laws with far narrower exemptions. Pet. 18-20. It says nothing about its exemptions for sole proprietors or members of partnerships, LLPs, or LLCs. Pet. 19. It says nothing about its exemption for members of religious orders. *Ibid.* And it says nothing about its exemption for independent contractors. App. 48a.

The State says only that an exemption for the Hutterites would be more harmful, because Hutterites are supposedly “some of the State’s most successful and prolific businesses.” BIO 31-32. But the Hutterites are not more “prolific” than every sole

proprietor, independent contractor, and working member of a partnership, LLP, or LLC in Montana. Montana has already granted exemptions to almost 18,000 independent contractors—more than ten times the number of adult male Hutterites.<sup>6</sup> That does far more to undermine the State’s supposed interests.

Finally, Montana claims that it was “legitimately concerned that a catastrophic injury to a colony member might expose Montana’s Uninsured Employers’ Fund to substantial liability.” BIO 32. This is spurious. Under Montana law, the Uninsured Employers’ Fund is available only to “employers’ *who are subject to the Act* but have not provided coverage for their employees.” App. 45a (emphasis added). Thus, before the State enacted the challenged amendment, it was legally impossible for any Hutterite to make such a claim. *Ibid.*

### **III. The decision below conflicts with *Hosanna-Tabor* and other decisions on the right of churches to govern their internal affairs.**

The State also fails to explain how this case can be reconciled with decisions protecting the internal affairs of churches.

1. First, Montana admits that *Hosanna-Tabor* prohibits the government from interfering with “an internal church decision.” BIO 22. It also admits that *Hosanna-Tabor* would bar it from imposing a minimum wage, App. 282a, or from interfering in the excommunication of a member claiming workers’ com-

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<sup>6</sup> See Dep’t of Labor & Indus., <http://erd.dli.mt.gov/workers-comp-regulations/montana-contractor/independent-contractor-central-unit/independent-contractor-list.html> (submit blank search form; search for Certificate # “%”; go to last page).

pensation. BIO 25. Nevertheless, it claims that mandating workers' compensation coverage is different, because it is "a classic labor regulation" that applies when Hutterites are "paid by 'nonmembers'" and is "generally applicable to all competitors." BIO 23.

But the law in *Hosanna-Tabor*—the ADA—is also "a classic labor regulation"; it also applied to a school receiving payment from "nonmembers"; and it also applied "to all competitors." If the state can regulate the relationship between a church and its members merely because the church is "paid by 'nonmembers,'" then nothing is an internal church decision.

Next, Montana claims that applying *Hosanna-Tabor* would make the Hutterites "a law unto [themselves]," able to ignore "general health and safety laws." BIO 22-23. But the Hutterites have been heavily regulated by these laws for decades, without objection. Pet. 8; App. 26a-27a. They object to this particular law only because it interferes with their "internal relationship[s]"—including 500-year-old rules governing how the Colony and its members share property—which is not true of general health and safety laws. App. 49a.

Alternatively, the State claims that the burden on internal governance is "exaggerated," BIO 23, because the Hutterites can simply decline to file claims (BIO 24); because workers' compensation is no different from their existing health insurance (BIO 25); and because they can excommunicate any member who files a claim (BIO 26-26). Were this true, the law would serve no purpose; it would be "the very definition of illusory coverage that 'defies logic.'" App. 50a.

But it is not true. Under the workers' compensation law, colonies must set aside funds for compensat-

ing injured workers. Mont. Code Ann. §§ 39-71-2101 to -2115. Unlike the Hutterite Medical Trust, these funds are not shared equally by all members; they are available only to “covered” members performing certain types of work. *Id.* § 39-71-407. Nor are the funds limited to medical expenses; they must also cover lost “wages.” *Id.* § 39-71-123. Access to the funds is a vested, individual right that a member or his successor-in-interest holds against the colony. *Id.* § 39-71-721(1)(a). And it is a right that routinely produces legal disputes that “must be brought before [the State].” *Id.* § 39-71-2401. All of this flatly contradicts Hutterite vows to abandon all claims of individual right, to hold all property in common, and to relinquish all claims against the colony.

Finally, Montana claims that it has an “important interest” in protecting “*former* Hutterite members.” BIO 26. But the Hutterites have been exempt for 96 years, and no member, or former member, has ever been injured without receiving comprehensive care. Beyond that, colonies frequently provide food, housing, and medical care to former members, even to old age. And Montana does not pursue this supposed interest with respect to thousands of non-Hutterite workers who are exempt—even when they are injured and lack access to workers’ compensation *or* a generous medical trust.

2. Montana also argues that this case is “controlled by *Alamo*, not *Hosanna-Tabor*,” because the Hutterites engage in “‘ordinary’ commercial businesses” and “work[] ‘in expectation of compensation.’” BIO 28-29. But *Alamo* rested on a finding that the members were “employees” under federal law, who worked in expectation of “wages.” 471 U.S. 290, 301 (1985). Members were “‘fined’ heavily for poor job per-

formance, worked on a ‘commission’ basis, and were prohibited from obtaining food from the cafeteria if they were absent from work.” *Id.* at 301 n.22.

Here, by contrast, Montana formally determined that Hutterite members are *not* “employees” and do *not* work in expectation of “wages.” App. 4a. And that determination is obviously true: No member is ever fined for poor performance; the same food, shelter, and medical care are provided to every member regardless of work. The federal Department of Labor also interacts with the Hutterites and has never suggested that they must pay minimum wage. And Montana has admitted that forcing the Hutterites to pay wages would violate *Hosanna-Tabor* (App. 282a)—a tacit admission that *Alamo* is inapplicable.

3. Finally, Montana simply ignores the many decisions that have rejected compensation claims between religious orders and their members (Pet. 26-27), rejected interference with rules governing members (Pet. 28), and rejected the application of workers’ compensation to religious orders (Pet. 29). Nor does it dispute that states across the country already exempt religious orders like the Hutterites from their workers’ compensation laws, Michigan *Amicus* Br. 7-15, and that Hutterites are functionally indistinguishable from monasteries, Belmont Abbey *Amicus* Br. 4. In short, the State offers no principled basis for distinguishing this case from one in which a monastery is compelled to pay wages to its members—a case it admits is controlled by *Hosanna-Tabor*. App. 282a.

## CONCLUSION

The petition for a writ of certiorari should be granted.



Respectfully submitted.

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**APPENDIX A**

**LEHRERLEUT COLONIES**

2010 Average Revenues and Expenses per Colony

36 Colonies

	<u>2010</u>
<b>REVENUES</b>	
Cattle	225,886.36
Hogs	1,164,141.09
Sheep/Wool	41,199.77
Grain	1,438,478.30
Eggs	236,243.30
Dairy	464,873.49
Poultry	56,631.12
Pasture Rent	3,387.80
Produce	50,687.19
Hay	20,110.17
Investment Income	(3,086.78)
Gov't Programs	212,480.55
Custom Work	84,935.20
Fed Gas Tax Ref	4,279.00
State Gas Tax Ref	5,062.37
Oil & Gas Lease/Royalty	13,806.45
Sundry Income	127,969.92
Crop Ins Proceeds	110,414.57
<u>Pers Consumption</u>	<u>15,868.51</u>
Total Revenues	4,273,368.40
 <b>PERSONAL EXPENSES</b>	
Colony Food	87,783.08
Colony Clothing/Dry Goods	32,617.68
Colony Dr. Med	326,402.65
Colony Misc	39,907.95

2a

Colony Income Tax	5,945.81
Colony Utilities	14,432.17
Depreciation	51,569.69
Person Exp Reimb	(2,667.34)
<u>Non-Deductible</u>	<u>743.60</u>
Total Personal Expenses	556,735.27

FARM EXPENSES

Repairs	270,285.77
Supplies	75,692.90
Fuel	227,838.40
Utilities	178,533.24
Travel	4,181.01
Feed	1,061,163.07
Veterinary	87,764.29
Freight & Truck	9,910.49
Taxes & License	93,459.74
Mt Corp License	(3,373.58)
Lease & Rent	37,023.58
Insurance	156,539.80
Legal & Acct'g	22,849.51
Government Program Expense	0.00
Poultry	20,271.68
Chemical, Spray & Fertilizer	550,546.30
Seed	65,814.51
Contract Services	39,023.87
Interest Paid	76,611.99
Dues & Pubs	764.41
Sundry Expense	17,775.20
<u>Depreciation</u>	<u>550,996.03</u>
Total Farm Expenses	3,543,672.22

Net Income (Loss) \$172,960.91