APPENDIX

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF MONTANA

[Filed December 31, 2012]

DA 11-0572
2012 MT 320

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

Petitioners and Appellees,

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,

Respondent and Appellant.

APPEAL FROM:

District Court of the Ninth Judicial District,
In and For the County of Glacier,
Cause No. DV 10-4
Honorable Laurie McKinnon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Steve Bullock, Montana Attorney General; J. Stuart Segrest (argued), Assistant Attorney General, Helena, Montana

For Appellees:

Ron A. Nelson (argued); Michael P. Talia; Church, Harris, Johnson & Williams, P.C., Great Falls, Montana

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Argued: April 25, 2012

Submitted: November 28, 2012

Decided: December 31, 2012

Filed: _____

Clerk

Justice Brian Morris delivered the Opinion of the Court.

¶1 Appellant Montana Department of Labor and Industry (the Department) appeals from the order of the Ninth Judicial District Court, Glacier County, that granted summary judgment to Appellees Big Sky Colony, Inc., and Daniel E. Wipf (collectively Colony). The District Court determined that the requirement to provide workers' compensation coverage for the Colony's members engaged in certain commercial activities contained in House Bill 119 (2009 Mont. Laws, ch. 112 § 30) (HB 119) violated the Colony's rights under the Free Exercise Clause and the Establishment Clause of the First Amendment to the U.S Constitution, and also violated the Colony's right to equal protection of the laws under the U.S. Constitution and the Montana Constitution. We reverse.

¶2 We address the following issues on appeal:

¶3 *1. Whether the provisions in HB 119 that incorporate the Colony into the definition of "employer" and the Colony's members into the definition of "employee" under the Workers' Compensation Act violate the Free Exercise Clause.*

¶4 *2. Whether the provisions in HB 119 that incorporate the Colony into the definition of "employer" and*

the Colony's members into the definition of "employee" under the Workers' Compensation Act violate the Establishment Clause.

¶5 *3. Whether the provisions in HB 119 that incorporate the Colony into the definition of "employer" and the Colony's members into the definition of "employee" under the Workers' Compensation Act violate the Colony's right to equal protection of the laws.*

FACTUAL AND PROCEDURAL BACKGROUND

¶6 The Hutterite Brethren Church originally formed in the 16th century as part of the Anabaptist movement during the Protestant Reformation in Europe. Anabaptists rejected infant baptism as "unbiblical" and instead renewed the practice of adult baptism. Anabaptists live a life of pacifism. Jacob Hutter and his followers eventually broke away from other Anabaptists over a dispute regarding communal living.

¶7 Jacob Hutter suffered a violent end as he was burned at the stake in a public square in Innsbruck, Austria, in 1536. Austro-Hungarian authorities held Hutter in freezing water and then placed him in a hot room. Authorities further tortured Hutter by pouring brandy on his wounds before burning him to death.

¶8 Hutterite believers moved across Europe for the next several centuries in search of a safe place in which to practice their faith and live their communal life. This wandering eventually brought the Hutterites to North America in the 19th century in search of religious freedom. Hutterites continue to practice their faith and live a communal lifestyle in colonies in Minnesota, North Dakota, South Dakota, Montana, Washington, and parts of Canada.

¶9 The Colony, a signatory to the Hutterian Brethren Church Constitution, organizes itself as a religious corporation under Montana law. The Colony's Articles of Incorporation provide that it was formed for the purpose of operating "a Hutterische Church Brotherhood Community." All members of the Colony must belong to the Hutterische Church Society and all members agree to "live a communal life and follow the teaching and tenets of the Hutterische Church Society." Daniel Wipf serves as the Colony's first minister and corporate president.

¶10 The Department initially determined that the Workers' Compensation Act did not apply to the Colony or its members due to the fact that the Colony did not pay "wages" to its members. The Department based this determination on the fact that the Colony did not fall within the definition of "employer" set forth at § 39-71-117, MCA, and that the Colony's members did not fall within the definition of "employee" set forth at § 39-71-118, MCA. The 2009 Montana legislature enacted HB 119.

¶11 HB 119 worked a laundry list of changes to the Workers' Compensation Act, including revised claims handling practices (§ 39-71-107, MCA), and revised accident reporting requirements for employers (§ 39-71-307, MCA). Pertinent to our analysis, Section 6 amended the definition of "employer" to include:

> 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.

Section 39-71-117(1)(d), MCA. Section 7 of HB 119 amended the definition of "employee" to include:

> 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).

Section 39-71-118(1)(i), MCA.

¶12 The Colony brought an action against the Department in 2010. The Colony alleged that Sections 6 and 7 of HB 119 impermissibly swept the Colony and its members within the definition of "employer" and "employee" in the Workers' Compensation Act. The Colony and the Department agreed that the inclusion of the Colony within the definition of "employer" and the Colony's members within the definition of "employee" would require the Colony to provide workers' compensation coverage for its members engaged in commercial activities. The Colony alleged that this requirement to provide workers' compensation coverage violated the Free Exercise Clause, the Establishment Clause, and the Colony's right to equal protection of the law.

¶13 The parties filed cross-motions for summary judgment. The District Court first addressed the Colony's Free Exercise claim. The court determined that Sections 6 and 7 were not neutral as the burdens posed "fall only on the Hutterite religion." The court further determined that Sections 6 and 7 were not generally applicable as the bill "unquestionably targets only the Hutterite religious practice of communal living." The two determinations prompted the court to apply strict scrutiny. The court's strict scrutiny analysis led it to reject the Department's claim of

any compelling state interest being served by Sections 6 and 7.

¶14 With respect to the Colony's Establishment Clause claim, the court purported to apply the test from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971). Sections 6 and 7 foundered on every factor of the *Lemon* Test. The court concluded that Sections 6 and 7 impermissibly "targeted a group defined by their religion." The primary effect of this impermissible targeting, in turn, "would be to inhibit the Colony in the practice of their religion." Finally, the court concluded that excessive entanglement with the State would ensue as it "appears evident that a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that only particular areas of Hutterite activities are scrutinized."

¶15 The court also determined that Sections 6 and 7 violated the Colony's right to equal protection of the laws. These provisions, according to the court, specifically identify "religious organizations" and target a particular religious organization. The separate classification created by Sections 6 and 7 "treats Hutterites differently from other religious organizations and further targets religious organizations generally." This classification, according to the District Court, failed to satisfy even the rational basis standard that applies to constitutional challenges to workers' compensation laws. The Department appeals.

STANDARD OF REVIEW

¶16 This Court exercises plenary review of constitutional issues. *DeVoe v. City of Missoula*, 2012 MT 72, ¶ 12, 364 Mont. 375, 274 P.2d 752. We review for correctness a district court's decisions on constitu-

tional issues. *De Voe*, ¶ 12. Statutes enjoy a presumption of constitutionality. The party challenging the constitutionality of a statute bears the burden of proof. *DeVoe*, ¶ 12.

DISCUSSION

¶17 *Issue I. Whether the provisions in HB 119 that incorporate the Colony into the definition of "employer" and the Colony's members into the definition of "employee" under the Workers' Compensation Act violate the Free Exercise Clause*.

¶18 The District Court determined that the practice of the Hutterite faith demands that its members engage in commercial activities with nonmembers for remuneration. This determination prompted the District Court to analyze the statute based on the strict scrutiny standard applied in the U.S. Supreme Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217 (1993). The Court in *Lukumi Babalu* struck down a group of municipal ordinances that banned animal sacrifice.

¶19 The Santeria church intended to construct a church in the City of Hialeah. Animal sacrifice represents one of the principal forms of devotion of the Santeria church. Church members perform animal sacrifices "at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during annual celebrations." *Lukumi Babalu*, 508 U.S. at 524, 113 S. Ct. at 2222. The City of Hialeah enacted four ordinances immediately after the Santeria church announced its plans to construct a church there.

¶20 The Court recognized that the ordinances, though seemingly neutral on their faces, effectively

served to ban animal sacrifices undertaken for religious reasons. The Court likened the religious discrimination effect of the ordinances to an impermissible state law that disqualified members of the clergy from holding certain public offices in *McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322 (1978). *Lukumi Babalu*, 508 U.S. at 532, 113 S. Ct. at 2226. The Court similarly considered the effect of the ordinances in light of the unconstitutional application of a municipal ordinance in *Fowler v. Rhode Island*, 345 U.S. 67, 73 S. Ct. 526 (1953). *Lukumi Babalu*, 508 U.S. at 532, 113 S. Ct. at2226. There the city had interpreted a municipal ordinance to prohibit preaching in a public park by a Jehovah's Witness, but to allow preaching during the course of a Catholic Mass or a Protestant church service. *Lukumi Babalu*, 508 U.S. at 532, 113 S. Ct. at 2226, citing *Fowler*, 345 U.S. at 69-70, 73 S. Ct. at 527. The Court in *Lukumi Babalu* concluded that the religious exercise of the Santeria church represented "the only conduct" subject to the prohibition on animal sacrifice. *Lukumi Babalu*, 508 U.S. at 535, 113 S. Ct. at 2228.

¶21 The requirement that a religious corporation provide workers' compensation coverage for its members differs markedly from the outright ban of an activity central to the Santeria faith. Unlike the prohibitions in *Lukumi Babalu* and *McDaniel*, the workers' compensation requirement does not prohibit the Colony members from engaging in the commercial activity. HB 119 regulates the Colony's engagement in commercial activities in the same manner that the workers' compensation system regulates the commercial activities of other employers in Montana. The Colony, like all other employers in Montana, simply will make less money on these commercial endeavors once it pays the workers' compensation premiums.

And unlike the ordinance in *Fowler*, the workers' compensation requirement does not place the Colony members in a discriminatory position compared to other religious groups who might choose to engage in similar activity. These distinctions lead us to reject the strict scrutiny analysis from *Lukumi Babalu* as the appropriate lens through which to analyze the Colony's claim.

¶22 We instead apply the standard used by the Court in *Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878, 110 S. Ct. 1595, 1599 (1990). The workers' compensation requirement must be facially neutral and serve a secular purpose in order to survive a Free Exercise challenge. *Smith*, 494 U.S. at 878, 110 S. Ct. at 1599. The requirement also must impose only an incidental burden on religious conduct as opposed to a prohibition on religious conduct. *Smith*, 494 U.S. at 878, 110 S. Ct. at 1599.

Facially Neutral and Secular Purpose.

¶23 The District Court concluded that HB 119 "unquestionably targets only the Hutterite religious practice of communal living." This conclusion ignores the fact that the workers' compensation requirement in Montana applies generally to multiple types of entities. *See* § 39-71-117, MCA. The legislature did not conceive of the workers' compensation system as a means to shackle the religious practices of Colony members. HB 119 simply adds to the scope of the workers' compensation system religious corporations that engage in commercial activities with nonmembers for remuneration through its expansion of the definition of "employer" contained in § 39-71-117, MCA.

¶24 No doubt exists that the workers' compensation requirement would apply if the Colony employed its members to work for wages on these commercial activities. Indeed, in *St. John's Lutheran Church v. State Comp. Ins. Fund*, 252 Mont. 516, 524, 830 P.2d 1271, 1277 (1992), this Court rejected a Free Exercise challenge to the requirement that the church provide workers' compensation coverage to its pastor on the basis that the provision of workers' compensation represents "an overriding governmental interest." No doubt exists that the workers' compensation requirement would apply if the Colony opted to establish separate commercial entities to perform the type of work at issue here. *See Ridley Park Methodist Church v. Zoning Hearing Board*, 920 A.2d 953, 960 (Pa. 2007) (denying zoning variance to operate a day-care on church site did not impinge on religious activities of church as operation of the daycare "is not a fundamental religious activity of a church").

¶25 The Dissent suggests that HB 119 would not capture the activities of the other religious employers, in part, because they do not engage in the types of economic activities enumerated by HB 119. Dissent,1 88. HB 119 did not need to capture these other religious employers, however, to incorporate them into the workers' compensation system. Section 39-71-117(1)(a), MCA, already captures other religious employers who engage in commercial activities. Subsection (a) includes within the definition of "employer" "all public corporations and quasi-public corporations," religious or otherwise. Subsection (a) further includes within the definition of "employer" "each firm, voluntary association, limited liability company, limited liability partnership, and private corporation," religious or otherwise. Finally, subsection (c) defines employer to include "any non-profit

association, limited liability company, limited liability partnership, or corporation or other entity," religious or otherwise, that receives federal, state, or local government funds to be used for community service programs.

¶26 The Department of Labor and Industry previously did not consider the Colony subject to the workers' compensation system due to the fact that the Colony did not pay "wages" to its members as part of its communal living system. The Colony nevertheless engaged in commercial activities. The Colony instead provides food, shelter, clothing, and medical care to its members who engage in these commercial activities. *See Stahl v. United States*, 626 F.3d 520, 521 (9th Cir. 2010). HB 119 clarified that religious corporations, organizations, or trusts that engage in specified commercial activities, who do not pay "wages" to their members for labor on these commercial activities, but who receive remuneration from nonmembers, qualify as "employers" for purposes of the workers' compensation system. Section 39-71-117(1)(d), MCA. 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.

Incidental Burden or Prohibition on Religious Conduct.

¶27 The District Court pronounced that the communal lifestyle represents the Hutterites' "most distinguishing feature." This communal lifestyle merges religious exercise and labor as a member voluntarily contributes all of his property and labor to the Colony "as an expression of faith and worship." This attribute led the District Court to determine that applica-

tion of HB 119 to the Colony's commercial activities transformed a potentially valid regulation into an outright prohibition on religious conduct. Courts uniformly have rejected the notion that a party's religious motivation for undertaking an act can transform a generally applicable regulation into a prohibition on religious conduct. *Smith*, 494 U.S. at 878, 110 S. Ct. at 1600. Other courts have recognized that this logic, taken to its extreme, would subsume every facet of a religious organization into a religious activity.

¶28 The Court in *Smith* dismissed the notion that the "religious motivation" for using peyote placed the two employees beyond the reach of a criminal law not directed specifically at their religious practice. *Smith*, 494 U.S. at 878, 110 S. Ct. at 1600. Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both were members. The employment division denied their claims for unemployment due to the fact that they had been discharged for work-related "misconduct." *Smith*, 494 U.S. at 874, 110 S. Ct. at 1598. The two brought a Free Exercise challenge to the division's denial.

¶29 The Court recognized, similar to the Colony's claim, that the exercise of religion often involves not only belief, "but the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877, 110 S. Ct. at 1599. These acts include "assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Smith*, 494 U.S. at 877, 110 S. Ct. at 1599. The

Court noted, in an obvious foreshadowing of its decision in *Lukumi Babalu*, that it likely would be unconstitutional if a state attempted to ban such acts or abstentions only when a person engages in them for religious reasons. *Smith*, 494 U.S. at 877-78, 110 S. Ct. at 1599.

¶30 The Court upheld the denial of benefits based largely upon the fact that peyote use had not been prohibited for religious reasons. The "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879, 110 S. Ct. at 1600, quoting *United States v. Lee*, 455 U.S. 252, 263 n.3, 102 S. Ct. 1051, 1058, n.3 (Stevens, J. concurring). HB 119 does not ban Colony members from engaging in commercial activities with non-members for remuneration. It simply regulates this activity by requiring the Colony to provide workers' compensation insurance for its members when they engage in these commercial activities. *See also Mount Elliott Cemetery Assoc. v. City of Troy*, 171 F.3d 398, 403 (6th Cir. 1999) (noting that the Free Exercise Clause does not prevent the government from regulating behavior associated with religious beliefs).

¶31 The U.S. Supreme Court in *Alamo Foundation v. Sec'ty of Labor*, 471 U.S. 290, 105 S. Ct. 1953 (1985), similarly determined that the imposition of generally applicable secular regulations on the volunteer labor of religious members who lived in a communal setting constituted an incidental burden on religion rather than a prohibition on religious conduct. The Alamo Foundation, a non-profit religious organization, challenged the application of the

minimum wage, overtime, and recordkeeping requirements of the Fair Labor Standards Act (FLSA). The Foundation argued that it staffed its numerous commercial operations, including service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy, entirely with volunteers, known as "associates." *Alamo Foundation*, 471 U.S. at 292, 105 S. Ct. at 1957.

¶32 These associates typically had been "drug addicts, derelicts, or criminals" before their conversion and rehabilitation by the Foundation. *Alamo Foundation*, 471 U.S. at 292, 105 S. Ct. at 1957. The associates received no cash salaries. The Foundation instead provided them with food, clothing, shelter, and other benefits. The Secretary of Labor initiated an action against the Foundation based upon the notion that the Foundation was "engaged in ordinary commercial activities in competition with other commercial businesses." *Alamo Foundation*, 471 U.S. at 293, 105 S. Ct. at 1957. As a result, the Secretary argued that the "economic reality" test of employment demonstrated that the associates qualified as employees.

¶33 The Court examined the Foundation's claim that the associates functioned as "volunteers" without any expectation of compensation. In fact, one associate testified convincingly that "no one ever expected any kind of compensation, and the thought is totally vexing to my soul." *Alamo Foundation*, 471 U.S. at 301, 105 S. Ct. at 1961. Despite the heart-felt protests of this associate and others, application of the "economic reality" test revealed that the associ-

ates expected, indeed relied upon, the benefits conferred by the Foundation in the form of food, clothing, and shelter. *Alamo Foundation*, 471 U.S. at 301, 105 S. Ct. at 1961.

¶34 The Court further rejected the Foundation's claim that application of the generally applicable minimum wage and recordkeeping requirements failed to rise to the level of a prohibition on religious conduct. The Court reasoned that the FLSA does not require the payment of "cash wages." *Alamo Foundation*, 471 U.S. at 303-04, 105 S. Ct. at 1963. The FLSA defines wages to include many of the same benefits that the associates received. With respect to the amount of the benefits, the Court noted that nothing in the FLSA would "prevent the associates from returning the [excess] amounts to the Foundation, provided that they do so voluntarily." *Alamo Foundation*, 471 U.S. at 304, 105 S. Ct. at 1963.

¶35 A church in *South Ridge Baptist Church v. Industrial Comm'n of Ohio*, 911 F.2d 1203 (6th Cir. 1990), filed a declaratory judgment action remarkably similar to the Colony's dispute here, in which it alleged that the compulsory payment of workers' compensation premiums on behalf of its employees was "sinful." The court recognized that the generally applicable requirement of workers' compensation coverage imposed some incidental burden on the church's free exercise of its religious beliefs. The court held, however, that "Ohio's interest in the solvency of the workers' compensation fund" outweighed any incidental burden imposed on the church. The court premised this conclusion on the state's fundamental police power to safeguard the welfare of its citizens. *South Ridge Baptist Church*, 911 F.2d at 1208. *See also United States v. Indianap-*

olis Baptist Temple, 224 F.3d 627 (7th Cir. 2000) (rejecting church's Free Exercise challenge to a requirement that it pay unemployment tax for its employees).

¶36 The Court applied a similar analysis to mandatory payment of a generally applicable sales and use tax in *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 110 S. Ct. 688 (1990). The constitution and bylaws of Jimmy Swaggart Ministries provide that it "is called for the purpose of establishing and maintaining an evangelistic outreach for the worship of Almighty God." *Jimmy Swaggart Ministries*, 493 U.S. at 381, 110 S. Ct. at 691. Jimmy Swaggart Ministries sold merchandise during 23 crusades in California during the period of 1974 through 1981. This merchandise contained specific religious content – Bibles, Bible study materials, printed sermons and collections of sermons, audiocassette tapes of sermons, religious books and pamphlets, and religious music in the form of songbooks, tapes, and records. *Jimmy Swaggart Ministries*, 493 U.S. at 383, 110 S. Ct. at 692.

¶37 The Court analyzed first whether the government "has placed a substantial burden on the observation of a central religious belief or practice." *Jimmy Swaggart Ministries*, 493 U.S. at 383, 110 S. Ct. at 693 (emphasis added). The Court rejected the claim that the sales and use tax constituted a tax "on the right to disseminate religious information, ideas, or beliefs." The Court instead characterized the sales and use tax as a tax "on the privilege of making retail sales of tangible personal property" in California. *Jimmy Swaggart Ministries*, 493 U.S. at 389, 110 S. Ct. at 696. California treated the sale of a Bible by a religious organization in the same manner that it

treats the sale of a Bible by a bookstore: both would be subject to the tax. *See Knights of Columbus v. Town of Lexington*, 272 F.3d 25, 35 (1st Cir. 2001) (content-neutral ban on unattended structures on historic Battle Green, site of first battle of Revolutionary War, that eliminated Christmas crèche survived Free Exercise challenge).

¶38 The Court further rejected the notion that the collection and payment of the tax would violate the sincere religious beliefs of Jimmy Swaggart Ministries. The reduction in income to Jimmy Swaggart Ministries represented the only burden imposed by the tax. The Court deemed "not constitutionally significant" this reduction in the amount of money available to Jimmy Swaggart Ministries to spend on religious activities caused by the imposition of this generally applicable tax. *Jimmy Swaggart Ministries*, 493 U.S. at 391, 110 S. Ct. at 696; *see also Employment Division v. Rogue Valley Youth for Christ*, 770 P.2d 588 (Ore. 1989) (applying unemployment compensation taxation scheme to religious organizations did not offend Free Exercise Clause).

¶39 The Court in *Jimmy Swaggart Ministries* referred repeatedly to a "generally" applicable tax. *E.g.*, *Jimmy Swaggart Ministries*, 493 U.S. at 395, 110 S. Ct. 698. The Court did not require a tax to apply universally in order for it to be considered neutral toward religious entities. *See Indianapolis Baptist Temple*, 224 F.2d at 629 (describing federal unemployment tax laws as laws of "general" application). In the present case, the District Court rejected the notion that Sections 6 and 7 were generally applicable laws based on its determination that the "object of the legislation was remote from the concerns and purpose underlying the Workers' Compensation Act."

The District Court instead viewed HB 119 as "an attempt to 'tax' the Hutterites for a religious practice."

¶40 The Court in *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051 (1982), addressed a free exercise challenge to the mandatory participation of an Amish employer in the social security system. The Court noted that Congress had sought to accommodate, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system. *Lee*, 455 U.S. at 260, 102 S. Ct. at 1057. The Court cited the exemptions on religious grounds for self-employed Amish as an example of the efforts by Congress to accommodate religious beliefs. *Lee*, 455 U.S. at 260, 102 S. Ct. at 1057. The Court further recognized, however, that when "followers of a particular [religious] sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261, 102 S. Ct. at 1057.

¶41 The legislature's regulation of the activities of Colony members would violate the right of members to exercise freely their religion only when the regulation impermissibly singles out "some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi Babalu*, 508 U.S. at 532, 113 S. Ct. at 2226. The workers' compensation system in Montana generally applies to all employers engaged in commercial activities. Section 39-71-401, MCA. The inclusion of religious organizations that engage voluntarily in commercial activities within the workers' compensation system

does not single out religious beliefs. *Lee*, 455 U.S. at 261, 102 S. Ct. at 1057. And neither does HB 119's inclusion of religious organizations within the workers' compensation system regulate or prohibit any conduct "because it is undertaken for religious reasons." *Lukumi Babalu*, 508 U.S. at 532, 113 S. Ct. at 2226.

¶42 Courts routinely have rejected Free Exercise challenges to compelled participation by religious organizations in a wide variety of social welfare programs. These programs range from a similar workers' compensation system to the one at issue here, *South Baptist Temple*, to social security, *Lee*, to unemployment tax systems, *Indianapolis Baptist Temple* and *Valley Youth for Christ*, to federal minimum wage and overtime and recordkeeping requirements, *Alamo Foundation*, to state sales and use taxes, *Jimmy Swaggart Ministries*. Each of these religious organizations presented sincere and heartfelt beliefs that its participation in the governmental program violated its religious beliefs. The courts rejected each claim. We, too, reject the Colony's Free Exercise challenge to its participation in Montana's workers' compensation system for Colony members engaged in commercial activities with nonmembers for remuneration. The decision of the legislature to include in the definition of "employer" religious corporations that voluntarily engage in commercial activities with nonmembers for remuneration fails to establish evidence of discrimination against religious organizations. *Cf. Smith*, 494 U.S. at 878, 110 S. Ct. at 1599-1600.

¶43 *Issue 2. Whether the provisions in HB 119 that incorporate the Colony into the definition of "employer" and the Colony's members into the defini-*

tion of "employee" under the Workers' Compensation Act violate the Establishment Clause.

¶44 *Lemon* provides the test to analyze government conduct under the Establishment Clause of the First Amendment. The government conduct at issue must (1) have a secular purpose, (2) not have as its principal or primary effect inhibiting religion, and (3) not foster excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13, 91 S. Ct. at 2111. Courts most commonly apply Lemon to situations in which the government allegedly has given preference to a religion. *Roemer v. Board of Public Works*, 426 U.S. 736, 96 S. Ct. 2337 (1976). The *Lemon* test likewise accommodates evaluation of a claim brought under the theory of hostility to religion. *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) (applying *Lemon* to a claim that the City of Los Angeles's investigation of a police officer was prompted by hostility to the officer's religious beliefs).

¶45 The purpose prong of *Lemon* asks whether the government's actual purpose "is to endorse or disapprove of religion." *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993). As a practical matter, however, a government practice will stumble on the purpose prong "only if it is motivated wholly by an impermissible purpose." *Bowen v. Kendrick*, 487 U.S. 589, 602, 108 S. Ct. 2562, 2570 (1988). We cannot agree with the District Court that an impermissible purpose wholly motivated the legislature's inclusion of Sections 6 and 7 in HB 119.

¶46 The Court in *Wisconsin v. Yoder*, 406 U.S. 205, 220, 92 S. Ct. 1526, 1535 (1972), *abrogated in part*, *Smith*, 494 U.S. 872, 110 S. Ct. 1595, recognized "even when religiously based, [one's activities] are often subject to regulation by the States in the exer-

cise of their undoubted power to promote the health, safety, and general welfare." The workers' compensation system in Montana undoubtedly promotes the health, safety, and welfare of workers. *Walters v. Flathead Concrete Prods., Inc*., 2011 MT 45, ¶ 28, 359 Mont. 346, 249 P.3d 913. The decision by the legislature to ensure coverage under the workers' compensation system to members of religious organizations engaged in commercial activities with nonmembers for remuneration furthers this secular purpose.

¶47 The District Court further determined the primary effect of including the Colony's members in the workers' compensation system "would be to inhibit the Colony in the practice of their religion." We evaluate this question from the perspective of a "reasonable observer." *Kreisner*, 1 F.3d at 784. In this regard, we must keep in mind that the Establishment Clause does not demand "that we elevate a group of persons to a privileged status, above all [others], because of their religious beliefs." *Hofer v. DPHHS*, 2005 MT 302, ¶ 42, 329 Mont. 368, 124 P.3d 1098. We must consider instead whether it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 592-93, 109 S. Ct. 3086, 3100-01 (1989).

¶48 The legislature has chosen to include religious corporations that engage in commercial activities with nonmembers for remuneration in the workers' compensation system. The workers' compensation system applies to many other types of corporations and other entities organized in various fashions that engage in commercial activities. Section 39-71-117(a), (b), and (c), MCA. No reasonable observer would con-

strue the legislature's explicit inclusion in the workers' compensation system of religious corporations that engage in commercial activities with nonmembers for remuneration, along with various other types of corporations and entities, as sending a message of disapproval of religion. *Cf. County of Allegheny*, 492 U.S. at 592-93, 109 S. Ct. at 3100-01.

¶49 The third prong of the Lemon test requires the court to examine whether the government action results in "an excessive government entanglement with religion." *Lemon*, 403 U.S. at 613, 91 S. Ct. at 2111. The entanglement prong "seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs." *Cammack v. Waihee*, 932 F.2d 765, 780 (9th Cir. 1991). Administrative entanglement typically involves comprehensive, discriminating, and continuing state surveillance of religion. *Lemon*, 403 U.S. at 619-22, 91 S. Ct. at 2114-15.

¶50 The Supreme Court usually has found excessive entanglement in situations that involve either state aid to groups affiliated with a religious institution, such as parochial schools, *see, e.g.*, *Aguilar; Roemer; Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472, 93 S. Ct. 2814 (1973); *Lemon*, or where religious employees and public employees must work closely together, *Aguilar*, 473 U.S. at 412-14, 105 S. Ct. at 3237-39 (program required on-site monitoring of sectarian schools by public authorities and coordinated planning by public and sectarian figures). The Colony's claim presents none of these situations.

¶51 Courts look first to the character and purpose of the religious institution affected by the government action. *Lemon*, 403 U.S. at 615, 91 S. Ct. at

2112. Courts next assess the nature of the activity that the government mandates. *Lemon*, 403 U.S. at 615, 91 S. Ct. at 2112. And finally, courts evaluate the resulting relationship between the government and the religious institution. *Lemon*, 403 U.S. at 615, 91 S. Ct. at 2112. *See also Jimmy Swaggart Ministries*, 493 U.S. at 393, 110 S. Ct. at 697.

¶52 *The Alamo Foundation*, 471 U.S. at 303, 105 S. Ct. at 1962, presented a similar excessive entanglement claim. The Court recognized that the recordkeeping requirement imposed by the FLSA applied only to commercial activities undertaken for a "business purpose." The recordkeeping requirement would have no impact on the Foundation's "own evangelical activities or on individuals engaged in volunteer work." *Alamo Foundation*, 471 U.S. at 305, 105 S. Ct. at 1963.

¶53 The workers' compensation requirement here applies only to those religious corporations that receive "remuneration" from nonmembers for "agricultural production, manufacturing, or a construction project." Section 39-71-117(1)(d), MCA. Any extra bookkeeping or recordkeeping would apply only to the Colony's commercial activities undertaken for a "business purpose." *Cf. Alamo Foundation*, 471 U.S. at 305, 105 S. Ct. at 1963. No extra bookkeeping or recordkeeping would be required for labor conducted by Colony members for support of the Colony. The court's decision in *Stahl*, 626 F.3d 520, provides further persuasive reasoning.

¶54 There the president of the Stahl Hutterian Brethren sought a refund of a portion of his personal income taxes. The Stahl Hutterian Brethren is a nonprofit apostolic corporation that maintains a common treasury and pays no income tax. Members

instead pay personal income taxes on their pro rata share of the corporation's income. *Stahl*, 626 F.3d at 521. Members live a communal lifestyle similar to the Colony and engage mainly in agriculture. The corporation farms 30,000 acres of land and produces dairy products and a variety of crops that it sells to other businesses and at farmers markets. *Stahl*, 626 F.3d at 521.

¶55 The corporation members disavow individual personal property ownership, and, as a result, members receive no salaries from the corporation. The corporation maintains and uses all of its property for the benefit of its members. The corporation, in turn, provides for the members' personal needs, including food, shelter, clothing, and medical care. *Stahl*, 626 F.3d at 521.

¶56 The president brought an action to obtain an income tax refund on the basis that the corporate income level should have been reduced for tax purposes before his pro-rata share passed through to him. He argued that the costs of meals and medical expenses of the corporation's employees constituted ordinary and necessary business expenses. *Stahl*, 626 F.3d at 522. The district court determined that none of the corporation's members, including the president, qualified as employees for tax purposes. *Stahl*, 626 F.3d at 522.

¶57 The Ninth Circuit reversed. The court evaluated whether the corporation's members qualified as employees for tax purposes under federal law. This analysis led the court to determine that "the individual Hutterites" who work for the corporation should be seen "as common law employees" to the extent that these individual members perform the work of the corporation. *Stahl*, 626 F.3d at 527. The court

remanded for consideration of the president's claims for deductions.

¶58 On remand, the district court granted the president's claim for deduction. With respect to food, the court reasoned that the corporation's dairy farm operation required round the clock supervision. These employees must be fed. *Stahl v. United States*, 861 F. Supp. 2d 1226, 1231 (E.D. Wa. 2012). Likewise, the court concluded that the corporation had provided food and medical care to the president in return for his labor.

¶59 The court recognized that the corporation and its members had created a community that functions largely without wages. Employee compensation in a wageless community takes the form of housing, food, and medical care. The fact that the corporation and its members had chosen this wageless community for religious reasons proved "irrelevant" as long as the items that the corporation claims as compensation—food and medical care—truly function as compensation in the community. *Stahl*, 861 F. Supp. 2d at 1231. Similar reasoning applied to medical expenses incurred by the corporation to purchase a health plan for the president and the corporation's members and payment for any uninsured charges. *Stahl*, 861 F. Supp. 2d at 1232.

¶60 The Court in *Jimmy Swaggart Ministries* noted that the organization possessed a sophisticated accounting staff and had the ability to segregate retail sales and donations for purposes of obtaining a federal income tax exemption on these donations. Thus, Jimmy Swaggart Ministries easily could track the revenue generated by its retail sales. The Court further recognized that imposition of the tax involved a determination only of whether a sale had taken

place and required no determination of whether the materials sold were religious in nature. *Jimmy Swaggart Ministries*, 493 U.S. at 396,110 S. Ct. at 699. The fact that Jimmy Swaggart Ministries placed a price on its merchandise relieved California of the need to undertake any independent valuation of any religious items. *Jimmy Swaggart Ministries*, 493 U.S. at 396, 110 S. Ct. at 699; *see also Hofer*, ¶ 43 (concluding that an express trust exists between the Hutterite colony and its members and therefore the colony's resources are available to members when considering a member's eligibility for the Family-Related Medicaid Program).

¶61 The court in *South Ridge Baptist* similarly rejected an excessive entanglement claim. The burden imposed by the requirement that the church provide workers' compensation coverage for its employees differed little from the church's other involvements with the state. Ohio law required the church's payroll and wage expenditures to be open for inspection. These payroll reports are sent every six months to employers to be completed and returned. The church would be obligated to report job-related injuries or illnesses and report aggregate wages and the number of employees. None of this information delved into "the religious beliefs of the clergy or the congregation." *South Ridge Baptist*, 911 F.2d at 1210. Moreover, the church undoubtedly remains "subject to a variety of state public welfare regulations, from the zoning, building and fire codes applicable to its place of worship . . . to federal minimum wage and other labor standards governing [its] employment practices." *South Ridge Baptist*, 911 F.2d at 1211.

¶62 The Dissent laments that HB 119 creates a substantial intrusion into the religious practices of

the Colony and its members. Dissent, ¶ 99. Neither the Dissent, nor the Colony for that matter, claim that other state regulations of the Colony's commercial activities pose substantial intrusions into the religious practices of the Colony and its members. For example, Title 81 of the Montana Code Annotated regulates commercial agricultural producers of poultry, dairy, and other products. Title 81 further authorizes the Department of Agriculture and county boards of health to promulgate health and safety regulations for commercial agricultural producers. These regulations necessarily require some entanglement between the State and producers of commercial agricultural products, including the Colony.

¶63 The information necessary for the Colony to comply with participation in the workers' compensation system would not delve into the religious beliefs of the Colony or its members. It further appears that the requirement to provide workers' compensation coverage for its members engaged in commercial activities poses no more burdensome recordkeeping requirement than those outlined in *Stahl*. The Colony presently maintains financial records based on its status as a religious corporation so that its members, similar to the religious corporation in *Stahl*, may file tax returns. Finally, as the Department asserts, the Colony retains the option to self-insure as a means to limit excessive entanglement. Section 39-71-2101, MCA. We cannot agree with the District Court's conclusion that "a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that only particular areas of Hutterite activity are scrutinized." The recordkeeping required to establish compliance with Montana's workers' compensation system constitutes a valid regulation of the Colony's commercial activities.

¶64 *Issue 3. Whether the provisions in HB 119 that incorporate the Colony into the definition of "employer" and the Colony's members into the definition of "employee" under the Workers' Compensation Act violate the Colony's right to equal protection of the laws*.

¶65 The District Court determined that the separate classification created by Sections 6 and 7 "treats Hutterites differently from other religious organizations and further targets religious organizations generally." A party who asserts an equal protection claim based on a workers' compensation statute must satisfy two separate criteria. *Wilkes v. Mont. State Fund*, 2008 MT 29, ¶ 12, 342 Mont. 292, 177 P.3d 483. The party first must demonstrate that the legislature has created a classification that treats differently two or more similarly situated groups. *Wilkes*, ¶ 12. Once the party has demonstrated a classification that treats groups differently, the party must demonstrate that the discriminatory classification rationally relates to no legitimate governmental purpose. *Wilkes*, ¶ 12.

¶66 The Colony claims that HB 119 singles out the Hutterites and treats them differently than other similarly situated groups. The Colony identifies two separate sets of "similarly situated groups." The Colony first argues that HB 119 treats the Colony differently than any other religious groups. The Colony further argues that HB 119 treats religious groups differently from non-religious groups.

¶67 The Colony argues that its commitment to communal living prevents a member from owning property. As a result, a Colony member who received any compensation for lost wages pursuant to a workers' compensation claim immediately would have to

forfeit the money to the Colony or face possible excommunication from the Colony. The Colony claims, however, that HB 119 somehow would prevent the Colony from proceeding to excommunicate a member who received a workers' compensation claim payment. The Colony further claims that no other religion bans ownership of property, and, therefore, HB 119 would affect only the Colony in this manner.

¶68 We first note that nothing prevents an injured Colony member from refraining to file a workers' compensation claim or returning any workers' compensation claim award to the Colony. *Cf. Alamo Foundation*, 471 U.S. at 304, 105 S. Ct. at 1963. More importantly, nothing in HB 119 or any other provision of the Workers' Compensation Act prevents the Colony from proceeding to excommunicate a member who receives compensation for lost wages and refuses to give the money to the Colony. HB 119 treats the Colony no differently than any religious groups that do not prevent ownership of property.

¶69 The Colony next argues that HB 119 creates a group of religious employers and a group of all other employers. HB 119 amended the definition of "employer" explicitly to include religious corporations, organizations, or trusts that engage in commercial activities with nonmembers for remuneration. The Colony claims that the exclusive focus in Section 6 of HB 119 on religious employers results in a system that treats religious employers differently than non-religious employers.

¶70 We look to a statute's plain language to interpret it. *Delaney & Co. v. City of Bozeman*, 2009 MT 441, ¶ 22, 354 Mont. 181, 222 P.3d 618. We must read a whole act together and where possible we must give full effect to all statutes involved. *Delaney*

& Co., ¶ 22. Accordingly, we look to the entirety of the Workers' Compensation Act, rather than to a single subsection, to determine whether the Workers' Compensation Act treats religious employers differently than non-religious employers.

¶71 Section 39-71-117, MCA, sets forth in mind-numbing detail the full definition of "employer" for purposes of the workers' compensation system. This extensive definition, including subsections (a), (b), and (c), all of which predated HB 119, applies generally to religious and non-religious entities alike. The definition of "employer" includes the state, counties, cities, public corporations, quasi-public corporations, private corporations, individual people, associations, limited liability companies, and nonprofit associations, as well as numerous other entities. Section 39-71-117(a), (b), and (c), MCA. HB 119 simply adds religious organizations to the types of entities that qualify as an "employer" for purposes of the workers' compensation system. HB 119 treats religious organizations no differently than any other employer under the workers' compensation system. A review of the complete list of entities that qualify as an "employer" for purposes of the workers' compensation system reveals that the Workers' Compensation Act creates no separate classification under HB 119 that singles out religious groups for different treatment.

¶72 The Colony's failure to establish that HB 119 creates "two separate similarly situated groups" that receive unequal treatment under the Workers' Compensation Act ends our inquiry. This failure to establish two separate groups relieves the Court of the need to evaluate whether the alleged disparate treatment rationally relates to any legitimate

governmental interest. *Bustell v. AIG Claims Serv.*, 2004 MT 362, ¶ 22, 324 Mont. 478, 105 P.3d 286.

CONCLUSION

¶73 We recognize that the issues in dispute present intractable problems that no court ever will resolve to the satisfaction of all parties. Justice O'Connor, in rejecting a challenge brought by Native Americans to enjoin a United States forest service road through sacred areas, summed up our dilemma:

> However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452, 108 S. Ct. 1319, 1327 (1988).

¶74 Reversed and remanded for entry of summary judgment in favor of the Department.

/S/ BRIAN MORRIS

We Concur:

/S/ MIKE McGRATH
/S/ MICHAEL E WHEAT
/S/ BETH BAKER

Justice James C. Nelson, dissenting.

¶75 I join Justice Rice's well-reasoned and compelling Dissent.

¶76 Although in today's society and politics the principle is honored more in the breach, this Country was founded on the seminal precept that there is a wall of separation between church and state. *See Donaldson v. State*, 2012 MT 288, ¶ 194, __ Mont. __ P.3d (Nelson, J., dissenting). To that end, the First Amendment and Article II, Section 5 of Montana's Constitution both contain clear, unambiguous, and unequivocal proscriptions: Congress and the State shall make *no* law respecting an establishment of religion, or prohibiting the free exercise thereof.

¶77 Yet here, as Justice Rice explains, in order to level some theoretical economic playing field and to pacify the complaints of one industry, the Legislature enacted a law targeting Hutterite colonies and preventing them from being able to practice and comport with important doctrines of their religion—a religion that defines and drives every aspect of Colony life.

¶78 Today's decision allows the State to do exactly what the Montana and United States Constitutions expressly prohibit. This Court's decision allows the government to interfere with the doctrinal belief systems of a religious institution and its members. Apparently, henceforth, "no law" prohibiting the free exercise of religion does not actually mean "no law" in Montana. Rather, it means no law, except to the extent that the law greases the squeaky wheel of a powerful industry.

¶79 I dissent.

/S/ JAMES C. NELSON

Justice Jim Rice, dissenting.

¶80 To reach its decision, the Court uses waves of generic statements that fail to account for the facts of this case, the arguments of the Colony, and the applicable legal tests. The Court makes no effort to determine whether the challenged legislation constitutes a religious gerrymander, even though courts "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Lukumi Babalu*, 508 U.S. at 534, 113 S. Ct. at 2227. The Court minimizes the Colony's claim to merely "sincere and heartfelt beliefs that its participation in the governmental program violated its religious beliefs," and cites to numerous cases that reject claims of that nature, while failing to acknowledge that this case is factually, and fundamentally, different. Opinion, ¶ 42. I believe the facts and law, when properly considered, demonstrate that the Legislature created a clear religious gerrymander applicable only to the Hutterites and that such action was not justified by a compelling state interest. I would affirm the District Court's holding that their right to free exercise of religion was violated.

¶81 A law affecting the constitutional guarantee of free exercise of religion is to be both facially neutral and generally applicable. *Lukumi Babalu*, 508 U.S. at 531-32, 113 S. Ct. at 2226 (citing *Smith*, 494 U.S. at 879-81, 110 S. Ct. at 1600-01). A law failing to satisfy the requirements of neutrality and general applicability "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi Babalu*, 508 U.S. at 531-32, 113 S. Ct. at 2226. A law is not neutral if the text of the law has a targeting effect or a discriminatory object as discerned from direct and

circumstantial evidence. *Lukumi Babalu*, 508 U.S. at 533-34, 113 S. Ct. at 2227. The Court in *Lukumi Babalu* stated:

> Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'

Lukumi Babalu, 508 U.S. at 534, 113 S. Ct. at 2227 (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696, 90 S. Ct. 1409, 1425 (1970) (Harlan, J., concurring)). In determining that the contested ordinances in *Lukumi Babalu* were not neutral, the Court reviewed the legislative record and history surrounding the enactment of the ordinances, stating, "the effect of a law in its real operation is strong evidence of its object." *Lukumi Babalu*, 508 U.S. at 535, 113 S. Ct. at 2228. The Court found that the four contested ordinances created an impermissible religious gerrymander because they "were drafted in tandem" to "target petitioners and their religious practices." *Lukumi Babalu*, 508 U.S. at 535, 113 S. Ct. at 2228.

¶82 To appreciate the Hutterites' arguments, it is first necessary to understand their unique religious principles. The Court offers generally that the Hutterite faith is one in which "all members agree to live a communal life and follow the teaching and tenets of the Hutterische Church Society," Opinion, ¶ 9, but fails to discuss the manner in which the Hutterites were targeted or articulate the critical

tenets which the legislation would require the Hutterites to violate in order to participate in the workers' compensation system.

¶83 To begin, the record establishes that a hallmark of the Hutterite religion is the communal lifestyle where religious exercise and labor are not divisible because [a]ll labor and support provided by members to the Colony is done for their own personal religious purpose without promise or expectation of compensation. The performance of labor and support for the Colony is an act of religious exercise." Hutterites eat meals, worship, work, and are educated entirely communally and they do not associate with "non-members." The Membership Declaration, to which every member of the Colony must subscribe, affirms each member's responsibility to relinquish current and future property rights to the Colony, and members are not permitted a wage or salary. In fact, the Hutterite faith prohibits the payment of wages for labor performed by its members. At oral argument, the State conceded that the wage replacement component of workers' compensation coverage would not be applicable to Colony members because, pursuant to their tenets of faith, they cannot receive wages.[1] Farming and agricultural production has been a part of the Hutterite lifestyle for hundreds of years and is specifically named in the Colony's

[1] The State also argued that Colony members could nonetheless receive medical benefits from the mandated coverage, but this would require the forbidden act of filing a legal claim, discussed further herein. As to medical care, the record reflects that "the colonies fund the medical care that their members need. Each individual Colony still provides full no-fault medical care for its members" and "[r]egardless of the reason for any member's illness or injury, the member is cared for."

Articles of Incorporation and the Hutterian Brethren Church Constitution as a central component of the Colony's livelihood. The Colony also participates in manufacturing and construction projects.

¶84 In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972), parents of Amish children challenged Wisconsin's law requiring all children to attend school until age 16, claiming that their beliefs required children to be educated within the Amish community after completion of eighth grade in order to limit exposure to worldly influences inconsistent with their religious beliefs. *Yoder*, 406 U.S. at 210-13, 92 S. Ct. at 1530-32. The Supreme Court held that Wisconsin's compulsory school attendance law unduly burdened the Free Exercise Clause by forcing Amish parents to send their children to public school after the eighth grade in violation of one of the core Amish religious beliefs. *Yoder*, 406 U.S. at 234-35, 92 S. Ct. at 1542. In its analysis, the Supreme Court stated that "we must be careful to determine whether the Amish religious faith and their mode of life, are . . . inseparable and interdependent." *Yoder*, 406 U.S. at 215, 92 S. Ct. at 1533. As in Yoder, the record here supports the determination that the communal way of life of the Colony is "one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Yoder*, 406 U.S. at 216, 92 S. Ct. at 1533. The command to live communally and without property or legal claims is fundamental to the Hutterite faith.

¶85 In addition to the communal lifestyle that requires renouncement of wages and the ownership of property, and critical to an understanding of the conflict presented by their inclusion into the Workers' Compensation Act, is the tenet that making a legal

claim is a violation of fundamental Hutterian doctrine. Daniel Wipfs affidavit states that "Christians shall not sue one another at law nor sit in judgment of one another. Hutterites cannot make claims against others for wrongs done to them." The Membership Declaration, which every member of the Colony must sign, states:

> I declare that my acceptance of membership and the terms and conditions of membership is a matter of my religious beliefs . . . Among those beliefs is the commandment to live at peace with fellow believers, to resolve disputes within the Church, and *not to seek redress before secular authorities whether related to secular or sectarian issues*.

(Emphasis added.) Wipfs affidavit explains that a member who does not convey his or her "ownership" of a legal claim to the Colony, like other property, would be subject to excommunication, or essentially termination from membership in the Colony. He states, "I do not know of any Hutterite member who has made any workers' compensation claim against a Hutterite colony in Montana or against the Uninsured Employers['] Fund."

¶86 HB 119's legislative history must be considered in order to understand the impact of the bill. The United States Supreme Court has looked both to the text and to the legislative history of a law to determine whether legislators intended to target religious practices, *Lukumi Babalu*, 508 U.S. at 533-34, 113 S. Ct. at 2227, although the Court fails to do so here. The Department proposed HB 119 to address complaints received "about Hutterite colonies competing with other Montana businesses, such as contractors, without having to provide workers' com-

pensation insurance." The only religious group named in the legislative debates surrounding HB 119 was the Hutterites, and both the House and the Senate specifically discussed the impact HB 119 would have on Hutterite colonies. Representative Hunter said, "[i]n particular, we are speaking of, in [Sections 6 and 7], about Hutterite colonies" when he introduced HB 119 in the House Committee and reiterated this concept to the Senate Committee. Mont. H. Comm. on Bus. & Labor, *Hearing on H. Bill 119*, 61st Legis., Reg. Sess. (Jan. 8, 2009); Mont. Sen. Comm. on Bus., Labor, & Econ. Affairs, *Hearing on H. Bill 119*, 61st Legis., Reg. Sess. (Mar. 5, 2009). Senator Stewart-Peregoy characterized HB 119 and the corresponding Legislative debate as "targeting" the Hutterites, stating, "if we're going to target a group, we should have just put Hutterite religious organizations and let's be done with it. . . . [W]e are targeting a group and I just wanted that for the record." Mont. Sen. Comm. on Bus., Labor, & Econ. Affairs, *Hearing on H. Bill 119*, 61st Legis., Reg. Sess. (Mar. 11, 2009). Additionally, Senator Balyeat acknowledged HB 119 was really "aimed" at the Hutterite religious colonies near Great Falls. Mont. Sen., *Floor Session on H Bill 119*, 61st Legis., Reg. Sess. (Mar. 16, 2009). The legislative record clearly shows that the objective intent of the legislators was none other than to target the Hutterites.

¶87 In response to this expressed legislative intention, the text of HB 119 was amended throughout the legislative process to focus more and more narrowly on the Hutterites. Language was inserted within Section 6's definition of employer to read "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." Section 39-71-117(1)(d), MCA (emphasis added). The language "agricultural production, manufacturing, or a construction project"—instead of *all* commercial activities—was inserted into HB 119 to incorporate only those specific business enterprises in which the Hutterites engaged. Here, the Court's tactic of ignoring the facts and over-generalizing HB 119 and the Act as a whole in order to give the appearance that the Act applies equally to all employers is well illustrated. *See* Opinion, ¶ 21 ("HB 119 regulates the Colony's engagement in commercial activities in the same manner that the workers' compensation system regulates the commercial activities of other employers in Montana."). The Court repeatedly states that HB 119 applies to all "commercial activities" and bases its analysis thereon. *See* Opinion ¶¶ 18, 21, 23, 24, 25, 26, 27, 30, 41, and 42. However, the text of HB 119 does not apply to "commercial activities" generally, nor does HB 119 use the term "commercial activities" at all. Rather, it employs the phrase "agricultural production, manufacturing, or a construction project"—only those economic activities that the Legislature knew the Hutterites to be engaged in.

¶88 Similarly, the Court makes repeated statements to the effect that all religious employers are treated the same as other employers. See Opinion, ¶ 71 ("HB 119 treats religious organizations no differently than any other employer under the workers' compensation system"; "the Workers' Compensation Act creates no separate classification under HB 119 that singles out religious groups for different treatment."). However, these statements are not supported by the text of HB 119. Religious employers

such as a Presbyterian Day Care, a Mormon Cleaning Service, or a Catholic Social Agency would not satisfy HIB 119's defmition of religious "employer" for multiple reasons, the first being that they are not engaged in the economic activities targeted by the bill—"agricultural production, manufacturing, or a construction project."[2,3]

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[2] These are examples of religious employers who would be exempt from participation under § 39-71-117(1)(d), MCA. However, it is possible that a social agency could come within the definition of employer under § 39-71-117(c), MCA, if it was "funded in whole or in part by federal, state, or local government funds."

[3] The Court responds that HB 119 did not need to capture these other religious employers because they and the Hutterites were already included under other statutory provisions. Opinion, ¶ 25. The Court then reasons that the revision to the statutory definition of "wages" to include the concept of "remuneration" was all that was necessary to bring the Hutterites into the workers' compensation system. Opinion, ¶ 26. The State has not made these assertions, and the Court cites neither to authority nor to the record to support them. They are not supported by the plain language of the other provisions, which makes no reference to religious employers. If religious employers were already completely encompassed by other provisions, it would have been unnecessary to create the new category of "religious organization" within the statutory definition of "employer," as HB 119 did. See § 39-71-117(1)(d), MCA. Likewise, it would have been unnecessary to create, within the statutory definition of "employee," the new category of a "member" of a religious organization "while performing services" for the religious organization. *See* § 39-71-118(1)(i), MCA. I note that the former statutory provision under which the religious employer in *St. John's Lutheran Church* was required to participate in workers' compensation was subsequently repealed. *See* Sec. 13, Ch. 448, L. 2005. Context matters, and I believe that consideration of context should include all of the text of HB 119, the Act as a whole, and the

¶89 The Court distinguishes cases that have struck down legislation for violating the free exercise right by reasoning that HB 119 "does not place the Colony members in a discriminatory position compared to other religious groups who might choose to engage in similar activity. These distinctions lead us to reject the strict scrutiny analysis . . . ." Opinion, ¶ 21. Again, this distinction—and the conclusion based thereon to reject strict scrutiny review—is likewise belied by the text of HB 119. The Legislature cleverly drafted Sections 6 and 7 to include only the Hutterites engaged in these economic activities and to exclude other religious groups. Under these provisions, an "employee" must be "a member" of the "religious corporation, religious organization, or religious trust while performing services" for the organization. Correspondingly, an "employer" is defined as a religious organization engaged in the targeted economic activities *only when* such activities are "conducted by its members." *See* Section 39-71-117(1)(d), MCA. As mentioned, all Hutterite labor is provided by members of their communal organization. The "performance of labor" is a religious exercise required of every member "to the extent of his or her ability" and is provided for the "personal religious purpose" of the members. Hutterites do not associate for these purposes with nonmembers, who provide no labor for the organization. By merely hiring employees who are not "members" of their organization, other religious organizations choosing to participate in the named economic activities could be exempted from the provisions of HB 119. The tenets of the Hutterite religion, however, do not permit this evasion, as their labor is

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legislative history, which reveal an effort of laser-like precision to capture only the Hutterites.

provided by members only. HB 119 incorporates religious organizations within workers' compensation only when "members" (§ 39-71-118(1)(i), MCA) of a religious organization provide labor and services to "nonmembers" (§ 39-71-117(1)(d), MCA)—a scheme which only applies to the religious structure of the Hutterites. There is no evidence in the record that any other religious organization would be incorporated into the workers' compensation system under these provisions.

¶90 The text reveals further targeting of the Hutterites. HB 119 created the new financial category of "remuneration," § 39-71-117(1)(d), MCA, and in other provisions drafted in tandem, revised § 39-71-123(5), MCA, to incorporate a method for calculating remuneration so that the Act would apply to the Hutterites, who receive no wages. No other religious organization is identified in the record as using a non-wage system. HB 119's application to the specified economic activities when "conducted by its members on or off the property" of the religious organization, § 39-71-117(1)(d), MCA, is a reference to the practice of the Hutterites living communally on their own property and providing services off their property.

¶91 Some of these provisions could be potentially innocuous methods of defining a religious entity for incorporation within the workers' compensation system as part of a broad inclusion of all religious organizations within the system. However, the Legislature did not broadly incorporate all religions. Rather, it enacted these provisions to define and target only the Hutterite religion for inclusion within the system. While the text of HB 119 is not facially discriminatory, its history and text reveal that it

nonetheless fails to be neutral and generally applicable. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi Babalu*, 508 U.S. at 534, 113 S. Ct. at 2227. The effect of HB 119 is to create a religious gerrymander that improperly singles out one religion. *Lukumi Babalu*, 508 U.S. at 535, 113 S. Ct. at 2228 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object."). The significance of a religious gerrymander under the proper legal analysis is that it must sustain strict scrutiny review. *Lukumi Babalu*, 508 U.S. at 531-32, 113 S. Ct. at 2226.

¶92 The Court relies on cases that rejected Free Exercise challenges to truly generally applicable statutes. Generally applicable laws are not subject to strict scrutiny review and thus are more easily defended against challenges. In *Alamo Foundation* and *Jimmy Swaggart Ministries*, religious organizations challenged labor and tax laws that were generally applicable to the commercial activities of all organizations, including religious organizations. Similarly, *South Ridge Baptist Church*, *Lee*, and *Rogue Valley Youth for Christ* challenged generally applicable tax and wage requirements. In these cases, the religious organizations merely argued that compliance with such neutral and generally applicable requirements violated the tenets of their faith. Unlike HB 119, there was no effort in those cases to draft the challenged laws with the purpose to gerrymander and include a particular religious organization within the system. The failure to draft HB 119 in a generally applicable manner necessarily requires strict scrutiny review.

¶93 That being so, the State argues that a compelling state interest can be demonstrated. It offers that HB 119 was enacted for two legitimate government interests, including protection of the Uninsured Employers' Fund (UEF) from potential liability for a catastrophic injury claim filed by a Hutterite member and ensuring fair competition among businesses by eliminating the Hutterites' perceived advantage. Regarding the first, the UEF only applies to uninsured "employers" who are subject to the Act but have not provided coverage for their employees. *See Zempel v. Uninsured Employers' Fund*, 282 Mont. 424, 431, 938 P.2d 658, 663 (1997) (citations omitted) ("[O]nly injured employees of employers meeting the definition of uninsured employer . . . are entitled to the 'substitute' workers' compensation benefits the UEF was created to provide to injured employees of employers who have failed to 'properly comply' with the Act. . . . As a result, the UEF has no funding mechanism to provide 'substitute' workers' compensation benefits to injured employees of employers not subject to the Act."). Consequently, prior to HB 119, a claim could not have been filed by a Hutterite member against the UEF because the Colony was not an "employer" subject to the Act—and none have been filed. The State is attempting to legitimize HB 119 by arguing that the bill provides a solution to a problem that did not exist prior to the bill's enactment. Additionally, even if the UEF was a legitimate government concern, HB 119 does not further that concern. As noted by the District Court, a fundamental tenet of the Hutterites' faith is that they cannot make legal claims against others. The Hutterite faith includes "the commandment to . . . not to seek redress before secular authorities whether related to secular or sectarian issues." A governmental interest

in protecting the UEF from claims that are prohibited as a matter of law, made by people whose faith forbids them to make such claims, can hardly be considered "legitimate."

¶94 The State's second argument that HB 119 was enacted for a legitimate government purpose pertained to complaints from businesses about unequal competition with the colonies. We recognize that the State has legitimate interests in the financial viability of the workers' compensation system, in controlling costs, and in providing benefits. *See Stratemeyer v. Lincoln Co.*, 259 Mont. 147, 155, 855 P.2d 506, 511 (1993); *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 339, 777 P.2d 862, 866 (1989). However, the State has provided no authority for the proposition that ensuring "competitive fairness" among the state's businesses is an objective of the workers' compensation system. Rather, the workers' compensation system is directed to providing care and rehabilitation to injured workers and returning them to work as soon as possible. *Caldwell v. MACo Workers' Comp. Trust*, 2011 MT 162, ¶ 31, 361 Mont. 140, 256 P.3d 923. Further, the State has not made an effort to demonstrate that requiring the Colony to pay for workers' compensation coverage would actually address the concern over unfair competition, where any competitive advantage of the Colony would appear to be primarily because of its nonpayment of the more substantial expenses of wages and benefits, unique to the Colony's religious beliefs. The State argues that fairness "is a viable legislative goal, and the Legislature is entitled to take steps to ensure that the workers' compensation system is fair to all participants, whether religious or secular." However, whether or not "fairness" among competing businesses is a viable goal of the workers' compensa-

tion system, it pales in comparison to "one of the most cherished and protected liberties in our society," *St. John's Lutheran Church*, 252 Mont. at 523, 830 P.2d at 1276, and cannot be accomplished by legislation that targets a particular religious group and intrudes upon their internal religious practices. The State's interest in insuring a viable workers' compensation system or creating a "level playing field' is not legitimized by HB 119 in a way that satisfies the rigorous standards protecting the free exercise of religion.

¶95 The State argues there is a compelling state interest because workers' compensation, like social security, "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants . . ." (quoting *Lee*, 455 U.S. at 258, 102 S. Ct. at 1055), and this interest is advanced by HB 119's intention to correct the purported unfair competitive advantage the Colony has over other businesses. However, HB 119 fails to prohibit nonreligious conduct that endangers the State's purported government interests of preventing a catastrophic claim against the UEF and address the perceived business advantage enjoyed by the Hutterites by not participating in the workers' compensation system. The Workers' Compensation Act currently exempts other areas of employment in agriculture, manufacturing, and construction that could affect the UEF or the viability of the workers' compensation system. For example, § 39-71-401(2), MCA, exempts certain employments from the Act, unless the employer elects coverage and the insurer allows coverage, including: household or domestic employment (§ 39-71-401(2)(a)), casual employment (§ 39-71-401(2)(b)), employment of a person performing services in return for aid or sustenance only (§ 39-71-

401(2)(h)), a person who is employed by an enrolled tribal member or an association, business, corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted solely within the exterior boundaries of an Indian reservation (§ 39-71-401(2)(m)), and a person who is an officer or manager of a ditch company (§ 39-71-401(2)(s)).[4] Similarly, independent contractors may waive rights and benefits of the Act if they obtain an independent contractor exemption (§ 39-71-401(3)). These exemptions are contrary to the governmental interests asserted by the State, and lend further credence that the Legislature's intent, as demonstrated above, was to pursue "governmental interests only against conduct motivated by religious belief." *Lukumi Babalu*, 508 U.S. at 545, 113 S. Ct. at 2233.

¶96 HB 119 is likewise not narrowly tailored and it places an impermissible burden on the Hutterite religion. A law is narrowly tailored when the law achieves its stated ends without unduly burdening religion. *See Lukumi Babalu*, 508 U.S. at 546, 113 S. Ct. at 2234; Yoder, 406 U.S. at 220-21, 92 S. Ct. at 1536. Following the United States Supreme Court, this Court has previously applied the *Thomas* test to determine whether there is a burden on the free exercise of religion:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit

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[4] This Court has periodically discussed these exemptions to the Act, *see i.e.*, *Weidow v. Uninsured Employers' Fund*, 2010 MT 292, 359 Mont. 77, 246 P.3d 704; *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 744 P.2d 895 (1987); *Bennett v. Bennett*, 196 Mont. 22, 637 P.2d 512 (1981).

> because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists,

Griffith v. Butte Sch. Dist. No. 1, 2010 MT 246, ¶ 62, 358 Mont. 193, 244 P.3d 321 (quoting *Valley Christian Sch. v. Mont. High Sch. Ass'n*, 2004 MT 41, ¶ 7, 320 Mont. 81, 86 P.3d 554; *Thomas v. Review Bd. of Ind. Empl. Sec. Div*., 450 U.S. 707, 717-18, 101 S, Ct. 1425, 1432 (1981)). There is a burden on the free exercise of religion when the state causes an "internal impact or infringement" on the relationship between a religious entity and its members or "on their sincerely held religious beliefs." *St. John's Lutheran Church*, 252 Mont. at 526, 830 P.2d at 1278. The United States Supreme Court's 2012 *Hosanna-Tabor* decision further supports the premise that there is an impermissible burden on the free exercise of religion when a government action causes an "internal impact" on religious beliefs. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Empl. Opportunity Comm'n*, __ U.S. __ 132 S. Ct. 694 (2012).

¶97 The State argues that the burden imposed by the workers' compensation system on the Hutterites is incidental. However, it fails to recognize that the operation of HB 119 and the Act interferes with the internal relationship between the Colony and its members under the central tenets of the Hutterite faith. The Hutterite faith prohibits all property ownership, but the Act requires injured employees to initiate and thus "own" a claim against the employer or its insurer to receive benefits under the Act. See § 39-71-603, MCA. The State argues, and the Court accepts, that self-insurance is a viable option for the

Colony, under which a claim would be made to the Colony itself without any determination of whether a member is possessing property. *See* Opinion, ¶ 63, However, the statute cited for this premise, § 39-71-2103, MCA, actually provides that after an employer is approved to be self-insured, the employer may "make payments directly to the employees as they may become entitled to receive the payments." Such payments to Colony members are exactly the problem because the Colony's beliefs require members to relinquish property and live communally.

¶98 Further, in the event a member would file a workers' compensation claim against the Colony, an act directly contrary to Hutterite religious principles, the member faces excommunication from the Colony. The Court's solution for this religious burden is that "nothing prevents an injured Colony member from refraining to file a workers' compensation claim or returning any workers' compensation claim award" or, alternatively, the Colony could proceed "to excommunicate a member who receives compensation for lost wages and refuses to give the money to the Colony." Opinion, ¶ 68. The Court thus reasons that the Hutterites could simply forego participation in the system to comply with its religious beliefs. Yet, the financial burden would remain, for which no benefit would be paid. This is the very definition of illusory coverage that "defies logic" and violates public policy. *See Hardy v. Progressive Specialty Ins. Co*., 2003 MT 85, ¶ 37, 315 Mont. 107, 67 P.3d 892. The Court also reasons that the burden placed upon the Colony could be addressed by a member violating his religious tenets and having the Colony excommunicate the member. Opinion, ¶ 68. I would suggest that this is not a permissible rationale for justifying the State's internal impact upon a religion's practices.

¶99 I would thus reject the State's argument that the burden imposed here is incidental. HB 119 creates a substantial burden on the Colony's religious practice because, in order for the Colony and its members to actually participate under the Act, they must violate their sincerely held religious beliefs.[5] HB 119 creates substantial internal intrusion into the religious practices of the Colony and its members, burdening the Hutterites' religious practices. Strict scrutiny review is not satisfied because the law is neither justified by a compelling state interest nor narrowly tailored to advance that interest.[6]

¶100 In my view, the Court fails in its duty to properly undertake the necessary constitutional inquiry. The Court's over-general statements do not acknowledge the facts of the record. The Court's reliance on *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 108 S. Ct. 1319 (1988), where the United States Supreme Court rejected a challenge to the government's use of its own property for road construction and the property was deemed sacred by non-owners, provides little authority for this case and less consolation. Our Court has held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *St.*

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[5] No question has been raised about the sincerity of the Colony's religious beliefs. *See i.e.*, *Sherbert v. Verner*, 374 U.S. 398, 399 n. 1, 83 S. Ct. 1790, 1791 n. 1 (1963).

[6] The Court responds to the claim that HB 119 intrudes into the religious practices of the Colony by listing regulatory statutes that would apply to the Colony's business activities. *See* Opinion, ¶ 62. However, these statutes regulate the Hutterites' *external* activities and do not intrude into their *internal* religious practices, as do the provisions at issue here.

John's Lutheran Church, 252 Mont. at 524, 830 P.2d at 1276 (quoting *Miller v. Catholic Diocese of Great Falls, Billings*, 224 Mont. 113, 117, 728 P.2d 794, 796 (1986); *Yoder*, 406 U.S. at 215, 92 S. Ct. at 1533). However, in my view, such protection has not been provided herein. Had this been the status of religious freedom in 1620, the Pilgrims may well have sailed right by.

¶101 I dissent.

/S/ JIM RICE

Justice Patricia O. Cotter and Justice Jim Nelson join in the dissenting Opinion of Justice Rice.

/S/ PATRICIA COTTER
/S/ JAMES C. NELSON

APPENDIX B

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MONTANA NINTH JUDICIAL DISTRICT COURT,
GLACIER COUNTY

[Filed September 7, 2011]

Cause No. DV 10-4

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

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,
Respondent.

Judge: Laurie McKinnon

NOTICE OF ENTRY OF JUDGMENT

TO: MONTANA DEPARTMENT OF LABOR
AND INDUSTRY
In Care of J. Stuart Segrest
Assistant Attorney General
215 North Sanders
P. O. Box 201401
Helena, MT 59620-1401

You will please take notice and you are hereby notified that judgment by Order of the Court, in favor of Petitioners, was on the 6th day of September, 2011, duly entered by the Clerk in the above-entitled Court, a copy of which is attached.

DATED this 6th day of September, 2011.

CHURCH, HARRIS, JOHNSON
& WILLIAMS, P.C

BY: /s/ Michael P. Talia
Michael P. Talia
Attorneys for Big Sky Colony, Inc.
and Daniel E. Wipf

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of September, 2011, the foregoing document was served by U.S. Mail upon the individual whose name and address appears below:

J. Stuart Segrest
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

/s/ Michael P. Talia
Michael P. Talia

MONTANA NINTH JUDICIAL DISTRICT COURT,
GLACIER COUNTY

Cause No. DV 10-4

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

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,
Respondent.

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

On January 8, 2010, Petitioners, Big Sky Colony, Inc. and Daniel E. Wipf, ("the Colony"), filed a Petition for Declaratory Relief asserting that sections 6 and 7 of House Bill 119 ("HB 119"), codified as sections 39-71-117(1)(d) and -118(1)(i), MCA, violate the Religion and Equal Protection Clauses of the Montana and federal constitutions. Both parties agree that there are no genuine issues of material fact and that each is entitled to judgment as a matter of law. The parties have filed Cross-Motions for Summary Judgment and oral argument has been presented to the Court. In issuing this opinion, the Court has considered the Affidavits filed by the parties, the transcript of legislative proceedings, in addition to other exhibits attached to the parties' pleadings.

UNDISPUTED STATEMENT OF FACTS

HB 119 is a large bill that amends the Worker's Compensation Act (Title 39, ch. 7, Mont. Code Ann.).

Sections 6 and 7 are the only provisions at issue in these proceedings. Section 6 amends the definition of employer to include:

> (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.

Section 39-71-117(1)(d), MCA. Section 7 amends the definition of employee to include:

> (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).

Section 39-71-118(1)(i), MCA. Under the new law, the Colony, a religious corporation, meets the definition of "employer" for purposes of the Worker's Compensation Act if it is engaged in agricultural, construction, or manufacturing projects for remuneration from nonmembers. Similarly, any member performing services for the Colony under these conditions is an "employee". The Worker's Compensation Act, except for certain exemptions contained in section 39-71-401, applies to all employers and to all employees. The Worker's Compensation Act therefore applies to the Colony if it is engaged in a covered economic activity.[1]

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[1] This requirement is currently not being enforced by the Department of Labor and Industry pursuant to an agreement

The amendments at issue were introduced during the 2009 Legislative session with the following preamble from Representative Hunter:

> I'd next direct you to Sections 6 and 7. Now these sections are a full 8 pages of this bill so it covers quite a bit of territory in the bill and it adds a new definition under the list of employers for purposes of worker's compensation which, therefore, means coverage is required. The bill proposes to add this language: "A religious corporation, organization or trust receiving remuneration for a project performed by its members." That would be added into the definition of employers. *So who 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. Often, these organizations funnel their earnings into a trust and then make distributions from that trust to all the members of their organization. In that way, they are able to avoid the payment of wages and avoid the payment, therefore, of worker's compensation costs thereby gaining a competitive advantage over other people who are bidding on those same jobs and there have been numerous complaints over the years about the lack of a fair level playing field in those bidding jobs*. This section would provide a means to say, if those organizations are bidding on jobs for pay, then they will have to be an employer for those purposes and there are sections in there that

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with the Colony. See Exhibit 3, State's Brief in Support of Summary Judgment.

> deal with how we would calculate what the wages paid were. (Emphasis supplied.)

Transcript of Legislative Proceedings on HB 119, Representative Hunter (1/08/09), p. 3. Senator Stewart-Peregoy added ". . . if we are going to target a group, we should just put Hutterite religious organizations and let's be done with it. Because that's, you know, that's what it's about." *Transcript of Legislative Proceedings on HB 119, Sen. Stewart-Peregoy (3/11/09), p.10*.

The Colony is a religious corporation organized and existing under the Montana Nonprofit Corporation Act, Title 35, Chapter 2, Montana Code Annotated. It is exempt from tax under Section 501(d) of the Internal Revenue Code. The Colony is a signatory of the Hutterian Bretheren Church constitution with a principal place of business in Merriweather, Cut Bank, Montana. *Affidavit of Daniel Wipf*, *paragraphs 4, 6*. Under Article VIII of the Bylaws, all persons of the Hutterische faith residing on the Colony's property are members of the Colony, "The Colony is not a trust and does not hold assets in trust for its members or any other person." *Affidavit of Daniel Wipf, paragraph 6*. While the Colony's income is tax exempt, the income and deductions are reported on a pro rata basis by its members who are individually liable for income tax, although the members do not actually receive any distribution or assets. *Affidavit of Daniel Wipf, paragraphs 4, 6*.

The Hutterite religion traces its roots back to the time of the Reformation in Germany in the 1500's. It was founded by Jacob Huffer who was burned at the stake in 1536 for his religious beliefs. The Hutterites migrated to this country in the 1800's and brought with them their communal way of life—their most

distinguishing feature. The Hutterite Church is a communal way of life and is based upon the Book of Acts. The relevant doctrinal provisions are:

> And all that believed were together, and had all things in common; And sold their possessions and goods, and parted them to all men, as every man had need. And they, continuing daily, with one accord in the temple, and breaking bread from house to house, did eat their meat with gladness and singleness of heart, Praising God, and having favor with all people. And the Lord added to the church daily such as should be saved.

Acts 2:44-47 (KJV). *Affidavit of Daniel Wipf, paragraph 11*.

> And the multitude of them that were believed were of one heart and of one soul; neither said any of them that ought of the things which he possessed was his own; but they had all things in common. And with great power gave the apostles witness of the resurrection of the Lord Jesus; and great grace was upon them all. Neither was there any among them that lacked; for as many as were possessors of land or houses sold them, and brought the prices of the things that were sold, And laid them at the apostles' feet; and distribution was made unto every man according as he had need.

Acts 4:32-5 (KJV). *Affidavit of Daniel Wipf paragraph 11*.

In accordance with these beliefs, no member owns any interest in their colony or their colony's property. All property is held for and all labor performed for the communal benefit of the Colony and advancement

of its religious beliefs and purpose. A member voluntarily contributes all of his or her property and labor to the Colony as an expression of faith and worship. Article 3(a) of the Constitution of the Hutterian Brethren Church explains that the purpose of the Church is to facilitate the member's practice of faith according to the life of Jesus Christ and the Apostles which is achieved by the members having "one spiritual unit in complete community of goods (whether production or consumption). *Affidavit of Daniel Wipf, paragraph 9*. Failure to relinquish property interests of all kind will result in a member being excommunicated by the Church. It is a fundamental Hutterite belief that they shall not sue one another at law nor sit in judgment of one another. Hutterites cannot make claims against others for wrongs done to them. *Affidavit of Daniel Wipf, paragraph 18*.

Hutterites do not receive wages and members receive no-fault medical coverage through the Hutterite Medical Trust. Regardless of the reason for any member's injury, the member is cared for by the Colony. *Affidavit of Daniel Wipf, paragraph 17*.

STANDARD OF REVIEW

Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. M.R.Civ. P. 56; *Eastgate Village Water and Sewer v. Davis*, 343 Mont. 108, 183 P.3d 873 (2008). All reasonable inferences which may be drawn from the offered proof must be drawn in favor of the party opposing summary judgment. *Eastgate Village, supra*. If there is any doubt regarding the propriety of the summary judgment motion, it should be denied, *Eastgate Village*, *supra*;

360 Ranch Corp. v. R & D Holding, 278 Mont. 487, 926 P.2d 260 (1996); *Whitehawk v. Clark*, 238 Mont. 14, 776 P.2d 484 (1989).

ISSUES PRESENTED

Does HB 119 violate the Establishment Clause and the Free Exercise Clause of the United States Constitution, Amendment I, and of Article II, Section 5 of the Montana Constitution?

Does HB 119 violate the Equal Protection Clause of the United States Constitution, Amendment XIV, and of Article 2, Section 4 of the Montana Constitution?

ANAYLSIS

A. The Religion Clauses.

A constitutional analysis of legislation must begin with the relevant constitutional provisions themselves. The United States Constitution, Amendment I, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." Article II, Section 5, of the Montana Constitution provides that "[t]he state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." These provisions, frequently referred to as the Religion Clauses[2], have developed independent and sometimes competing realms of jurisprudence. Indeed, the competition between the clause prohibiting state "establishment of religion" and the clause forbidding any prohibition on "the free exercise thereof" has

[2] *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board of the Indiana Employment Security Division, et al*., 45-U.S. 707, 101 S. Ct. 1425 (1981).

been acknowledged numerous times. *See Cutter v. Wilkinson*, 544 U.S. 709, 719, 125 S. Ct. 2113 (2005); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510 (1995). "Tradeoffs are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not to be had." *McCreary v. ACLU*, 545 U.S. 844, 875, 125 S. Ct. 2722, 2742 (2005). Neither "establishment" nor "free exercise" is textually defined, nor is either self-defining. As a result, jurisprudence of the Religion Clause is "complex" and contains a "myriad [of] nuances". *Hofer v. DPHHS*, 329 Mont. 368, 383, 124 P.3d 1098 (2005), (J. Rice, dissenting opinion). Former Chief Justice Burger has acknowledged for the United States Supreme Court, in regard to the federal provision, that "[candor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive are of constitutional law." Chief Justice Burger further explained, the language of the Religion Clauses of the First Amendment is:

> at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history show they regarded as very important and fraught with great dangers. Instead they commanded that there should be 'no law *respecting* an establishment of religion.' A law may be one 'respecting' the forbidden objective while falling short of its total realization. A law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a

> step that could lead to such establishment and hence offend the First Amendment.

Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S. Ct. 2105, 2111 (1971) (emphasis in original).

1. The Free Exercise of Religion Clause.[3]

    a. *Reynolds*, *Sherbert*, *Yoder*, *Thomas*, and their progeny.

The starting point of an analysis of the Free Exercise Clause is the decision of the United State Supreme Court in *Reynolds v. United States*, 98 U.S.

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[3] Montana case law regarding the Religion Clauses is not extensive. *See Griffith v. Butte School District*, 358 Mont. 193, 244 P.3d 321 (2010); Justice Rice's dissent in *Hofer v. DPHHS*, 329 Mont 368, 124 P.3d 1098 (2005), *Valley Christian School, et. al. v. Montana High Schools Assoc*., 320 Mont. 81, 86 P.3d 554 (2004); *St. John's Lutheran Church v. State Compensation Fund*, 252 Mont. 516, 830 P.2d 1271 (1992); *Miller v. Catholic Diocese of Great Falls*, 224 Mont. 113, 728 P.2d 794 (1986). Thus far it appears the most extensive analysis has been determining subject matter jurisdiction under the neutral principles test. *See Hofer v. DPHHS*, 329 Mont 368, 124 P.3d 1098 (2005); *Second International Baha'l Council v. Chase*, 326 Mont. 41, 106 P.3d 1168 (2005). While general principles have been enunciated in the above-referenced decisions and must be applied appropriately, none deal with compulsory participation by a specifically identified group who believe participation is contrary to a fundamental religious practice. The current analysis in the instant proceedings has been conducted under federal case law and, to the extent relevant, Montana decisions will be cited.

Additionally, there is a strain of analysis identified by Justice Rice and also set forth in other cases interpreting the Religion Clause which finds distinctions based upon receipt or entitlement to public benefits and the free exercise of religion. These distinctions are significant but not directly applicable to the instant proceeding except to highlight that HB 119 is compelling participation in a public benefits program in which the Colony maintains no member will make a claim.

145 (1978). In this now famous decision, the Court rejected a claim that the Free Exercise Clause prevented the government from criminalizing bigamy. It was held that although the Free Exercise Clause prevented the government from enacting legislation that impinged on religious thought and opinion, it did not restrict the government from limiting religious practice. The Court recognized that if the law were invalidated it "would make the professed doctrines of religious belief superior to the law of the land, and [would] in effect permit every citizen to become a law unto himself." *Id*. at 167.

Later the Court refined its statements regarding the Free Exercise Clause in *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, the Supreme Court began its analysis by reiterating it's holding in *Reynolds* that although the government may not restrict a person's religious beliefs and opinions, it may restrict religious practices or actions. However, before free exercise rights may be impinged, the government must have a compelling interest. In *Sherbert*, a Seventh Day Adventist brought a claim for unemployment benefits after being discharged from her job for refusing to work on Saturdays. *Sherbert*, involved a law with a series of exceptions allowing for a determination of job unsuitability and thus was not the blanket prohibition found in *Reynolds* regarding the practice of polygamy. The Unemployment Compensation Act created a series of exemptions that allowed the Commission to determine whether certain work was suitable for a client. As the law created these exemptions, the Court held the law must similarly afford the same protection for religious practices as those obtaining the benefit for secular reasons. In reaching its decision that the law violated the Free Exercise

Clause, the Court applied a two-step analysis. The first step must be to determine if the governmental action imposed any burden on the free exercise of religion. If so, the second step requires a determination of whether the government had a compelling interest to infringe on First Amendment rights.

Subsequent precedent has defined the magnitude of the compelling state interest as requiring ". . . the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests. *McDaniel v. Paty*, 435 U.S. 618, 628, 98 S. Ct. 1322 (1978), *quoting Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526 (1972). The compelling interest standard . . . is not 'water[ed] . . . down' but 'really means what it says.' *Employment Div., Dept. of Human Resources of Ore. v. Smith* 494 U.S. 872, 888, 110 S. Ct. 1595 (1990).

In 1972, the principles enunciated in *Sherbert* were applied by the United States Supreme Court in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972). In *Yoder*, parents of Amish and Mennonite children were convicted for violating the state's compulsory public school attendance law. The parents practiced the Amish and Mennonite religions and argued that sending their children to school beyond the eighth grade violated their religious beliefs and threatened their religious way of life. The Court determined that although the regulation appeared neutral on its face, it may, in its application, "nonetheless offend the constitutional requirement of government neutrality if it unduly burdens the free

exercise of religion." *Yoder*, 406 U.S. at 221, *citing Sherbert, supra*. It was further noted in *Yoder*:

> "The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. *By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses 'we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed.' Walz v. Tax Commission*, 397 U.S. 664, 672, 90 S. Ct. 1409 (1970). (Emphasis supplied.)

Lastly, a decision relied upon in several opinions by the Montana Supreme Court is *Thomas v. Review Board of the Indiana Employment Security Division, et al*., 450 U.S. 707, 101 S. Ct. 1425 (1981). (*See Griffith v. Butte School District*, 358 Mont. 193, 244 P.3d 321 (2010); *Hofer v. DPHHS*, 329 Mont 368, 124 P.3d 1098 (2005), *Valley Christian School, et. al. v. Montana High Schools Assoc*., 320 Mont. 81, 86 P.3d 554 (2004); *St. John's Lutheran Church v. State Compensation Fund*, 252 Mont. 516, 830 P. 2d 1271 (1992); *Miller v. Catholic Diocese of Great Falls*, 224 Mont. 113, 728 P.2d 794 (1986).) *Thomas* concerned the denial of unemployment benefits to a Jehovah's Witness who voluntarily quit his job because his religious beliefs forbade participation in the production of armaments. The Court applied the compelling interest standard set forth in *Sherbert* and held:

> The mere fact that the petitioner's practice is burdened by a government program does not mean that an exemption accommodating his practice must be granted. The state must justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that 'the essence of all that has been said and written on the subject is that only those interest of the highest order. . . can overbalance legitimate claims to the free exercise of religion' *Wisconsin v. Yoder*, *supra*, at 215.

Thomas, 450 U.S. at 719. As in Sherbert, the Court found in *Thomas* that the state interest of maintaining the insurance fund was not sufficient to justify impingement on free exercise rights. *Thomas* is also helpful in its recognition that Thomas was receiving a government "benefit" derived from his religious beliefs which manifests the tension between the Free Exercise Clause and the Establishment Clause which the Court resolved in *Sherbert*:

> In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. *Sherbert v. Verner*, 374 U.S., at 409.

Thomas, 450 U.S., at 719-720.

b. *Smith*.

Sherbert, Walz, Yoder, Thomas, and their progeny remained the law until *Employment Division, Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990).[4] Smith concerned two members of the Native American Church who were discharged from their employment as counselors in a drug rehabilitation program after ingesting peyote during a religious ceremony. Justice Scalia distinguished *Sherbert* based upon the construction of the law at issue. Justice Scalia wrote:

> Respondents in the present case, . . . seek to carry the meaning of 'prohibiting the free exercise [of religion] one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as

[4] *Smith* was a contentious 5-4 decision in which Justice Scalia delivered the opinion of the Court and Rehnquist, C.J., and White, Stevens, and Kennedy, JJ. joined. Justice O'Connor filed an opinion concurring in the judgment, in Parts I and II of which Brennan, Marshall, and Blackmun, JJ., joined without concurring in the judgment. Blackmun, J., filed a dissenting opinion, in which Brennan and Marshall joined.

> 'prohibiting the free exercise [of religion]' by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as 'abridging the freedom . . . of the press' of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Id. at 878.

The distinction between *Sherbert* and *Smith* Justice Scalia attempts to draw is based on the law: where the law provides a series of exceptions, *Sherbert*, it must accommodate religious practice unless there is a compelling state interest; where the law is neutral and generally applicable, i.e., provides no exceptions, *Smith*, then government may restrict religious practice. *Smith* went further and developed the "hybrid" analysis: Where neutral and generally applicable laws infringe on the Free Exercise Clause they may be held unconstitutional only if they additionally impinge on "other constitutional protections, such as [the] freedom of speech and of the press". *Id*. at 881.

c. *Lukemi*.

Three years later, the United States Supreme Court adhered to the principles established in *Smith* and *Sherbert* by setting forth a dual testing analysis in *Church of the Lukemi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217 (1993). The

Petitioners in *Lukemi*, a church and its president, practiced the Santeria religion, a fusion of traditional African religion and Roman Catholicism, characterized by animal sacrifice as a principal form of devotion. After learning that the church was planning to build a house of worship in Hialeah, Florida, the city council adopted a resolution generally prohibiting animal sacrifice by the Petitioners. Justice Kennedy, writing for the United States Supreme Court, stated:

> In addressing the constitutional protection for exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Smith*, s*upra*. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. These ordinances fail to satisfy the *Smith* requirements.

Lukemi, 508 U.S. at 531.

1. Neutrality.

In *Lukemi*, the Court revisited *Sherbert* by stating that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religions beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id*. at 532. It likewise further

defined the meaning of "neutral" and "generally applicable" applied in Smith. If the "object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . ." *Id*. at 533. To determine the "object of the law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context" *Id*. The Court explained, however, that:

> Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality, . . . , and 'covert suppression of particular religious beliefs . . . . Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'

Lukemi, 508 U.S. at 543 (citations omitted).

While the Court in *Lukemi* determined that the ordinance was facially neutral, it found that the ordinance's "operation" improperly targeted the Santeria religion. After noting that the legislative history established that city officials could have had no other group in mind other than Santeria, the Court found that "the effect of the law in its real operation is strong evidence of its object . . . . [T]he ordinances when considered together disclose an

object remote from . . . legitimate legislative concerns. The design of these laws accomplishes instead a 'religious gerrymandering', . . . an impermissible attempt to target petitioners and their religious practices." *Id*. at 535 (citations omitted). Repeatedly, the *Lukemi* Court emphasized that the burden of the ordinance fell on no one but the adherents to the Santeria religion and that the only conduct subject to the ordinance was the religious exercise of the Santeria church members. ". . . Santeria alone was the exclusive legislative concern." *Id*. at 536.

2. Generally applicable.

Laws burdening religious practice must be of general application as well. *Lukemi*, 494 U.S. at 879-881. Categories of selection contained within laws are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause "protect[s] religious observers against unequal treatment and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukemi*, 494 U.S. at 542-543 (citations omitted). "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence." *Id*.

Lastly, the Court provided guidance regarding what factors should be examined in deciding on whether a law is neutral and general applicable. "Relevant evidence includes, among other things, the

historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. . . . These objective factors bear on the question of discriminatory object." *Lukemi*, 494 U.S. at 495. *See also Walz v. Tax Commission*, 397 U.S. at 696; *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 266, 97 S. Ct. 555 (1977); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, n.24, 99 S. Ct. 2282 (1979).

In summary, *Lukemi* established a two-part test for laws alleged to violate an individual's free exercise rights. If the law is neutral and of general applicability, it is constitutional under the *Smith* hybrid test if it does not infringe upon another constitutionally protected right. If the law is not neutral or not generally applicable, then the state must establish a compelling interest under *Sherbert*.

d. Big Sky Colony.

The Colony has represented through the Affidavit of Daniel Wipf that forced participation in the worker's compensation system, both through payment and receipt of benefits, is forbidden by the Hutterian Brethren Church (the "Church"). Daniel Wipf's affidavit is evidence that the Colony believes the forced establishment by the State of an employer-employee relationship between members of the Colony and the Colony, the adversarial nature of a worker's compensation claim, and the infusion of property rights concepts is forbidden by the fundamental communal living and community of goods doctrine upon which the Church is founded. The State has not presented any evidence suggesting that

this is not a correct interpretation of Church doctrine. Nor is it within "the judicial function and judicial competence" of this Court or the State to determine whether the Colony has the proper interpretation of Church doctrine as "[courts] are not arbiters of scriptural interpretation." *Thomas*, *supra*, 450 U.S. at 716. This Court therefore accepts the Colony's contention that participation in the worker's compensation system violates its religious beliefs and is forbidden by Church doctrine. As a result, compulsory participation by the Colony in the State's worker's compensation system interferes with the Colony's free exercise rights. *United States v. Lee*. 455 U.S. 252, 257, 102 S Ct. 1051 (1982).

A law that violates free exercise rights must be analyzed, pursuant to *Lukemi*, *supra*, under a two-part test. The first step is to determine whether the law is neutral and generally applicable. The requirement of facial neutrality is that the law not discriminate on its face. Although it is hard to examine the pertinent sections of HB 119 without knowledge that they were specifically targeting a particular religious group, HB 119, as was the law in *Lukemi*, appears facially neutral. This is true in regardless of HB 119's specific reference to "religious" organizations within its text. Looking beyond facial neutrality, however, HB 119 unquestionably targets the Colony and the religious practice of their communal lifestyle. The statements made by legislators during the 2009 Assembly clearly establish that the legislation was designed specifically to address Hutterites and the effects the practice of their religion had on private business. As in *Lukemi*, the burden of the HB 119 falls only on the Hutterite religion and the Hutterites "alone w[ere] the exclusive legislative concern. . ." behind the amendments to HB

119. *Lukemi*, 508 U.S. at 536. The object of the legislation was remote from the concerns and purpose underlying the Worker's Compensation Act[5] and instead was an attempt to "tax" the Hutterites for a religious practice in order to "level the playing field" presumably created because Hutterites receive other favorable tax exemptions. Hutterites already provide for their members no-fault comprehensive medical insurance. Hence there is no reason or purpose consistent with the legislative policy of the Worker's Compensation Act to require participation by the Hutterites—except to provide a financial penalty to level the playing field with private business. Pursuant to *Lukemi*, HB 119 cannot be considered a neutral law.

Turning next to the second requirement of the Free Exercise Clause analysis, that the law must be generally applicable, it is clear that the HB 119 falls well below the minimum standards necessary to protect First Amendment rights. Similar to many of the reasons regarding neutrality, HB 119 unquestionably targets only the Hutterite religious practice of communal living. While the law has been tailored to apply only to activities where remuneration is received, the governmental interest HB 119 seeks to protect—"leveling the playing field"—is being pursued

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[5] See section 39-71-105(1), MCA, regarding the policy behind the Worker's Compensation Act. "An objective of the Montana worker's compensation system is to provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make the worker whole but are intended to assist a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease."

only against conduct that has a religious motivation. HB 119 has been drafted with such care to apply to only Hutterites that one statesperson suggested that it just specifically name "Hutterites". While the concerns of private business is clearly a motivating force for perhaps some area of legislative activity, HB 119 is a solution that both the federal and Montana Constitutions do not allow. The law is neither neutral nor generally applicable.

If HB 119 is not neutral or generally applicable, then the state must have a compelling state interest under *Sherbert*. The State contends that maintenance of the worker's compensation fund is a compelling state interest and that the potential of a non-covered, ex-member pursuing legal action warrants compulsory participation of the Colony. The record in this case, however, does not bear out the State's contentions. For example, Congress has recognized the self-sufficiency of religious organizations such as the Hutterites by authorizing exemptions of such groups from the payment of social security taxes. Further, social security is not jeopardized by the exemption provided to these religious organizations. Title 26 U.S.C. section 1402 (h). A similar interest—the integrity of the insurance fund—was advanced and rejected in *Sherbert*. *See also Thomas, supra*. The record does, however, establish that a member of the Colony would not, consistent with Church doctrine, file a worker's compensation claim. Indeed, if a member were to receive benefits pursuant to a claim, Church doctrine would require that the member relinquish the money to the Colony. This is a result it which apparently was not contemplated by the Legislature or the amendment's supporters. Absent some contrary evidence, this Court is unwilling to assume that a member of the Colony who is injured

in a "work" related accident poses a burden on the State should that member pursue legal action. The record does not support such a determination.

As stated in *Sherbert*, the compelling interest by the State that must be demonstrated must satisfy rigorous scrutiny and be of the highest order. The State has not met this strict scrutiny standard by demonstrating a compelling state interest.

2. The Establishment Clause.

The Establishment Clause applies not only to official condonement of a particular religion or religious belief, but also to official disapproval or hostility towards religion. *American Family Assoc. v. City of San Francisco*, 277 F.3d 1114 (9th Cir. 2002), citing *Lukemi*, *supra*. The United States Supreme Court established the now widely known "Lemon test" for analyzing government conduct under the Establishment Clause of the First Amendment. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971). To survive the test, the government conduct at issue must (1) have a secular purpose, (2) not have as its principal or primary effect advancing or inhibiting religion, and (3) not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-613.

a. Secular Purpose

The secular purpose prong of the Lemon test requires an examination of whether the government's actual purpose was to disapprove or approve religion. *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355 (1984). A practice will stumble on the purpose prong "only if it is motivated wholly by an impermissible purpose." *Bowen v. Kendrick*, 487 U.S. 589, 602, 108 S. Ct. 2562 (1988). Further, a reviewing court must

be reluctant to attribute unconstitutional motives to government actors in the face of a plausible secular purpose. *Mueller v. Allen*, 463 U.S. 388, 394-395, 103 S. Ct. 3062 (1983).

While it is clear from the legislative history of HB 119 that its purpose was to "level the playing field" between Hutterites and non-Hutterites when Hutterites conduct business outside of the Colony, HB 119 is an attempt to remedy a situation resulting entirely from the religious practices of Hutterite communal living. Although the legislation specifically targets "religious" organizations and it specifically targets Hutterites, because they are the only individuals in Montana to which the legislation would apply, it will not be presumed that the legislature had a disguised, religious motive in enacting HB 119. Nevertheless, while the legislation may not have been proposed and adopted for the purpose of preventing Hutterites from practicing their religion, it targeted a group of people who are undeniably and primarily defined by their communal lifestyle. Hence, the Legislature targeted a group defined by their religion. "Although a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary v. ACLU*, 545 U.S. 844, 864, 125 S. Ct. 2722 (2005). "When a governmental agency professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to "distinguis[h] a sham secular purpose from a sincere one." *Edwards v. Aguillard*, 482 U.S. 578, 586-587, 107 S. Ct. 2573 (1987).

While the Court recognizes that targeting a group based upon an attribute of their religion which undeniably defines them may be different from targeting a group *because* of their religion, recognition of such a distinction would not be consistent with the above-referenced precedent. There is little denying that the object or purpose of the legislation was specifically directed at the Hutterites and an attribute of their religious practice.

b. Primary effect.

Under the second prong of the *Lemon* test, the court must consider whether government action has the principal or primary effect of advancing or inhibiting religion. *Lemon*, 403 U.S at 612. As has already been identified, the foundation of the Hutterite religion is communal living, forbearance of individual property rights, and service to God through their work. By forcing the Colony to comply with the requirements of the Worker's Compensation Act, the State is inhibiting the Hutterites' free exercise of religion by forcing them into an adversarial employer-employee relationship and employing property rights principles. This concept is completely contrary to the Colony's religious doctrine. Based upon the Affidavit of Daniel Wipf, the primary effect of HB 119 would be to inhibit the Colony in the practice of their religion.

c. Entanglement.

Under the third prong of the Lemon test, the law must not foster an excessive government entanglement with religion. In *Walz v. Tax Commission*, *supra*, the Court upheld state tax exemptions for real property owned by religious organizations and used for religious worship. The Court noted that "grants of

exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemptions constitute a reasonable and balanced attempt to guard against those dangers. . . . We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions." *Walz*, 397 U.S. at 675.

Walz is particularly relevant to the case *sub judice*. The Court in *Walz* recognized that taxation of religious entities would involve more entanglement than an exemption. "Elimination of exemption would tend to expand the involvement of government giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id*. at 764. While tax exemptions to churches necessarily operate to afford an indirect economic benefit, exemptions also give rise to a lesser involvement than taxing religious organizations. "The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other." The Court reasoned as follows:

> All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches—over 75 years-religious organizations have been expressly exempt from the tax. Such treatment is an 'aid' to churches no more and

> no less in principle than the real estate tax exemption granted by States. Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

Id. at 676-677.

For the reasons set forth in *Walz*, HB 119 would involve excessive entanglement by the state into the religious affairs of the Colony. While the State argues that all that would be needed is an accounting of income from jobs performed for remuneration, jobs performed for remuneration still involve Church doctrine, the Hutterite entirely non-secular way of life, and their communal living. The amount of wage, hours of employment, and who is earning the wage would have to be calculated. Further, the process would necessarily require inquiries of the Colony by the State regarding these variables as well as the nature of the work. Based upon Hutterite religious doctrine, a member's work is always an expression of faith, worship, and service to the Church and God. *See Affidavit of Daniel Wipf paragraphs, 9, 11*. Remuneration to the Colony does not equate to a non-religious function for an individual member of the Colony or even the Colony itself. It appears evident that a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that only particular areas of Hutterite activities are scrutinized and that First Amendment rights are otherwise respected.

"The first and greatest purpose of the Establishment Clause is to prevent. . . governmental interference [into the exclusive province of religion]. *Thus, an indirect benefit to religion must be tolerated when the alternative is entanglement with and interpretation of religious doctrine*." *Hofer*, 329 Mont. at 398 (dissenting opinion) (emphasis supplied). This Court finds that the law is unconstitutional because it does not have a secular purpose, its primary effect will be to inhibit the Hutterite free exercise of religion, and HB 119 will involve excessive entanglement between the State and the Colony.

B. Equal Protection Clause.

The Colony argues that HB 119 violates the federal and state Equal Protection Clauses because the law is not neutral in its application and specifically targets the Hutterites. The U.S. Constitution and the Montana Constitution provide that [**295] no person shall be denied equal protection of the laws. U.S. Const. amend XIV; Mont. Const. art. II, § 4. Montana's equal protection clause ensures that "Montana's citizens are not subject to arbitrary and discriminatory state action." *Bustell v. AIG Claims Services, Inc*., 324 Mont. 478, 483, 105 P.3d 286 (2008). We address equal protection claims concerning workers' compensation statutes using a two part analysis. We determine first whether the State has created a classification that treats differently two or more similarly situated groups. *Id*. If the claim satisfies the first step, we next determine whether a legitimate governmental purpose rationally relates to the discriminatory classification. *Id*.

An equal protection analysis is necessarily made when determining whether the law is neutral. As Justice Harlan noted in an Establishment Clause

analysis, "neutrality in its application requires an equal protection mode of analysis." *Walz*, 397 U.S. at 696 (concurring opinion). "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymandering. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Id*.

HB 119 specifically identifies "religious organizations" and is crafted to target a particular religious organization. Hutterites are the only religious organization which HB 119 addresses. HB 119 therefore creates a classification that treats Hutterites differently from other religious organizations and further targets religious organizations generally. For the reasons states under the compelling interest analysis, HB 119's discriminatory purpose is not related to a legitimate government purpose.

CONCLUSION

In his concluding remark for the United States Supreme Court, Justice Kennedy wrote in *Lukemi*, *supra*:

> The [Religion Clauses] commit the government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing

> the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

After a consideration of the Affidavit of Daniel Wipf, the legislative history and statements of legislators, and the numerous exhibits filed in support of the parties' cross-motions for summary judgment, is clear that HB119 impermissible targets a particular religious organization and requires that organization to participate involuntarily in a public benefit program contrary to that organizations' fundamental religious principles. The law is not neutral or generally applicable and no compelling state interest has been demonstrated. HB 119 has a non-secular purpose with a primary effect of inhibiting First Amendment rights and will entangle the State in Church affairs in an effort to monitor compliance. The law violates the Equal Protection Clause by specifically targeting Hutterites because of their communal lifestyle. For these reasons, sections 39-71-117(1)(d) and 39-71-118(1)(i), MCA, are void.

ORDER

IT IS HEREBY ORDERED that Petitioner's Cross-Motion for Summary Judgment is **GRANTED** and Respondent's Cross-Motion for Summary Judgment is **DENIED**. The Clerk of Court is directed to enter Judgment accordingly.

Dated this 6th day of September, 2011.

/s/ Laurie McKinnon
LAURIE MCKINNON
DISTRICT JUDGE

APPENDIX C

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MONTANA NINTH JUDICIAL DISTRICT COURT,
GLACIER COUNTY

[Filed January 8, 2010]

Cause No. DV 10-4

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

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,
Respondent.

Judge: Laurie McKinnon

PETITION FOR DECLARATORY RELIEF

Big Sky Colony, Inc. and Daniel E. Wipf petition the Court as follows:

PARTIES AND JURISDICTION

1. Big Sky Colony, Inc. is a religious corporation organized and existing in the State of Montana under Montana law, 26 U.S.C. § 501(d), and the Hutterian Brethren Church, with principal offices in Glacier County, Montana. Big Sky Colony, Inc. was formed 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."

2. Mr. Daniel E. Wipf is a resident of Glacier County, Montana and a member of Big Sky Colony, Inc. and the Hutterian Brethren Church. Mr. Wipf is also the first minister and corporate president of Big Sky Colony, Inc..

3. The Montana Department of Labor and Industry is an agency of the State of Montana with the responsibility for administering and regulating Workers Compensation law in Montana.

4. This petition involves questions regarding the constitutionality of certain Montana statutes.

5. Jurisdiction and venue are proper in this court.

COMMON ALLEGATIONS

6. House Bill 119 was introduced in the 61st Montana Legislature by Representative Chuck Hunter in December 2008 and signed into law by Governor Schweitzer on April 1, 2009.

7. Among other things, HB 119 was enacted to "[include] religious organizations as employers for

workers' compensation purposes under certain conditions."

8. Section 6 of HB 119 amended M.C.A. § 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.

9. Section 7 of HB 119 amended M.C.A. § 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).

10. HB 119 was specifically designed to restrain the conduct of colonies of the Hutterian Brethren Church and their members. 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).

11. Communal living and community of goods (hereinafter "communal living") is the distinguishing religious doctrine of the Hutterian Brethren Church. Hutterite colonies are founded upon the belief and practice that each member of the colony contributes

all of his or her property and labor to the colony as an expression of faith and worship. All property is held for and all labor is performed for the common benefit of the colony and advancement of its religious beliefs and as a fundamental expression of the doctrine of the Hutterian Brethren Church. This doctrine is founded upon the following biblical passages:

> And all that believed were together, and had all things common; And sold their possessions and goods, and parted them to all men, as every man had need. And they, continuing daily, with one accord in the temple, and breaking bread from house to house, did eat their meat with gladness and singleness of heart, Praising God, and having favor with all people. And the Lord added to the church daily such as should be saved.

Acts 2:44-47 (KJV).

> And the multitude of them that were believed were of one heart and of one soul; neither said any of them that aught of the things which he possessed was his own; but they had all things common. And with great power gave the apostles witness of the resurrection of the Lord Jesus; and great grace was upon them all. Neither was there any among them that lacked; for as many as were possessors of land or houses sold them, and brought the prices of the things that were sold, And laid them at the apostles' feet; and distribution was made unto every man according as he had need.

Acts 4:32-35 (KJV).

12. As a result of the foundational religious doctrine of communal living, Hutterite colonies and their members are not in an employer/employee

relationship under any statutory or common law sense.

13. Sections 6 and 7 of HB 119 are specifically aimed at restricting and interfering with the communal way of life practiced by Hutterite colonies by redefining the relationship between colony and member as an employer/employee relationship.

14. "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993).

15. Sections 6 and 7 of HB 119 were intended to inject secular values into the ecclesiastical structure of the Hutterian Brethren Church by attacking the communal way of life practiced by all Hutterite colonies. Sections 6 and 7 of HB 119 alters each members relationship with his or her colony, impedes each member's free expression of his or her religious beliefs and excessively entangles the State of Montana in religious matters and organizations.

16. Sections 6 and 7 of HB119 violate the Religion and Equal Protection Clauses of the Constitution of the State of Montana, specifically Article II, Sections 4 and 5, and the Religion and Equal Protection Clauses of the Constitution of the United States of America, specifically the First and Fourteenth Amendments.

17. Sections 6 and 7 of HB 119 are illegal, unconstitutional, and without force of the law in the following respects, among others:

a. They preclude the Petitioners from freely exercising their religion as members of the Hutterian Brethren Church;

b. They are an establishment of religion in that the State of Montana has taken upon itself to interpret the religious doctrine of the Hutterian Brethren Church by defining and altering the relationship between the colonies and their members;

c. They excessively entangle the State of Montana in the doctrine of the Hutterian Brethren Church by making the State a manager of Hutterite religious activities; and

d. They deny the members of the Hutterian Brethren Church equal protection of the law because the laws were targeted directly at Hutterite colonies and even not so targeted, the result is a disparate impact on Hutterite colonies.

18. This is an action for a declaratory judgment under the Uniform Declaratory Judgments Act.

19. Big Sky Colony, Inc. and Daniel E. Wipf are entitled to a declaration of their legal rights under Montana Code Annotated § 27-8-202.

20. All persons necessary for the determination of this action are parties to this action.

21. Big Sky Colony, Inc. and Daniel E. Wipf are entitled to a declaration that Sections 6 and 7 of HB 119, codified at Montana Code Annotated §§ 39-71-117(1)(d) & 118(1)(i), are without the force of law, illegal, and unconstitutional under both the United States Constitution and the Montana Constitution.

PRAYER FOR RELIEF

WHEREFORE, the Petitioners pray for judgment from the Court as follows:

1. Declaring that Sections 6 and 7 of House Bill 119 of the Sixty-first Montana Legislature, codified at Montana Code Annotated §§ 39-71-117(1)(d) & 118(1)(i), are inapplicable to the Petitioners and are void, unconstitutional, ineffective, and without force of law, and that the Petitioners are not required to comply with their terms and provisions;

2. For their costs of suit;

3. For their attorney fees as allowed by law; and

4. For such other and further relief as the Court deems appropriate.

DATED this 7th day of January, 2010.

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

BY: /s/ Ronald A Nelson
RONALD A. NELSON

BY: /s/ Michael P. Talia
MICHAEL P. TALIA

Attorneys for Big Sky Colony, Inc. and Daniel E. Wipf

APPENDIX D

West's Montana Code Annotated
Title 39. Labor
Chapter 71. Workers' Compensation
Part 1. General Provisions

39-71-101. Short title

This chapter may be cited as the "Workers' Compensation Act".

39-71-102. Reference to plans

Whenever compensation plan No. 1, 2, or 3 is referred to, such reference also includes all other sections which are applicable to the subject matter of such reference.

39-71-103. Compensation provisions

The compensation provisions of this chapter, whenever referred to, shall be held to include the provisions of compensation plan No. 1, 2, or 3 and all other sections of this chapter applicable to the same or any part thereof.

* * *

39-71-105. Declaration of public policy

For the purposes of interpreting and applying this chapter, the following is the public policy of this state:

(1) An objective of the Montana workers' compensation system is to provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole but are intended to provide assistance to a worker at a reasonable cost to the em-

ployer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

(2) It is the intent of the legislature to assert that a conclusive presumption exists that recognizes that a holder of a current, valid independent contractor exemption certificate issued by the department is an independent contractor if the person is working under the independent contractor exemption certificate. The holder of an independent contractor exemption certificate waives the rights, benefits, and obligations of this chapter unless the person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3.

(3) A worker's removal from the workforce because of a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, an objective of the workers' compensation system is to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.

(4) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

(5) This chapter must be construed according to its terms and not liberally in favor of any party.

(6) It is the intent of the legislature that:

(a) stress claims, often referred to as "mental-mental claims" and "mental-physical claims", are not compensable under Montana's workers' compensation and occupational disease laws. The legislature recognizes that these claims are difficult to objectively verify and that the claims have a potential to place an economic burden on the workers' compensation and occupational disease system. The legislature also recognizes that there are other states that do not provide compensation for various categories of stress claims and that stress claims have presented economic problems for certain other jurisdictions. In addition, not all injuries are compensable under the present system, and it is within the legislature's authority to define the limits of the workers' compensation and occupational disease system.

(b) for occupational disease claims, because of the nature of exposure, workers should not be required to provide notice to employers of the disease as required of injuries and that the requirements for filing of claims reflect consideration of when the worker knew or should have known that the worker's condition resulted from an occupational disease. The legislature recognizes that occupational diseases in the workplace are caused by events occurring on more than a single day or work shift and that it is within the legislature's authority to define an occupational disease and establish the causal connection to the workplace.

39-71-116. Definitions

Unless the context otherwise requires, in this chapter, the following definitions apply:

(1) "Actual wage loss" means that the wages that a worker earns or is qualified to earn after the work-

er reaches maximum healing are less than the actual wages the worker received at the time of the injury.

(2) "Administer and pay" includes all actions by the state fund under the Workers' Compensation Act necessary to:

(a) investigation, review, and settlement of claims;

(b) payment of benefits;

(c) setting of reserves;

(d) furnishing of services and facilities; and

(e) use of actuarial, audit, accounting, vocational rehabilitation, and legal services.

(3) "Aid or sustenance" means a public or private subsidy made to provide a means of support, maintenance, or subsistence for the recipient.

(4) "Beneficiary" means:

(a) a surviving spouse living with or legally entitled to be supported by the deceased at the time of injury;

(b) an unmarried child under 18 years of age;

(c) an unmarried child under 22 years of age who is a full-time student in an accredited school or is enrolled in an accredited apprenticeship program;

(d) an invalid child over 18 years of age who is dependent, as defined in 26 U.S.C. 152, upon the decedent for support at the time of injury;

(e) a parent who is dependent, as defined in 26 U.S.C. 152, upon the decedent for support at the time of the injury if a beneficiary, as defined in subsections (4)(a) through (4)(d), does not exist; and

(f) a brother or sister under 18 years of age if dependent, as defined in 26 U.S.C. 152, upon the decedent for support at the time of the injury but only until the age of 18 years and only when a beneficiary, as defined in subsections (4)(a) through (4)(e), does not exist.

(5) "Business partner" means the community, governmental entity, or business organization that provides the premises for work-based learning activities for students.

(6) "Casual employment" means employment not in the usual course of the trade, business, profession, or occupation of the employer.

(7) "Child" includes a posthumous child, a dependent stepchild, and a child legally adopted prior to the injury.

(8)(a) "Claims examiner" means an individual who, as a paid employee of the department, of a plan No. 1, 2, or 3 insurer, or of an administrator licensed under Title 33, chapter 17, examines claims under chapter 71 to:

(i) determine liability;

(ii) apply the requirements of this title;

(iii) settle workers' compensation or occupational disease claims; or

(iv) determine survivor benefits.

(b) The term does not include an adjuster as defined in 33-17-102.

(9)(a) "Construction industry" means the major group of general contractors and operative builders, heavy construction (other than building construction) contractors, and special trade contractors listed in

major group 23 in the North American Industry Classification System Manual.

(b) The term does not include office workers, design professionals, salespersons, estimators, or any other related employment that is not directly involved on a regular basis in the provision of physical labor at a construction or renovation site.

(10) "Days" means calendar days, unless otherwise specified.

(11) "Department" means the department of labor and industry.

(12) "Direct result" means that a diagnosed condition was caused or aggravated by an injury or occupational disease.

(13) "Fiscal year" means the period of time between July 1 and the succeeding June 30.

(14) "Health care provider" means a person who is licensed, certified, or otherwise authorized by the laws of this state to provide health care in the ordinary course of business or practice of a profession.

(15)(a) "Household or domestic employment" means employment of persons other than members of the household for the purpose of tending to the aid and comfort of the employer or members of the employer's family, including but not limited to housecleaning and yard work.

(b) The term does not include employment beyond the scope of normal household or domestic duties, such as home health care or domiciliary care.

(16)(a) "Indemnity benefits" means any payment made directly to the worker or the worker's beneficiaries, other than a medical benefit. The term in-

cludes payments made pursuant to a reservation of rights.

(b) The term does not include stay-at-work/return-to-work assistance, auxiliary benefits, or expense reimbursements for items such as meals, travel, or lodging.

(17) "Insurer" means an employer bound by compensation plan No. 1, an insurance company transacting business under compensation plan No. 2, or the state fund under compensation plan No. 3.

(18) "Invalid" means one who is physically or mentally incapacitated.

(19) "Limited liability company" has the meaning provided in 35-8-102.

(20) "Maintenance care" means treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status.

(21) "Medical stability", "maximum medical improvement", "maximum healing", or "maximum medical healing" means a point in the healing process when further material functional improvement would not be reasonably expected from primary medical services.

(22) "Objective medical findings" means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.

(23)(a) "Occupational disease" means harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift.

(b) The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity.

(24) "Order" means any decision, rule, direction, requirement, or standard of the department or any other determination arrived at by the department.

(25) "Palliative care" means treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms.

(26) "Payroll", "annual payroll", or "annual payroll for the preceding year" means the average annual payroll of the employer for the preceding calendar year or, if the employer has not operated a sufficient or any length of time during the calendar year, 12 times the average monthly payroll for the current year. However, an estimate may be made by the department for any employer starting in business if average payrolls are not available. This estimate must be adjusted by additional payment by the employer or refund by the department, as the case may actually be, on December 31 of the current year. An employer's payroll must be computed by calculating all wages, as defined in 39-71-123, that are paid by an employer.

(27) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:

(a) has a permanent impairment, as determined by the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, that is established by objective medical findings for the ratable condition. The ratable condition must be a direct result of the compensable injury

or occupational disease and may not be based exclusively on complaints of pain.

(b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and

(c) has an actual wage loss as a result of the injury.

(28) "Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

(29) "Primary medical services" means treatment prescribed by the treating physician, for conditions resulting from the injury or occupational disease, necessary for achieving medical stability.

(30) "Public corporation" means the state or a county, municipal corporation, school district, city, city under a commission form of government or special charter, town, or village.

(31) "Reasonably safe place to work" means that the place of employment has been made as free from danger to the life or safety of the employee as the nature of the employment will reasonably permit.

(32) "Reasonably safe tools or appliances" are tools and appliances that are adapted to and that are reasonably safe for use for the particular purpose for which they are furnished.

(33) "Regular employment" means work on a recurring basis performed for remuneration in a

trade, business, profession, or other occupation in this state.

(34)(a) "Secondary medical services" means those medical services or appliances that are considered not medically necessary for medical stability. The services and appliances include but are not limited to spas or hot tubs, work hardening, physical restoration programs and other restoration programs designed to address disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation facilities.

(b)(i) As used in this subsection (34), "disability" means a condition in which a worker's ability to engage in gainful employment is diminished as a result of physical restrictions resulting from an injury. The restrictions may be combined with factors, such as the worker's age, education, work history, and other factors that affect the worker's ability to engage in gainful employment.

(ii) Disability does not mean a purely medical condition.

(35) "Sole proprietor" means the person who has the exclusive legal right or title to or ownership of a business enterprise.

(36) "State's average weekly wage" means the mean weekly earnings of all employees under covered employment, as defined and established annually by the department before July 1 and rounded to the nearest whole dollar number.

(37) "Temporary partial disability" means a physical condition resulting from an injury, as defined in 39-71-119, in which a worker, prior to maximum healing:

(a) is temporarily unable to return to the position held at the time of injury because of a medically determined physical restriction;

(b) returns to work in a modified or alternative employment; and

(c) suffers a partial wage loss.

(38) "Temporary service contractor" means a person, firm, association, partnership, limited liability company, or corporation conducting business that hires its own employees and assigns them to clients to fill a work assignment with a finite ending date to support or supplement the client's workforce in situations resulting from employee absences, skill shortages, seasonal workloads, and special assignments and projects.

(39) "Temporary total disability" means a physical condition resulting from an injury, as defined in this chapter, that results in total loss of wages and exists until the injured worker reaches maximum medical healing.

(40) "Temporary worker" means a worker whose services are furnished to another on a part-time or temporary basis to fill a work assignment with a finite ending date to support or supplement a workforce in situations resulting from employee absences, skill shortages, seasonal workloads, and special assignments and projects.

(41) "Treating physician" means the person who, subject to the requirements of 39-71-1101, is primarily responsible for delivery and coordination of the worker's medical services for the treatment of a worker's compensable injury or occupational disease and is:

(a) a physician licensed by the state of Montana under Title 37, chapter 3, and has admitting privileges to practice in one or more hospitals, if any, in the area where the physician is located;

(b) a chiropractor licensed by the state of Montana under Title 37, chapter 12;

(c) a physician assistant licensed by the state of Montana under Title 37, chapter 20, if there is not a treating physician, as provided for in subsection (41)(a), in the area where the physician assistant is located;

(d) an osteopath licensed by the state of Montana under Title 37, chapter 3;

(e) a dentist licensed by the state of Montana under Title 37, chapter 4;

(f) for a claimant residing out of state or upon approval of the insurer, a treating physician defined in subsections (41)(a) through (41)(e) who is licensed or certified in another state; or

(g) an advanced practice registered nurse licensed by the state of Montana under Title 37, chapter 8.

(42) "Work-based learning activities" means job training and work experience conducted on the premises of a business partner as a component of school-based learning activities authorized by an elementary, secondary, or postsecondary educational institution.

(43) "Year", unless otherwise specified, means calendar year.

39-71-117. Employer defined

(1) "Employer" means:

(a) the state and each county, city and county, city school district, and irrigation district; all other districts established by law; all public corporations and quasi-public corporations and public agencies; each person; each prime contractor; each firm, voluntary association, limited liability company, limited liability partnership, and private corporation, including any public service corporation and including an independent contractor who has a person in service under an appointment or contract of hire, expressed or implied, oral or written; and the legal representative of any deceased employer or the receiver or trustee of the deceased employer;

(b) any association, corporation, limited liability company, limited liability partnership, or organization that seeks permission and meets the requirements set by the department by rule for a group of individual employers to operate as self-insured under plan No. 1 of this chapter;

(c) any nonprofit association, limited liability company, limited liability partnership, or corporation or other entity funded in whole or in part by federal, state, or local government funds that places community service participants, as described in 39-71-118(1)(e), with nonprofit organizations or associations or federal, state, or local government entities; and

(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.

(2) A temporary service contractor is the employer of a temporary worker for premium and loss experience purposes.

(3) Except as provided in chapter 8 of this title, an employer defined in subsection (1) who uses the services of a worker furnished by another person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, is presumed to be the employer for workers' compensation premium and loss experience purposes for work performed by the worker. The presumption may be rebutted by substantial credible evidence of the following:

(a) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, furnishing the services of a worker to another retains control over all aspects of the work performed by the worker, both at the inception of employment and during all phases of the work; and

(b) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, furnishing the services of a worker to another has obtained workers' compensation insurance for the worker in Montana both at the inception of employment and during all phases of the work performed.

(4) An interstate or intrastate common or contract motor carrier that maintains a place of business in this state and uses an employee or worker in this state is considered the employer of that employee, is liable for workers' compensation premiums, and is subject to loss experience rating in this state unless:

(a) the worker in this state is certified as an independent contractor as provided in 39-71-417; or

(b) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation furnishing employees or workers in this state to a motor carrier has obtained Montana workers' compensation insurance on the employees or workers in Montana both at the inception of employment and during all phases of the work performed.

39-71-118. Employee, worker, volunteer, volunteer firefighter, and volunteer emergency medical technician defined

(1) As used in this chapter, the term "employee" or "worker" means:

(a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. The terms include aliens and minors, whether lawfully or unlawfully employed, and all of the elected and appointed paid public officers and officers and members of boards of directors of quasi-public or private corporations, except those officers identified in 39-71-401(2), while rendering actual service for the corporations for pay. Casual employees, as defined by 39-71-116, are included as employees if they are not otherwise covered by workers' compensation and if an employer has elected to be bound by the provisions of the compensation law for these casual employments, as provided in 39-71-401(2). Household or domestic employment is excluded.

(b) any juvenile who is performing work under authorization of a district court judge in a delinquency prevention or rehabilitation program;

(c) a person who is receiving on-the-job vocational rehabilitation training or other on-the-job training under a state or federal vocational training program, whether or not under an appointment or contract of hire with an employer, as defined in 39-71-117, and, except as provided in subsection (9), whether or not receiving payment from a third party. However, this subsection (1)(c) does not apply to students enrolled in vocational training programs, as outlined in this subsection, while they are on the premises of a public school or community college.

(d) an aircrew member or other person who is employed as a volunteer under 67-2-105;

(e) a person, other than a juvenile as described in subsection (1)(b), who is performing community service for a nonprofit organization or association or for a federal, state, or local government entity under a court order, or an order from a hearings officer as a result of a probation or parole violation, whether or not under appointment or contract of hire with an employer, as defined in 39-71-117, and whether or not receiving payment from a third party. For a person covered by the definition in this subsection (1)(e):

(i) compensation benefits must be limited to medical expenses pursuant to 39-71-704 and an impairment award pursuant to 39-71-703 that is based upon the minimum wage established under Title 39, chapter 3, part 4, for a full-time employee at the time of the injury; and

(ii) premiums must be paid by the employer, as defined in 39-71-117(3), and must be based upon

the minimum wage established under Title 39, chapter 3, part 4, for the number of hours of community service required under the order from the court or hearings officer.

(f) an inmate working in a federally certified prison industries program authorized under 53-30-132;

(g) a volunteer firefighter as described in 7-33-4109 or a person who provides ambulance services under Title 7, chapter 34, part 1;

(h) a person placed at a public or private entity's worksite pursuant to 53-4-704. The person is considered an employee for workers' compensation purposes only. The department of public health and human services shall provide workers' compensation coverage for recipients of financial assistance, as defined in 53-4-201, or for participants in the food stamp program, as defined in 53-2-902, who are placed at public or private worksites through an endorsement to the department of public health and human services' workers' compensation policy naming the public or private worksite entities as named insureds under the policy. The endorsement may cover only the entity's public assistance participants and may be only for the duration of each participant's training while receiving financial assistance or while participating in the food stamp program under a written agreement between the department of public health and human services and each public or private entity. The department of public health and human services may not provide workers' compensation coverage for individuals who are covered for workers' compensation purposes by another state or federal employment training program. Premiums and benefits must be based upon the wage that a probationary

employee is paid for work of a similar nature at the assigned worksite.

(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).

(2) The terms defined in subsection (1) do not include a person who is:

(a) performing voluntary service at a recreational facility and who receives no compensation for those services other than meals, lodging, or the use of the recreational facilities;

(b) performing services as a volunteer, except for a person who is otherwise entitled to coverage under the laws of this state. As used in this subsection (2)(b), "volunteer" means a person who performs services on behalf of an employer, as defined in 39-71-117, but who does not receive wages as defined in 39-71-123.

(c) serving as a foster parent, licensed as a foster care provider in accordance with 52-2-621, and providing care without wage compensation to no more than six foster children in the provider's own residence. The person may receive reimbursement for providing room and board, obtaining training, respite care, leisure and recreational activities, and providing for other needs and activities arising in the provision of in-home foster care.

(d) performing temporary agricultural work for an employer if the person performing the work is otherwise exempt from the requirement to obtain workers' compensation coverage under 39-71-401(2)(r)

with respect to a company that primarily performs agricultural work at a fixed business location or under 39-71-401(2)(d) and is not required to obtain an independent contractor's exemption certificate under 39-71-417 because the person does not regularly perform agricultural work away from the person's own fixed business location. For the purposes of this subsection, the term "agricultural" has the meaning provided in 15-1-101(1)(a).

(3)(a) With the approval of the insurer, an employer may elect to include as an employee under the provisions of this chapter any volunteer as defined in subsection (2)(b).

(b) A fire district, fire service area, or volunteer fire department formed under Title 7, chapter 33, an ambulance service not otherwise covered by subsection (1)(g), or a paid or volunteer nontransporting medical unit, as defined in 50-6-302, in service to a town, city, or county may elect to include as an employee under the provisions of this chapter a volunteer firefighter or a volunteer emergency medical technician.

(4)(a) The term "volunteer emergency medical technician" means a person who has received a certificate issued by the board of medical examiners as provided in Title 50, chapter 6, part 2, and who serves the public through an ambulance service not otherwise covered by subsection (1)(g) or a paid or volunteer nontransporting medical unit, as defined in 50-6-302, in service to a town, city, or county.

(b) The term "volunteer firefighter" means a firefighter who is an enrolled and active member of a governmental fire agency organized under Title 7, chapter 33, except 7-33-4109.

(c) The term "volunteer hours" means all the time spent by a volunteer firefighter or a volunteer emergency medical technician in the service of an employer or as a volunteer for a town, city, or county, including but not limited to training time, response time, and time spent at the employer's premises.

(5)(a) If the employer is a partnership, limited liability partnership, sole proprietor, or a member-managed limited liability company, the employer may elect to include as an employee within the provisions of this chapter any member of the partnership or limited liability partnership, the owner of the sole proprietorship, or any member of the limited liability company devoting full time to the partnership, limited liability partnership, proprietorship, or limited liability company business.

(b) In the event of an election, the employer shall serve upon the employer's insurer written notice naming the partners, sole proprietor, or members to be covered and stating the level of compensation coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection (5)(d). A partner, sole proprietor, or member is not considered an employee within this chapter until notice has been given.

(c) A change in elected wages must be in writing and is effective at the start of the next quarter following notification.

(d) All weekly compensation benefits must be based on the amount of elected wages, subject to the minimum and maximum limitations of this subsection (5)(d). For premium ratemaking and for the determination of the weekly wage for weekly compensation benefits, the electing employer may elect an

amount of not less than $900 a month and not more than 1 1/2 times the state's average weekly wage.

(6)(a) If the employer is a quasi-public or a private corporation or a manager-managed limited liability company, the employer may elect to include as an employee within the provisions of this chapter any corporate officer or manager exempted under 39-71-401(2).

(b) In the event of an election, the employer shall serve upon the employer's insurer written notice naming the corporate officer or manager to be covered and stating the level of compensation coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection (6)(d). A corporate officer or manager is not considered an employee within this chapter until notice has been given.

(c) A change in elected wages must be in writing and is effective at the start of the next quarter following notification.

(d) For the purposes of an election under this subsection (6), all weekly compensation benefits must be based on the amount of elected wages, subject to the minimum and maximum limitations of this subsection (6)(d). For premium ratemaking and for the determination of the weekly wage for weekly compensation benefits, the electing employer may elect an amount of not less than $200 a week and not more than 1 1/2 times the state's average weekly wage.

(7)(a) The trustees of a rural fire district, a county governing body providing rural fire protection, or the county commissioners or trustees for a fire service area may elect to include as an employee within the provisions of this chapter any volunteer

firefighter. A volunteer firefighter who receives workers' compensation coverage under this section may not receive disability benefits under Title 19, chapter 17.

(b) In the event of an election, the employer shall report payroll for all volunteer firefighters for premium and weekly benefit purposes based on the number of volunteer hours of each firefighter, but no more than 60 hours, times the state's average weekly wage divided by 40 hours.

(c) A self-employed sole proprietor or partner who has elected not to be covered under this chapter, but who is covered as a volunteer firefighter pursuant to subsection (7)(a), and when injured in the course and scope of employment as a volunteer firefighter may in addition to the benefits described in subsection (7)(b) be eligible for benefits at an assumed wage of the minimum wage established under Title 39, chapter 3, part 4, for 2,080 hours a year. The trustees of a rural fire district, a county governing body providing rural fire protection, or the county commissioners or trustees for a fire service area may make an election for benefits. If an election is made, payrolls must be reported and premiums must be assessed on the assumed wage.

(8) Except as provided in Title 39, chapter 8, an employee or worker in this state whose services are furnished by a person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, to an employer, as defined in 39-71-117, is presumed to be under the control and employment of the employer. This presumption may be rebutted as provided in 39-71-117(3).

(9) A student currently enrolled in an elementary, secondary, or postsecondary educational institution who is participating in work-based learning activities and who is paid wages by the educational institution or business partner is the employee of the entity that pays the student's wages for all purposes under this chapter. A student who is not paid wages by the business partner or the educational institution is a volunteer and is subject to the provisions of this chapter.

(10) For purposes of this section, an "employee or worker in this state" means:

(a) a resident of Montana who is employed by an employer and whose employment duties are primarily carried out or controlled within this state;

(b) a nonresident of Montana whose principal employment duties are conducted within this state on a regular basis for an employer;

(c) a nonresident employee of an employer from another state engaged in the construction industry, as defined in 39-71-116, within this state; or

(d) a nonresident of Montana who does not meet the requirements of subsection (10)(b) and whose employer elects coverage with an insurer that allows an election for an employer whose:

(i) nonresident employees are hired in Montana;

(ii) nonresident employees' wages are paid in Montana;

(iii) nonresident employees are supervised in Montana; and

(iv) business records are maintained in Montana.

(11) An insurer may require coverage for all nonresident employees of a Montana employer who do not meet the requirements of subsection (10)(b) or (10)(d) as a condition of approving the election under subsection (10)(d).

(12)(a) An ambulance service not otherwise covered by subsection (1)(g) or a paid or volunteer nontransporting medical unit, as defined in 50-6-302, in service to a town, city, or county may elect to include as an employee within the provisions of this chapter a volunteer emergency medical technician who serves public safety through the ambulance service not otherwise covered by subsection (1)(g) or the paid or volunteer nontransporting medical unit.

(b) In the event of an election under subsection (12)(a), the employer shall report payroll for all volunteer emergency medical technicians for premium and weekly benefit purposes based on the number of volunteer hours of each emergency medical technician, but no more than 60 hours, times the state's average weekly wage divided by 40 hours.

(c) A self-employed sole proprietor or partner who has elected not to be covered under this chapter, but who is covered as a volunteer emergency medical technician pursuant to subsection (12)(a), and when injured in the course and scope of employment as a volunteer emergency medical technician may in addition to the benefits described in subsection (12)(b) be eligible for benefits at an assumed wage of the minimum wage established under Title 39, chapter 3, part 4, for 2,080 hours a year. If an election is made as provided in subsection (12)(a), payrolls must be re-

ported and premiums must be assessed on the assumed weekly wage.

(d) A volunteer emergency medical technician who receives workers' compensation coverage under this section may not receive disability benefits under Title 19, chapter 17, if the individual is also eligible as a volunteer firefighter.

* * *

39-71-123. Wages defined

(1) "Wages" means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). Wages include the cash value of all remuneration paid in any medium other than cash. The term includes but is not limited to:

(a) commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and periods of sickness;

(b) backpay or any similar pay made for or in regard to previous service by the employee for the employer, other than retirement or pension benefits from a qualified plan;

(c) tips or other gratuities received by the employee, to the extent that tips or gratuities are documented by the employee to the employer for tax purposes;

(d) income or payment in the form of a draw, wage, net profit, or substitute for money received or taken by a sole proprietor or partner, regardless of whether the sole proprietor or partner has performed work or provided services for that remuneration;

(e) board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its actual value; and

(f) payments made to an employee on any basis other than time worked, including but not limited to piecework, an incentive plan, or profit-sharing arrangement.

(2) The term "wages" does not include any of the following:

(a) employee expense reimbursements or allowances for meals, lodging, travel, subsistence, and other expenses, as set forth in department rules;

(b) the amount of the payment made by the employer for employees, if the payment was made for:

(i) retirement or pension pursuant to a qualified plan as defined under the provisions of the Internal Revenue Code;

(ii) sickness or accident disability under a workers' compensation policy;

(iii) medical or hospitalization expenses in connection with sickness or accident disability, including health insurance for the employee or the employee's immediate family;

(iv) death, including life insurance for the employee or the employee's immediate family;

(c) vacation or sick leave benefits accrued but not paid;

(d) special rewards for individual invention or discovery; or

(e) monetary and other benefits paid to a person as part of public assistance, as defined in 53-4-201.

(3)(a) Except as provided in subsection (3)(b), for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except that if the term of employment for the same employer is less than four pay periods, the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work.

(b) For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, including periods of idleness or seasonal fluctuations.

(4)(a) For the purpose of calculating compensation benefits for an employee working concurrent employments, the average actual wages must be calculated as provided in subsection (3). As used in this subsection, "concurrent employment" means employment in which the employee was actually employed at the time of the injury and would have continued to be employed without a break in the term of employment if not for the injury.

(b) Except as provided in 39-71-118(7)(c) and (12)(c), the compensation benefits for a covered volunteer must be based on the average actual wages in the volunteer's regular employment, except self-employment as a sole proprietor or partner who

elected not to be covered, from which the volunteer is disabled by the injury incurred.

(c) The compensation benefits for an employee working at two or more concurrent remunerated employments must be based on the aggregate of average actual wages of all employments, except for the wages earned by individuals while engaged in the employments outlined in 39-71-401(3)(a) who elected not to be covered, from which the employee is disabled by the injury incurred.

(5) For the purposes of calculating compensation benefits for an employee working for an employer, as provided in 39-71-117(1)(d), and for calculating premiums to be paid by that employer, the wages must be based upon all hours worked multiplied by the mean hourly wage by area, as published by the department in the edition of Montana Informational Wage Rates by Occupation, adopted annually by the department, that is in effect as of the date of injury or for the period in which the premium is due.

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Part 3. Miscellaneous Provisions

* * *

39-71-317. Employer not to terminate worker for filing claim—preference—jurisdiction over dispute

(1) An employer may not use as grounds for terminating a worker the filing of a claim under this chapter. The district court has exclusive jurisdiction over disputes concerning the grounds for termination under this section.

(2) When an injured worker is capable of returning to work within 2 years from the date of inju-

ry and has received a medical release to return to work, the worker must be given a preference over other applicants for a comparable position that becomes vacant if the position is consistent with the worker's physical condition and vocational abilities.

(3) This preference applies only to employment with the employer for whom the employee was working at the time the injury occurred.

(4) The workers' compensation court has exclusive jurisdiction to administer or resolve a dispute concerning the reemployment preference under this section. A dispute concerning the reemployment preference is not subject to mediation or a contested case hearing.

* * *

Part 4. Coverage, Liability, and Subrogation

39-71-401. Employments covered and exemptions—elections—notice

(1) Except as provided in subsection (2), the Workers' Compensation Act applies to all employers and to all employees. An employer who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers' Compensation Act is subject to and bound by the compensation plan that has been elected by the employer.

(2) Unless the employer elects coverage for these employments under this chapter and an insurer allows an election, the Workers' Compensation Act does not apply to any of the following:

(a) household or domestic employment;

(b) casual employment;

(c) employment of a dependent member of an employer's family for whom an exemption may be claimed by the employer under the federal Internal Revenue Code;

(d) employment of sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company, except as provided in subsection (3);

(e) employment of a real estate, securities, or insurance salesperson paid solely by commission and without a guarantee of minimum earnings;

(f) employment as a direct seller as defined by 26 U.S.C. 3508;

(g) employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States;

(h) employment of a person performing services in return for aid or sustenance only, except employment of a volunteer under 67-2-105;

(i) employment with a railroad engaged in interstate commerce, except that railroad construction work is included in and subject to the provisions of this chapter;

(j) employment as an official, including a timer, referee, umpire, or judge, at an amateur athletic event;

(k) employment of a person performing services as a newspaper carrier or freelance correspondent if the person performing the services or a parent or guardian of the person performing the ser-

vices in the case of a minor has acknowledged in writing that the person performing the services and the services are not covered. As used in this subsection (2)(k):

(i) "freelance correspondent" means a person who submits articles or photographs for publication and is paid by the article or by the photograph; and

(ii) "newspaper carrier":

(A) means a person who provides a newspaper with the service of delivering newspapers singly or in bundles; and

(B) does not include an employee of the paper who, incidentally to the employee's main duties, carries or delivers papers.

(l) cosmetologist's services and barber's services as referred to in 39-51-204(1)(e);

(m) a person who is employed by an enrolled tribal member or an association, business, corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted solely within the exterior boundaries of an Indian reservation;

(n) employment of a jockey who is performing under a license issued by the board of horseracing from the time that the jockey reports to the scale room prior to a race through the time that the jockey is weighed out after a race if the jockey has acknowledged in writing, as a condition of licensing by the board of horseracing, that the jockey is not covered under the Workers' Compensation Act while performing services as a jockey;

(o) employment of a trainer, assistant trainer, exercise person, or pony person who is performing

services under a license issued by the board of horseracing while on the grounds of a licensed race meet;

(p) employment of an employer's spouse for whom an exemption based on marital status may be claimed by the employer under 26 U.S.C. 7703;

(q) a person who performs services as a petroleum land professional. As used in this subsection, a "petroleum land professional" is a person who:

(i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in negotiating a business agreement for the exploration or development of minerals;

(ii) is paid for services that are directly related to the completion of a contracted specific task rather than on an hourly wage basis; and

(iii) performs all services as an independent contractor pursuant to a written contract.

(r) an officer of a quasi-public or a private corporation or, except as provided in subsection (3), a manager of a manager-managed limited liability company who qualifies under one or more of the following provisions:

(i) the officer or manager is not engaged in the ordinary duties of a worker for the corporation or the limited liability company and does not receive any pay from the corporation or the limited liability company for performance of the duties;

(ii) the officer or manager is engaged primarily in household employment for the corporation or the limited liability company;

(iii) the officer or manager either:

(A) owns 20% or more of the number of shares of stock in the corporation or owns 20% or more of the limited liability company; or

(B) owns less than 20% of the number of shares of stock in the corporation or limited liability company if the officer's or manager's shares when aggregated with the shares owned by a person or persons listed in subsection (2)(r)(iv) total 20% or more of the number of shares in the corporation or limited liability company; or

(iv) the officer or manager is the spouse, child, adopted child, stepchild, mother, father, son-in-law, daughter-in-law, nephew, niece, brother, or sister of a corporate officer who meets the requirements of subsection (2)(r)(iii)(A) or (2)(r)(iii)(B);

(s) a person who is an officer or a manager of a ditch company as defined in 27-1-731;

(t) service performed by an ordained, commissioned, or licensed minister of a church in the exercise of the church's ministry or by a member of a religious order in the exercise of duties required by the order;

(u) service performed to provide companionship services, as defined in 29 CFR 552.6, or respite care for individuals who, because of age or infirmity, are unable to care for themselves when the person providing the service is employed directly by a family member or an individual who is a legal guardian;

(v) employment of a person performing the services of an intrastate or interstate common or contract motor carrier when hired by an individual or entity who meets the definition of a broker or freight forwarder, as provided in 49 U.S.C. 13102;

(w) employment of a person who is not an employee or worker in this state as defined in 39-71-118(10);

(x) employment of a person who is working under an independent contractor exemption certificate;

(y) employment of an athlete by or on a team or sports club engaged in a contact sport. As used in this subsection, "contact sport" means a sport that includes significant physical contact between the athletes involved. Contact sports include but are not limited to football, hockey, roller derby, rugby, lacrosse, wrestling, and boxing.

(z) a musician performing under a written contract.

(3)(a)(i) A person who regularly and customarily performs services at locations other than the person's own fixed business location shall elect to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3 unless the person has waived the rights and benefits of the Workers' Compensation Act by obtaining an independent contractor exemption certificate from the department pursuant to 39-71-417.

(ii) Application fees or renewal fees for independent contractor exemption certificates must be deposited in the state special revenue account established in 39-9-206 and must be used to offset the certification administration costs.

(b) A person who holds an independent contractor exemption certificate may purchase a workers' compensation insurance policy and with the in-

surer's permission elect coverage for the certificate holder.

(c) For the purposes of this subsection (3), "person" means:

(i) a sole proprietor;

(ii) a working member of a partnership;

(iii) a working member of a limited liability partnership;

(iv) a working member of a member-managed limited liability company; or

(v) a manager of a manager-managed limited liability company that is engaged in the work of the construction industry as defined in 39-71-116.

(4)(a) A corporation or a manager-managed limited liability company shall provide coverage for its employees under the provisions of compensation plan No. 1, 2, or 3. A quasi-public corporation, a private corporation, or a manager-managed limited liability company may elect coverage for its corporate officers or managers, who are otherwise exempt under subsection (2), by giving a written notice in the following manner:

(i) if the employer has elected to be bound by the provisions of compensation plan No. 1, by delivering the notice to the board of directors of the corporation or to the management organization of the manager-managed limited liability company; or

(ii) if the employer has elected to be bound by the provisions of compensation plan No. 2 or 3, by delivering the notice to the board of directors of the corporation or to the management organization of the manager-managed limited liability company and to the insurer.

(b) If the employer changes plans or insurers, the employer's previous election is not effective and the employer shall again serve notice to its insurer and to its board of directors or the management organization of the manager-managed limited liability company if the employer elects to be bound.

(5) The appointment or election of an employee as an officer of a corporation, a partner in a partnership, a partner in a limited liability partnership, or a member in or a manager of a limited liability company for the purpose of exempting the employee from coverage under this chapter does not entitle the officer, partner, member, or manager to exemption from coverage.

(6) Each employer shall post a sign in the workplace at the locations where notices to employees are normally posted, informing employees about the employer's current provision of workers' compensation insurance. A workplace is any location where an employee performs any work-related act in the course of employment, regardless of whether the location is temporary or permanent, and includes the place of business or property of a third person while the employer has access to or control over the place of business or property for the purpose of carrying on the employer's usual trade, business, or occupation. The sign must be provided by the department, distributed through insurers or directly by the department, and posted by employers in accordance with rules adopted by the department. An employer who purposely or knowingly fails to post a sign as provided in this subsection is subject to a $50 fine for each citation.

* * *

39-71-407. Liability of insurers—limitations

(1) For workers' compensation injuries, each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer covered under plan No. 1, plan No. 2, and the state fund under plan No. 3 that it insures who receives an injury arising out of and in the course of employment or, in the case of death from the injury, to the employee's beneficiaries, if any.

(2) An injury does not arise out of and in the course of employment when the employee is:

(a) on a paid or unpaid break, is not at a worksite of the employer, and is not performing any specific tasks for the employer during the break; or

(b) engaged in a social or recreational activity, regardless of whether the employer pays for any portion of the activity. The exclusion from coverage of this subsection (2)(b) does not apply to an employee who, at the time of injury, is on paid time while participating in a social or recreational activity or whose presence at the activity is required or requested by the employer. For the purposes of this subsection (2)(b), "requested" means the employer asked the employee to assume duties for the activity so that the employee's presence is not completely voluntary and optional and the injury occurred in the performance of those duties.

(3)(a) An insurer is liable for an injury, as defined in 39-71-119, only if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:

(i) a claimed injury has occurred; or

(ii) a claimed injury has occurred and aggravated a preexisting condition.

(b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.

(4)(a) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:

(i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or

(ii) the travel is required by the employer as part of the employee's job duties.

(b) A payment made to an employee under a collective bargaining agreement, personnel policy manual, or employee handbook or any other document provided to the employee that is not wages but is designated as an incentive to work at a particular jobsite is not a reimbursement for the costs of travel, gas, oil, or lodging, and the employee is not covered under this chapter while traveling.

(5) Except as provided in subsection (6), an employee is not eligible for benefits otherwise payable under this chapter if the employee's use of alcohol or drugs not prescribed by a physician is the major contributing cause of the accident.

(6)(a) An employee who has received written certification, as defined in 50-46-302, from a physician for the use of marijuana for a debilitating medi-

cal condition and who is otherwise eligible for benefits payable under this chapter is subject to the limitations of subsections (6)(b) through (6)(d).

(b) An employee is not eligible for benefits otherwise payable under this chapter if the employee's use of marijuana for a debilitating medical condition, as defined in 50-46-302, is the major contributing cause of the injury or occupational disease.

(c) Nothing in this chapter may be construed to require an insurer to reimburse any person for costs associated with the use of marijuana for a debilitating medical condition, as defined in 50-46-302.

(d) In an accepted liability claim, the benefits payable under this chapter may not be increased or enhanced due to a worker's use of marijuana for a debilitating medical condition, as defined in 50-46-302. An insurer remains liable for those benefits that the worker would qualify for absent the worker's medical use of marijuana.

(7) The provisions of subsection (5) do not apply if the employer had knowledge of and failed to attempt to stop the employee's use of alcohol or drugs not prescribed by a physician. This subsection (7) does not apply to the use of marijuana for a debilitating medical condition because marijuana is not a prescribed drug.

(8) If there is no dispute that an insurer is liable for an injury but there is a liability dispute between two or more insurers, the insurer for the most recently filed claim shall pay benefits until that insurer proves that another insurer is responsible for paying benefits or until another insurer agrees to pay benefits. If it is later proven that the insurer for the most recently filed claim is not responsible for paying ben-

efits, that insurer must receive reimbursement for benefits paid to the claimant from the insurer proven to be responsible.

(9) If a claimant who has reached maximum healing suffers a subsequent nonwork-related injury to the same part of the body, the workers' compensation insurer is not liable for any compensation or medical benefits caused by the subsequent nonwork-related injury.

(10) An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury.

(11) For occupational diseases, every employer enrolled under plan No. 1, every insurer under plan No. 2, or the state fund under plan No. 3 is liable for the payment of compensation, in the manner and to the extent provided in this chapter, to an employee of an employer covered under plan No. 1, plan No. 2, or the state fund under plan No. 3 if the employee is diagnosed with a compensable occupational disease.

(12) An insurer is liable for an occupational disease only if the occupational disease:

(a) is established by objective medical findings; and

(b) arises out of or is contracted in the course and scope of employment. An occupational disease is considered to arise out of or be contracted in the course and scope of employment if the events occurring on more than a single day or work shift are the major contributing cause of the occupational disease

in relation to other factors contributing to the occupational disease.

(13) When compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.

(14) When there is more than one insurer and only one employer at the time that the employee was injuriously exposed to the hazard of the disease, the liability rests with the insurer providing coverage at the earlier of:

(a) the time that the occupational disease was first diagnosed by a health care provider; or

(b) the time that the employee knew or should have known that the condition was the result of an occupational disease.

(15) In the case of pneumoconiosis, any coal mine operator who has acquired a mine in the state or substantially all of the assets of a mine from a person who was an operator of the mine on or after December 30, 1969, is liable for and shall secure the payment of all benefits that would have been payable by that person with respect to miners previously employed in the mine if acquisition had not occurred and that person had continued to operate the mine, and the prior operator of the mine is not relieved of any liability under this section.

(16) As used in this section, "major contributing cause" means a cause that is the leading cause contributing to the result when compared to all other contributing causes.

* * *

39-71-409. Waivers by employee invalid

(1) An agreement by an employee to waive any rights under this chapter is not valid.

(2)(a) A person who possesses and is working under a current independent contractor exemption certificate issued by the department waives all rights and benefits of the Workers' Compensation Act unless the person elects coverage pursuant to 39-71-401(3)(b).

(b) A waiver by reason of an independent contractor exemption certificate is an exception to the general prohibition of waiving the advantage of a statute enacted for a public reason as provided for in 1-3-204.

* * *

39-71-417. Independent contractor certification

(1)(a)(i) Except as provided in subsection (1)(a)(ii), a person who regularly and customarily performs services at a location other than the person's own fixed business location shall apply to the department for an independent contractor exemption certificate unless the person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3.

(ii) An officer or manager who is exempt under 39-71-401(2)(r)(iii) or (2)(r)(iv) may apply, but is not required to apply, to the department for an independent contractor exemption certificate.

(b) A person who meets the requirements of this section and receives an independent contractor exemption certificate is not required to obtain a personal workers' compensation insurance policy.

(c) For the purposes of this section, "person" means:

(i) a sole proprietor;

(ii) a working member of a partnership;

(iii) a working member of a limited liability partnership;

(iv) a working member of a member-managed limited liability company; or

(v) a manager of a manager-managed limited liability company that is engaged in the work of the construction industry as defined in 39-71-116.

(2) The department shall adopt rules relating to an original application for or renewal of an independent contractor exemption certificate. The department shall adopt by rule the amount of the fee for an application or certificate renewal. The application or renewal must be accompanied by the fee.

(3) The department shall deposit the application or renewal fee in an account in the state special revenue fund to pay the costs of administering the program.

(4)(a) To obtain an independent contractor exemption certificate, the applicant shall swear to and acknowledge the following:

(i) that the applicant has been and will continue to be free from control or direction over the performance of the person's own services, both under contract and in fact; and

(ii) that the applicant is engaged in an independently established trade, occupation, profession, or business and will provide sufficient documentation of that fact to the department.

(b) For the purposes of subsection (4)(a)(i), an endorsement required for licensure, as provided in 37-47-303, does not imply or constitute control.

(5)(a) An applicant for an independent contractor exemption certificate shall submit an application under oath on a form prescribed by the department and containing the following:

(i) the applicant's name and address;

(ii) the applicant's social security number;

(iii) each occupation for which the applicant is seeking independent contractor certification; and

(iv) other documentation as provided by department rule to assist in determining if the applicant has an independently established business.

(b) The department shall adopt a retention schedule that maintains copies of documents submitted in support of an initial application or renewal application for an independent contractor exemption certificate for a minimum of 3 years after an application has been received by the department. The department shall, to the extent feasible, produce renewal applications that reduce the burden on renewal applicants to supply information that has been previously provided to the department as part of the application process.

(c) An applicant who applies on or after July 1, 2011, to renew an independent contractor exemption certificate is not required to submit documents that have been previously submitted to the department if:

(i) the applicant certifies under oath that the previously submitted documents are still valid and current; and

(ii) the department, if it considers it necessary, independently verifies a specific document or decides that a document has not expired pursuant to the document's own terms and is therefore still valid and current.

(6) The department shall issue an independent contractor exemption certificate to an applicant if the department determines that an applicant meets the requirements of this section.

(7)(a) When the department approves an application for an independent contractor exemption certificate and the person is working under the independent contractor exemption certificate, the person's status is conclusively presumed to be that of an independent contractor.

(b) A person working under an approved independent contractor exemption certificate has waived all rights and benefits under the Workers' Compensation Act and is precluded from obtaining benefits unless the person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3.

(c) For the purposes of the Workers' Compensation Act, a person is working under an independent contractor exemption certificate if:

(i) the person is performing work in the trade, business, occupation, or profession listed on the person's independent contractor exemption certificate; and

(ii) the hiring agent and the person holding the independent contractor exemption certificate do not have a written or an oral agreement that the independent contractor exemption certificate holder's

status with respect to that hiring agent is that of an employee.

(8) Once issued, an independent contractor exemption certificate remains in effect for 2 years unless:

(a) suspended or revoked pursuant to 39-71-418; or

(b) canceled by the independent contractor.

(9) If the department's independent contractor central unit denies an application for an independent contractor exemption certificate, the applicant may contest that decision as provided in 39-71-415(2).

* * *

Part 21. Compensation Plan Number One

39-71-2101. General requirements for electing coverage under plan

(1) An employer may elect to be bound by compensation plan No. 1 upon furnishing satisfactory proof to the department and the Montana self-insurers guaranty fund of solvency and financial ability to pay the compensation and benefits provided for in this chapter and to discharge all liabilities that are reasonably likely to be incurred during the fiscal year for which the election is effective. The employer may, by order of the department and with the concurrence of the guaranty fund, make the payments directly to employees as they become entitled to receive payments under the terms and conditions of this chapter.

(2) Employers who comply with the provisions of this chapter and who are participating in collectively bargained, jointly administered Taft-Hartley trust

funds are eligible to provide self-insured workers' compensation benefits for their employees.

* * *

39-71-2103. Employer permitted to carry on business and settle directly with employee—individual liability

(1) If the employer making the election is found by the department and the Montana self-insurers guaranty fund to have the requisite financial ability to pay the compensation and benefits in this chapter, then the department, with the concurrence of the guaranty fund, shall grant to the employer permission to carry on business for the year within which the election is made and proof filed, or the remaining portion of the year, and to make payments directly to the employees as they may become entitled to receive the payments.

(2) Each individual employer in an association, corporation, limited liability company, or organization of employers given permission by the department to operate as self-insured under plan No. 1 of this chapter is jointly and severally liable for all obligations incurred by the association, corporation, limited liability company, or organization under this chapter. An association, corporation, limited liability company, or organization of employers given permission to operate as self-insured shall maintain excess liability coverage in amounts and under conditions as provided by rules of the department.

* * *

Part 22. Compensation Plan Number Two

39-71-2201. Election to be bound by plan—captive reciprocal insurers

(1) Any employer except those specified in 39-71-403 may, by filing an election to become bound by compensation plan No. 2, insure the employer's liability to pay the compensation and benefits provided by this chapter with any insurance company authorized to transact such business in this state.

(2) Any employer electing to become bound by compensation plan No. 2 shall make the election on the form and in the manner prescribed by the department.

(3) A captive reciprocal insurer established by or on behalf of an employer or a group of employers is considered to be a compensation plan No. 2 insurer. Pursuant to 33-28-205, a captive reciprocal insurer may not be a member of an insurance guaranty association or guaranty fund.

* * *

Part 23. Compensation Plan Number Three

* * *

39-71-2311. Intent and purpose of plan—expense constant defined

(1) It is the intent and purpose of the state fund to allow employers an option to insure their liability for workers' compensation and occupational disease coverage with the state fund. The state fund must be neither more nor less than self-supporting. Premium rates must be set at least annually at a level sufficient to ensure the adequate funding of the insurance program, including the costs of administration, bene-

fits, and adequate reserves, during and at the end of the period for which the rates will be in effect. In determining premium rates, the state fund shall make every effort to adequately predict future costs. When the costs of a factor influencing rates are unclear and difficult to predict, the state fund shall use a prediction calculated to be more than likely to cover those costs rather than less than likely to cover those costs. The prediction must take into account the goal of pooling risk and may not place an undue burden on employers that are not eligible for the tier with the lowest-rated premium for workers' compensation purposes.

(2) Unnecessary surpluses that are created by the imposition of premiums found to have been set higher than necessary because of a high estimate of the cost of a factor or factors may be refunded by the declaration of a dividend as provided in this part. For the purpose of keeping the state fund solvent, the board of directors may implement multiple rating tiers as provided in 39-71-2330 and may assess an expense constant, a minimum premium, or both.

(3) As used in this section, "expense constant" means a premium charge applied to each workers' compensation policy to pay expenses related to issuing, servicing, maintaining, recording, and auditing the policy.

APPENDIX E

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Michael P. Talia, Esq.
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P. O. Box 1645
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Attorneys for Big Sky Colony, Inc.
and Daniel E. Wipf

MONTANA NINTH JUDICIAL DISTRICT COURT,
GLACIER COUNTY

[Filed December 6, 2010]

Cause No. DV 10-4

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

Petitioners,

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,

Respondent.

Judge: Laurie McKinnon

AFFIDAVIT OF DANIEL E. WIPF

STATE OF MONTANA)
: ss
County of Cascade)

DANIEL E. WIPF, after first duly affirming upon his oath and upon his own personal knowledge, deposes and says:

1. I am a resident of Glacier County, Montana and a member of Big Sky Colony, Inc. (the "Colony") and the Hutterian Brethren Church (the "Church"). I am the first minister and corporate president of Big Sky Colony, Inc. I have served in both positions since 1996. I have been a minister as well as an advisor to approximately 35 Hutterite colonies located in Montana who are members of the Lehrerleut Conference of the Hutterian Brethren Church since 1978.

2. As president of Big Sky Colony, Inc., I am involved in and familiar with all corporate action taken by the Colony. The corporation is engaged in agricultural operations, including production of cattle, hogs, grain, eggs, dairy, poultry, produce, hay, and custom work. The Colony's agricultural products are sold to non-Colony members, other colonies and entities and are also consumed by the Colony's members.

3. As first minister of the Colony, I am the senior religious minister on the Colony. I am responsible for the spiritual direction of every member of the Colony according to the tenets, doctrine, teachings and practices of the Hutterian Brethren Church. I am familiar with the tenets, doctrine, teachings and practices of the Hutterian Brethren Church because I grew up in the Church, have studied them and have been a minister for many years. As part of my role

as first minister of the Colony, I teach the Colony members the tenets, doctrine, teachings and practices of the Hutterian Brethren Church.

4. Big Sky Colony, Inc. is a religious corporation organized and existing under the Montana Nonprofit Corporation Act, Montana Code Annotated, Title 35, Chapter 2. Big Sky Colony is classified as a "Religious and Apostolic Organization" which is exempt from tax under Section 501(d) of the Internal Revenue Code, Big Sky Colony is a signatory to the Hutterian Brethren Church constitution and, as such, is recognized as a Hutterite Colony by the Hutterian Brethren Church. The principal offices of Big Sky Colony are located at 1657 Merriweather, Cut Bank, Montana. A true and accurate copy of the current Articles of Incorporation of Big Sky Colony ("Articles") is attached as Exhibit A. A true and accurate copy of the current Code of Bylaws of Big Sky Colony ("Bylaws") is attached as Exhibit B. There are approximately one hundred Hutterite adherents residing on the Colony.

5. Big Sky Colony was formed 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; to conduct business deemed by the members necessary to support the church and the members thereof. . . ." Articles, Art. II.

6. Big Sky Colony, and other Hutterite Colonies, are organized as non-profit religious corporations with members. Under Article VIII of the Bylaws. all persons of Hutterische faith residing on the Colony's property are members of the Colony. Big Sky Colony

and other Hutterite colonies are recognized as tax exempt entities under Section 501(d) of the Internal Revenue Code. The Colony is not a trust and does not hold assets in trust for its members or any other person. While the entity is tax exempt, the income and the deductions are reported on a pro rata basis by its members who are individually liable for income tax, although the members do not actually receive any distribution of income or assets. The Colony does not have any shareholders or owners. In effect, it owns itself. The corporation is governed by its members acting through officers and directors elected by the members. Article X of the Bylaws describes each member's commitment to contribute to the welfare of the Corporation and the church to the extent of his ability, age, and physical condition.

7. The Hutterian Brethren Church began as a part of the Anabaptist movement during the Protestant Reformation in Germany. The Hutterian Brethren Church was founded in the 1500s by Jacob Hutter, after whom the Church was named. Jacob Hutter and his followers broke away from other Anabaptists over the issue of communal living. Jacob Hutter was burned at the stake in 1536. Hutterites lived in Europe until the late 1800s, when they emigrated to North America in search of religious freedom. Presently, there are colonies located in Montana, Minnesota, North Dakota, South Dakota, Washington, and the Canadian prairie provinces.

8. The designation of a colony as a "Hutterite Colony" is a function of its meeting mutually agreed characteristics as set forth in the Constitution of the Hutterian Brethren Church. Naturally, some body or group must exist to state or declare those characteristics. That is the role of the Hutterian

Brethren Church. The Hutterian Brethren Church does not fit the common understanding of a church or denomination. The Church has no staff or physical facility or address. It owns no property or accounts. While it has been officially recognized in Canada, it does not exist as a corporation, association or any other type of entity in the United States. To the extent the Hutterian Brethren Church exists in a temporal form, it does so as a loose association of the various Hutterite colonies through a written constitution to which all recognized Hutterite colonies subscribe.

9. The Church and its constituent colonies are governed by the Hutterite Constitution. A true and accurate copy of the Constitution of the Hutterian Brethren Church (the "Hutterite Constitution") is attached as Exhibit C. Article 3(a) of the Hutterite Constitution explains that the purpose of the Church is to facilitate the members practice of their faith according to the life of Jesus Christ and the Apostles as established by Jacob Hutter in 1533, This is done "in such a way that the members achieve one entire spiritual unit in complete community of goods (whether production or consumption). . ." Article 3(b) explains that the members and colonies are all expected to completely dedicate themselves to the aims and objects of the Church for the purpose of advancing the objects of the Church. Articles 36 through 39 explain that individual members, as a condition of membership, give up all rights to any property the member may own or may subsequently acquire and that all property becomes the property of the colony to be used for the common benefit of all members. Article 40 shows each colony member is also obligated to "give and devote all his or her time, labor, services, earnings and energies to that Colony,

and the purposes for which it is formed, freely, voluntarily and without compensation or reward of any kind whatsoever. . . ."

In sum, the communal lifestyle of the members of the Colony can be summarized by saying that its members, in the exercise of their religious beliefs, have joined together to pool property and efforts to worship and to further advance their religious beliefs.

10. Article 9 of the Hutterite Constitution identifies the three conferences of the Hutterian Brethren Church which are Dariusleut, Schmeidleut, and Lehrerleut. Big Sky Colony is aligned with the Lehrerleut conference. There are approximately 35 Lehrerleut colonies in the State of Montana, all of which adhere to the same tenet, doctrines, teachings and practices as Big Sky Colony.

11. Communal living and community of goods are the religious doctrines of the Hutterian Brethren Church that distinguish it from other Christian denominations and sects. Hutterite colonies are founded upon the belief and practice that each member of the Colony voluntarily contributes all of his or her property and labor to the Colony as an expression of faith and worship. All property is held for and all labor is performed for the common benefit of the Colony and advancement of its religious beliefs and as a fundamental expression of the doctrine of the Hutterian Brethren Church. This doctrine is founded upon the following biblical passages:

> And all that believed were together, and had all things common; And sold their possessions and goods, and parted them to all men, as every man had need. And they, continuing daily, with one accord in the temple, and breaking bread from

> house to house, did eat their meat with gladness and singleness of heart, Praising God, and having favor with all people. And the Lord added to the church daily such as should be saved.

Acts 2:44-47 (KJV).

> And the multitude of them that were believed were of one heart and of one soul; neither said any of them that ought of the things which he possessed was his own; but they had all things common. And with great power gave the apostles witness of the resurrection of the Lord Jesus; and great grace was upon them all. Neither was there any among them that lacked; for as many as were possessors of land or houses sold them, and brought the prices of the things that were sold, And laid them at the apostles' feet; and distribution was made unto every man according as he had need.

Acts 4:32-35 (KJV). Each colony is the community of property referenced in these passages. In accordance with this belief, no colony member owns any interest in their colony or their colony's property.

12. Membership in the Colony is voluntary. All members of the Colony and their families live communal lives and follow the teachings of the Hutterische Church Society. Members are free to leave at any time. The Colony is totally communal. Members all wear similar clothing. Members speak a unique German dialect. We eat all of our meals together in the communal dining hall. We attend worship services together in the communal church which services are given in our German dialect. Our children are educated in the communal school. The Colony's agricultural operations are also communal,

with every member helping to the extent of his or her ability. We have limited contact with non-members.

13. Members of Big Sky Colony are forbidden from owning property as a condition of membership. Every member of the Colony has executed a Membership Acknowledgment in which he or she conveyed and transferred to the Colony any and all property of any nature in which he or she may have an interest. Each member of the Colony has further agreed to transfer all property acquired in the future to the Colony. A true and accurate copy of the Membership Acknowledgment that I executed is attached as Exhibit D. The terms of my Membership Acknowledgment are the same as the terms of those executed by every other member of the Colony.

14. If a member of the Colony fails to convey and transfer to the Colony any and all property owned by the member, he or she will be excommunicated from the Hutterian Brethren Church. An excommunicated member may or may not continue residing on the Colony after excommunication.

15. Members of Big Sky Colony are not entitled to any pay, wages, or salary from the Colony. Every member voluntarily provides labor and support to the Colony to the extent they are able without any expectation of payment. All labor and support provided by members to the Colony is done for their own personal religious purpose without promise or expectation of compensation. The performance of labor and support for the Colony is an act of religious exercise.

16. Members of the Colony are cared for by one another, regardless of the member's individual contribution to the Colony and regardless of the

reason for their sickness or injury. Colony members who are too sick or too old to work are still cared for just like any other member. As part of its religious function, the Colony provides its members with all the necessities of life from the Colony, including food, housing, clothing, and medical care. In 2009, the Colony spent $351,820.78 on medical expenses for its nearly 100 members.

17. The Colony participates in the Shared Medical Benefits Plan for Participating Colonies of the Lehrerleut Hutterite Medical Trust (the "Hutterite Medical Trust"). A true and accurate (redacted) copy of the plan document is attached as Exhibit E. The Hutterite Medical Trust is another example of communal living and community of goods because the colonies participating in this plan have pooled their resources so that they can provide modern medical care to the members of other Lehrerleut colonies. The Hutterite Medical Trust is just a tool to help the colonies fund the medical care that their members need. Each individual Colony still provides full no-fault medical care for its members in the absence of the trust. The Colony sometimes uses government programs such as Healthy Montana Kids and Medicaid to provide coverage for care and in those cases the Colony assists with applications and paperwork and pays any premiums, co-pays, or uncovered expenses for its members. Regardless of the reason for any member's illness or injury, the member is cared for.

18. In addition to the fundamental Hutterite belief in communal living and community of goods, another doctrine of the Church is that Christians shall not sue one another at law nor sit in judgment of one another. Hutterites cannot make claims against

others for wrongs done to them. Doing so is a violation of fundamental Church doctrine. I do not know of any Hutterite member who has made any workers' compensation claim against a Hutterite colony in Montana or against the Uninsured Employers Fund.

Further Affiant Sayeth Naught.

DATED this 3rd day of December, 2010.

/s/ Daniel W. Wipf
DANIEL E. WIPF

SUBSCRIBED AND AFFIRMED before me this 3rd day of December, 2010.

/s/ Betty J. DeMers
Notary Public for the State of Montana
Printed Notary Name: Betty J. DeMers
Residing at Great Falls, MT
My Commission expires: 10-26-2011

(Notarial Seal)

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of December, 2010, the foregoing document was served upon the individual whose name and address appear below by U.S. Mail:

J. Stuart Segrest
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
ssegrest@mt.gov

/s/ Michael P. Talia
Michael P. Talia

APPENDIX F

EXHIBIT A

ARTICLES OF INCORPORATION
OF
BIG SKY COLONY, INC.

THAT WHEREAS, the Hutterische Church Society is an international religious church society which devotes its entire membership to farming, stock raising and all other branches of agriculture, living communal lives and follows the teachings and tenets of the Hutterische Church Society, having representative bodies known as "colonies" made up entirely of non-profit membership and devoted exclusively to agriculture and agricultural pursuits for the livelihood of its members, dependants and descendents, and

ACKNOWLEDGING the Big Sky Colony, Inc. is a representative body of said Hutterische Church Society and is located on ranch and farm land located in Glacier County, Montana, and engaged in farming and stock raising at said place, and

ACKNOWLEDGING said Big Sky Colony, Inc. is desirous of oranizing itself into a corporation in accordance with the provisions of Code Section 15-2301 Revised Codes of Montana, 1947 and related sections as a Montana non-profit corporation it is certified as follows:

ARTICLE I
NAME AND DURATION

The name of the corporation is BIG SKY COLONY, INC. and its duration shall be perpetual.

ARTICLE II
PURPOSES

The purposes for which this corporation is formed is to operate 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; to conduct the business deemed by the members necessary to support the church and the members thereof and all of their dependents and to accumulate and create trust funds and property for their descendants, and to that end this corporation may engage in farming, stock raising, dairying and all other incidental agricultural enterprises and business for the benefit of this corporation and the mutual benefit of all the members and their dependents and descendants; and to carry out such purposes it may sell and barter the products of the work of the members, and it may rent, buy, sell, mortgage and hold real estate and contract for the purchase and sale thereof, buy, sell, mortgage, hold, contract for and exchange all classes and kinds of personal property, chattels and securities incidental to its business. It may also take by gift, devise, or bequest either real or personal property or any other thing of value to be used incidental to its business or in its church activities.

This corporation is a church and religious corporation and its members are strictly a Hutterische Church Society and Brotherhood and all of its members shall live a communal life. No member of the corporation shall live outside the Colony nor hold any property rights in the corporation property and the corporation shall not be conducted for profit for

any of the members thereof, and all membership is strictly voluntary. All rights of membership, grounds for expulsion and managerial rules over all members and over all property and over the management of all the activities of this corporation shall be prescribed by By-Laws assented to by all members of this corporation, none of which shall be contrary to the tenets, rules and discipline of the Hutterische Church Society, and none of which shall be inconsistent with the laws of the State of Montana.

ARTICLE III
POWERS

As a means of accomplishing the foregoing purposes, this corporation shall have all of the powers now or hereafter conferred by law upon corporations of this character as conferred under the laws of the State of Montana so long as any special limitation is not contrary to the purposes of this corporation as hereinabove set forth.

Notwithstanding any other provisions of these Articles, only such powers are granted this corporation as are consistent with and in furtherance of the tax exempt purposes of this corporation and may be exercised by an organization subject to the provisions of 501D of the Internal Revenue Code and its Regulations of such organizations.

ARTICLE IV
INITIAL REGISTERED OFFICE AND AGENT

The initial registered office of the corporation is:

BIG SKY COLONY, INC.
P. O. Box 147
Cut Bank, Montana 59427

The initial registered agent of the corporation is:

Joesph A. Wipf

ARTICLE V
GOVERNMENT

The affairs of this corporation shall be managed by a Board of Directors which shall be not less than seven (7) in number.

ARTICLE VI
INITIAL BOARD OF DIRECTORS

The first Board of Directors shall be composed of seven (7) members. The following are the names and addresses of the seven (7) persons who shall hold office as Directors until selection of their successors:

JOSEPH A. WIPF
P. O. Box 147
Cut Bank, Montana 59427

ELIAS P. WIPF
P. O. Box 147
Cut Bank, Montana 59427

DANIEL E. WIPF
P. O. Box 147
Cut Bank, Montana 59427

PAUL J. KLEINSASSER
P. O. Box 147
Cut Bank, Montana 59427

DAVID J. HOFER
P. O. Box 147
Cut Bank, Montana 59427

JOSEPH J. KLEINSASSER
P. O. Box 147
Cut Bank, Montana 59427

PAUL A. WIPF
P. O. Box 147
Cut Bank, Montana 59427

ARTICLE VII
INCORPORATOR

The name and address of the incorporator of the corporation is:

JOSEPH A. WIPF
P. O. Box 147
Cut Bank, Montana 59427

ARTICLE VIII
DISSOLUTION

Upon dissolution of this corporation, whether voluntary or involuntary, by operation of law or otherwise, the Board of Directors, after payment or making provision for the payment of all liabilities of the corporation shall dispose of the assets of the corporation to one or more Hutterische Church Society located in the State of Montana, it being further provided that Hutterische Church Societies receiving the proceeds from the dissolution likewise must be exempt organizations under Section 501D of the Internal Revenue Code of 1954 and shall be eligible for such liquidation distribution. Further, said assets shall be used for the same purposes as provided for and set forth in these Articles of Incorporation for Hutterische Church Societies and in no event shall any part of the assets of said corporation upon dissolution be distributed to any individual officer, member or director thereof.

ARTICLE IX
AMENDMENT

The text of the Articles of Incorporation may be amended, repealed, or restated upon the affirmative vote of at least two-thirds (2/3) of the votes which directors present at an annual meeting or a special meeting called for that purpose are entitled to cast.

These Articles of Incorporation were executed on the 23rd day of October, 1978.

Joseph A Wipf
JOSEPH A. WIPF

STATE OF MONTANA)
: ss
County of Cascade)

On this 23rd day of October 1978, before me, the undersigned, a Notary Public for the State of Montana, personally appeared JOSEPH A. WIPF, known to me to be the person whose name is subscribed to the within and foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year hereinabove first written.

/s/ [Illegible]
Notary Public for the State of Montana
Residing at [Illegible] Falls
My Commission expires: May 16, 1979

(NOTARIAL SEAL)

APPENDIX G

EXHIBIT B

CODE OF BY-LAWS
OF
BIG SKY COLONY, INC.

ARTICLE I.

The principal office and place of business of this corporation shall be at the ranch headquarters of the corporation near Cut Bank, Montana.

ARTICLE II.
OFFICERS

SECTION 1. Officers. The officers of this corporation, other than the Board of Directors, shall be a President, Vice-President, Secretary and Treasurer, all of whom shall be selected by the Board of Directors; however, the office of Secretary and Treasurer may be consolidated by unanimous action of the Board of Directors.

SECTION 2. President. The President shall be the chief executive officer and shall preside at all meetings of the members of this corporation and at all meetings of the Board of Directors. The President shall see that all orders and resolutions of the Board of Directors are carried into effect, and he, together with the Secretary, shall execute all deeds, conveyances, bonds, mortgages, leases, contracts and other documents requiring the seal of this corporation and shall see that the Secretary shall affix the same thereto.

SECTION 3. Vice-President. The Vice-President shall in the absence or disability of the President perform all of the duties and exercise all of the

powers of the President of this corporation, and in case of the death, resignation or removal of the President, the Vice-President shall become President until the Board of Directors shall duly elect a President.

SECTION 4. Secretary. The Secretary shall attend all sessions of the members of this corporation and all meetings of its Board of Directors and shall keep a record of all votes and other proceedings at such sessions and meetings in a book provided for that purpose.

He shall keep the corporate seal of this corporation and affix the same to all papers requiring a seal and attest the same.

The Secretary shall perform all other duties prescribed by these By-Laws or by the laws of the State of Montana or by the Board of Directors of this corporation, as well as all duties prescribed by the Hutterische Church Society or the BIG SKY COLONY thereof.

SECTION 5. Treasurer. The Treasurer shall have the custody of the corporation funds and securities of this corporation and shall keep a full and accurate account of all receipts and disbursements of this corporation.

He shall disburse the funds of the corporation as ordered by the Board of Directors and shall render to the Board of Directors at all regular meetings thereof or whenever otherwise required by a majority of said Board, an account of all treasury transactions and of the financial condition of this corporation.

ARTICLE III.
SUBORDINATE OFFICERS

For the administration and the carrying on of the business of this corporation, the Board of Directors may create any subordinate office that it deems necessary, such as General Manager, General Superintendent, Field Manager, Cattle Manager, Sheep Manager or any other subordinate office by such name or designation as the Board may desire and prescribe the duties thereof. The person so elected need not be of age and he need not be baptized, but he must be a member of a family of the Hutterische Church and have pledged himself to become baptized as soon as he reach the proper age and be approved by the proper officer of the Church. No such subordinate officer shall bind this corporation on any contract or agreement whatever and neither shall he be permitted to sell, trade or dispose of any of the property of this corporation without the approval of the Board of Directors first had and obtained in writing.

ARTICLE IV.
VOTING

Whenever requested by any member of this corporation at a membership meeting or by any member of the Board of Directors at a Directors' Meeting, a written and secret ballot shall be had upon any action taken in either event.

ARTICLE V.
DIRECTORS

Unless otherwise provided by the laws of Montana or of the United States, all of the power and authority of this corporation over its property and property rights shall be vested in and originate from a Board of Directors, except as in these By-Laws provided, consisting of seven (7) members all of whom must

be in good standing in the Hutterische Church Society and members of the BIG SKY COLONY of said Church Society and members of this corporation over the age of twenty-one years, and all of whom must be selected by a majority vote of all of the membership of this corporation, and hold office for one year, except that the Board of Directors named in the Articles of Incorporation shall hold office until the first Monday in January, 1979, and until their successors are elected and qualify.

The Board of Directors shall meet on the first Monday in January of each year immediately after the annual meeting of the membership of this corporation and at all other times that it may be necessary therefor, upon mutual consent of all of its members or at the call of the President or Secretary or any two members of the Board upon three (3) days notice either verbal or written.

The President and Secretary are authorized by these By-Laws to do and transact all acts and business which shall come up in the ordinary course of business of this corporation, but when any purchase or sale or contract or act out of the ordinary course of business concerning either real or personal property or when any purchase or sale or debt or note or mortgage or contract is to be entered into and made which shall exceed in the aggregate of ONE THOUSAND DOLLARS ($1,000.00), the same must be submitted to and approved by the Board of Directors by a majority vote, and in all such events the Board of Directors by such majority may authorize the President and Secretary in the corporation's name and under its seal and as its act and deed to make any sale or purchase and to contract for the same and to incur any indebtedness as the Board

may determine and to evidence the same by note or notes and secure it or them by mortgage or other written instruments upon either real or personal property belonging to the corporation.

ARTICLE VI.
ANNUAL MEETING MEMBERSHIP

The annual meeting of the members of this corporation shall be on the first Monday of January of each year at the ranch headquarters of the corporation and at all of said annual meetings a complete Board of Directors shall be elected by a majority of said membership and the said Directors so elected shall hold office for one year and until their successors are elected and qualify.

ARTICLE VII.
NO SALARY FOR OFFICERS

No officer, Director, Subordinate Officer or any other member acting in an official capacity for this corporation shall receive any salary or compensation for his services as such officer.

ARTICLE VIII.
MEMBERSHIP OF CORPORATION

There shall be no limitation as to the number or qualification of the members of this corporation. All persons of the Hutterische faith residing in the BIG SKY COLONY shall be members of this corporation and all such members shall have equal voting rights and there shall be only one class of membership and that is a member of the Hutterische faith residing in the BIG SKY COLONY.

ARTICLE IX.
TERM OF OFFICE

All officers of this corporation shall hold office for one year and until their successors are elected and qualify, and all subordinate officers shall hold office at the pleasure of the Board of Directors.

ARTICLE X.
NO INDIVIDUAL PROPERTY RIGHTS

All of the members of this corporation and their families shall live a communal life and follow the teachings and tenets of the Hutterische Church Society and they shall all join, without pay, wages or salary, in the conduct of the business of this corporation for the support of this Church and the members thereof and all their dependents and to accumulate and create trust funds and property for their descendants, and to practice charity among their membership and colonies, and to that end no member of this corporation and no member of his family, either male or female shall have any property right or rights in any of the property or funds now owned or hereafter accumulated or acquired by this corporation.

If any member of this corporation or any member of his family either male or female, be he or she either adult or minor, withdraw from this corporation or from the Church or leave the family of any member of this corporation or of the Church, he or she shall have no claim whatsoever upon the property or funds of this corporation, and all labors and services done and performed up to that time shall be considered as compensation for support and keep and as contributions for Church purposes.

ARTICLE XI.
CORPORATION MEMBERS TO ABIDE RULES OF CHURCH

All members of this corporation shall recognize and abide the rules of the Hutterische Church and each and all of them do renounce the right to hold private property, and they agree to abide by the principles and authority of the presiding Bishop or Bishops of the Hutterische Church Society to which all members of this corporation, through its local Church Colony, belong.

These By-Laws are adopted and approved this ___ day of ____, 19___ by all of the Directors, officers and members of BIG SKY COLONY, INC., a Montana corporation.

_____	_____
DIRECTOR	PRESIDENT
_____	_____
DIRECTOR	VICE-PRESIDENT
_____	_____
DIRECTOR	SECRETARY-TREASURER
_____	
DIRECTOR	
_____	
DIRECTOR	
_____	
DIRECTOR	
_____	
DIRECTOR	

We, the undersigned, being members of the BIG SKY COLONY of the Hutterische Church, do hereby agree to the foregoing By-Laws of the BIG SKY COLONY, INC., a Montana corporation, and by our signature hereto do become members of said corporation.

DATED this ____ day of ____, 19____.

APPENDIX H

EXHIBIT C

CONSTITUTION OF THE
HUTTERIAN BRETHREN CHURCH
AND
RULES AS TO COMMUNITY OF PROPERTY

Macleod Dixon
Barristers and Solicitors
3700, 400 Third Avenue S. W.
Calgary, Alberta
T2P 4H2

CONSTITUTION OF THE
HUTTERIAN BRETHREN CHURCH AND
RULES AS TO COMMUNITY OF PROPERTY

Recitals

WHEREAS there has continuously existed since the Sixteenth Century a Hutterian Brethren Church.

AND WHEREAS the Church is comprised of communal congregations called Colonies which have existed in various places at various times since the original founding of the Church.

AND WHEREAS all the Colonies of the Church adhere to and practice the teachings of the New Testament substantially as expounded by one Peter Rideman as let out in a book or work entitled, 'ACCOUNT OF OUR RELIGION, DOCTRINE AND FAITH, GIVEN BY PETER RIDEMAN OF THE BROTHERS WHOM MEN CALL HUTTERIANS", and in accordance with the ways of the Hutterian Brethren which includes community of goods.

AND WHEREAS Colonies of the Hutterian Brethren Church were established in Dakota Territory in the United States of America between the years 1874-1877.

AND WHEREAS out of the organization in Dakota Territory. Colonies have been formed in the States of South Dakota, North Dakota. Montana, Minnesota and Washington in The United States of America, and in the Provinces of Alberta, Saskatchewan, British Columbia and Manitoba in Canada.

AND WHEREAS it was deemed advisable to reorganize the Church in August of 1950 at which time a Constitution of the Hutterian Brethren Church and Rules as to Community of Property was adopted by the Colonies of the Hutterian Brethren Church then in existence.

AND WHEREAS by Act of the Parliament of Canada there was incorporated "The Hutterian Brethren Church", which body corporate exists as a separate and distinct entity for purposes of the Hutterian Brethren Church in Canada.

AND WHEREAS it was decided that each Colony reaffirm its membership in the Church and its acceptance of the Constitution of the Hutterian Brethren Church and Rules as to Community of Property and to restate and amend the Constitution of the Hutterian Brethren Church and Rules as to Community of Property:

NOW, THEREFORE, We, the Colonies of the Church, by subscribing hereto do reaffirm our membership in the Hutterian Brethren Church and ratify and confirm the Constitution as Set forth herein.

ARTICLES

Definitions

1. Unless the context otherwise requires, the capitalized terms defined herein, whether in the preamble or hereafter, shall have the meanings as follows:

"Board of Managers" means the representatives of each Conference elected or appointed as provided in Article 30, hereof and 'Manager' means a member of the Board of Managers;

"Church" means the Hutterian Brethren Church and includes all Colonies that adhere to and practice the teachings of the New Testament substantially as expounded by one Peter Rideman as set out in a book or work entitled, 'ACCOUNT OF OUR RELIGION, DOCTRINE AND FAITH, GIVEN BY PETER RIDEMAN OF THE BROTHERS WHOM MEN CALL HUTTERIANS', and in accordance with the ways of the Hutterian Brethren which includes community of goods, as recognized by the Board of Managers;

"Colony" means and includes a community, association, congregation or colony, incorporated or unincorporated comprised of persons who have joined together to have, hold, use, possess and enjoy all things in common, being all of one mind, heart and soul, according to the ways of those whom men call Hutterians which community, association, congregation or colony has accepted membership and fellowship to the Church by affirmation or reaffirmation and which community, association, congregation or

colony has been accepted by the Board of Managers;

"Conference" means a group of Colonies of the Church, of which there are three, structured to recognize certain differences in practice and for administrative purposes, consisting of the Darius-Leut, the Lehrer-Leut and the Schmeid-Leut;

"Conference Board" means a board consisting of two delegates from each Colony within a Conference or, when deemed appropriate by the Senior Elder, consisting of the ministers of the Colonies of such Conference;

"Corporate Church" means the legal entity created by an Act of the Parliament of Canada entitled "An Act to incorporate the Hutterian Brethren Church" (S.C. 1951, c. 77).

"Darius-Leut" means a Conference of the Church comprised of the Colonies which have affirmed or reaffirmed membership in the Church and have been joined to the Darius-Leut Conference.

"Lehrer-Leut" means a Conference of the Church comprised of the Colonies which have affirmed or reaffirmed membership in the Church and have been joined to the Lehrer-Leut Conference.

"Schmeid-Leut" means a Conference of the Church comprised of the Colonies which have affirmed or reaffirmed membership in the Church and have been joined to the Sehmeid-Leut Conference.

Name

2. The name of the Church is the HUTTERIAN BRETHREN CHURCH.

Objects and Powers

3 The objects and powers of the Church are:

(a) To obtain for its Colonies and their members and also for the novices, helpers, children and persons in need under its care, without distinction of race, class, social standing, nationality, religion, age or sex, spiritual, cultural, educational and economic assistance based upon the life and mission of Jesus Christ and the Apostles, in the spirit and way of the first Christian community in Jerusalem and of the community reestablished by Jacob Hutter in 1533 at the time of the origin of the "Baptisers' movement" in such a way that the members achieve one entire spiritual unit in complete community of goods (whether production or consumption) in perfect purity in mutual relationships, absolute truthfulness and a real attitude of peace confessing and testifying by word and deed that Love, Justice, Truth and Peace is God's will for all men on earth. All the members, and especially the Elders, are responsible for carrying out the objects of the Church by following exactly the spontaneous direction of the Holy Spirit and by mutual stimulation and education.

(b) Complete dedication in the work for the aims and objects of the Church is expected from all Colonies and their members. The capital and surplus produce and surplus funds of each Colony is to be used by such Colony for social work to which the Church is constantly dedicated, helping poor, weak and sickly persons who need, ask for and accept this

help, especially children, and for the purchase of lands, stock and equipment for the use of such Colony in order that the members thereof may maintain themselves and acquire funds for the purposes of carrying out the aims of the Church and to assist in the establishment of new Colonies.

(c) Each Colony is authorized for the purposes aforesaid:

(i) To engage in, and carry on farming, stock-raising, milling, and all branches of these industries; and to manufacture and deal with the products and by-products of these industries;

(ii) To engage in other undertakings and activities which the Colony deems appropriate to sustain its members not inconsistent with the practice and beliefs of the Church, as determined by such Colony.

(d) Each Colony, in furtherance of the religious objects, of the Church, may purchase, acquire, take, have, hold, exchange, receive, possess, inherit, retain and enjoy, property, real or personal, corporeal or incorporeal, whatsoever, and for any or every estate or interest therein whatsoever given, granted, devised or bequeathed to it or appropriated, purchased or acquired by it in any manner or way whatsoever and may also sell, convey, exchange, alienate, mortgage, lease, demise or otherwise dispose of any such real or personal property.

(e) Each Colony shall have power to borrow money, to issue bonds, debentures or other securities, to pledge or sell such bonds, debentures or securities for such sum and at such price as may be deemed expedient or be necessary; to charge, hypothecate, mortgage or pledge any or all of its real or personal property, rights and powers, undertakings, franchises, including book debts to secure any bonds, debentures or other securities or any liability of that Colony.

(f) Each Colony shall have full power to make, establish and sanction, amend, repeal or abrogate all such rules, regulations and by-laws of their Colony as they judge necessary for its good administration and government, providing the same be not contrary to law, this Constitution or the belief, practice and customs of the Church.

Organization

4. The Church shall be, comprised of all of the Colonies which have acknowledged their association and affiliation by subscribing to this Constitution and such other Colonies wheresoever existing, which in the future affirm and are chosen and elected to membership in accordance with this Constitution.

5. The Head Office of the Church shall be at the offices of the Colony of the President of the Church as chosen from time to time.

6. The Church consists of three Conferences, namely: the Darius-Leut, the Lehrer-Leut, and the Schmeid-Leut,

Board of Managers

7. The Church dogma and Church discipline and the affairs, powers, privileges and all matters affecting and pertaining to Hutterian Brethren generally and subject to the rights of each Conference as set forth in Article 22 hereof, shall be administered, managed, exercised, transacted, conducted and controlled by a Board of fifteen (15) managers, five (5) of whom shall be chosen as set forth in Article 30 hereof by each of the said Conferences. From among their members the Board of Managers shall elect nine (9) managers, three (3) from each Conference to serve as the board of managers of the Corporate Church. The affairs of the Church in Canada may, as required by the Board of Managers, be conducted through the Corporate Church.

8. The Managers shall elect from among their numbers

   (a) a President;

   (b) a Vice-President; and

   (c) a Secretary-Treasurer.

   The Senior Elder of a Conference shall not be eligible to serve as President and if the President is elected as the Senior Elder of a Conference, he shall, from that time cease to serve as the President.

9. A Manager of the Church shall hold office until such Manager is expelled or removed, as provided for herein, or until a successor is elected or appointed as provided for herein.

10. Any of the Managers may be expelled or removed by a vote of a majority of the members

of such Board of Managers, or by the Conference by which he was elected or appointed. Any Manager expelled or removed on two occasions shall not be eligible to be reelected or appointed unless approved by both the Conference and the Board of Managers.

11. Vacancies caused by death, removal, expulsion or otherwise shall be filled by the Conference from which such Manager was elected.

12. Whenever a vacancy occurs in the office of President, Vice-president or Secretary, the Board of Managers may from their own number fill such vacancy at any bi-annual, general or special meeting of the Managers.

13. No officer or Manager of the Church shall receive or be entitled to any reward or compensation of any amount or character whatsoever for any time, labour or service that he may give or render to the Church.

14. At any meeting of Managers each member present in person or represented by proxy shall have one vote and all questions arising at such meetings shall be decided by a majority vote of those in attendance. No more than two (2) proxy votes will be counted for each Conference and in the event that more than two (2) proxies are represented from a Conference then the votes of the proxies representing the two (2) longest serving members from that Conference shall be counted. In the case of equality of votes, the President shall cast lots in accordance with the ways of the Hutterian Brethren and decide the issue as determined by such casting of lots.

15. At any meeting of the Board of Managers nine (9) members of the Board, present in person, shall constitute a quorum. If a quorum is not present within two (2) hours from the appointed time for the meeting, the meeting shall be adjourned to the same place twenty-four (24) hours later and the members then present shall constitute a quorum.

16. A bi-Annual Meeting of the Board of Managers shall be held on the third Wednesday in July at 2 o'clock in the afternoon, or at such other time as the Board of Managers designates, with the next such meeting to be held in the year in 1995 and biannually thereafter.

17. Any meeting of the Managers may be held at any place by order of the Board of Managers or if no place is designated it shall be held at the offices of the Colony of the President.

18. Special meetings of the Managers may be called at any time by order of the President, or by two (2) Managers, by notice in writing sent electronically at least four (4) clear days or by mail at least seven (7) clear days before the day fixed for the holding of such meeting.

Organization of Conferences

19. There shall be three (3) Conferences, namely, the Darius-Leut Conference, the Lehrer-Leut Conference, and the Schmeid-Leut Conference.

20. The affairs, powers and privileges of each of the Conferences shall be administered, managed, exercised, transacted, conducted and controlled by the Conference Board.

21. Each Conference Board, following the ways of the Hutterian Brethren, shall select from their number a Senior Elder and an Assistant Senior Elder, who shall hold office for life subject to ill health, misfeasance or malfeasance at the pleasure of the Conference Board, and by a majority vote of the Conference Board the Senior Elder or Assistant Senior Elder may be directed to stand down, and the Conference Board may elect another in his place and stead.

22. Each Conference Board shall exercise control over the Church dogma and Church discipline within its respective Conference, and shall have charge of all matters pertaining to the Church and the Hutterian Brethren within its Conference, and shall have power to take such action as it deems appropriate in respect to matters affecting or pertaining to the Church and the Hutterian Brethren of that Conference. The Senior Elder is recognized as the spiritual and ecclesiastical leader for a Conference. To the extent that the decisions of the Conference might affect the Church generally then such decisions shall be subject to review by the Board of Managers who have the right, in accordance with the provisions of Article 7 hereof, to overrule any such decision pertaining only to matters which are of concern to the whole of the Church or which may affect the working, administration or operation of the Church generally.

23. Any member of the Conference Board may be expelled or removed by a vote of the majority of the members of such Board.

24. Vacancies caused by death, removal, expulsion or otherwise shall be filled by the Colony from which the Board member was appointed.

25. No member of the Conference Board shall receive or be entitled to any reward or compensation of any amount or character whatsoever for any time, labour or service which he may give or render to the Conference or the Church.

26. At any meeting of the Conference Board each member present in person shall have one vote and all questions arising at such meeting shall be decided by a majority vote of those in attendance. In the case of equality of votes, the Senior Elder, or, in his absence the chairmen of the meeting, shall cast lots in accordance with the ways of the Hutterian Brethren and decide the issue as determined by such casting of lots.

27. At any meeting of the Conference Board a majority of the total number of Board members shall constitute a quorum. If a quorum is not present within one hour from the appointed time for the meeting, the meeting shall be adjourned to the same place twenty four (24) hours later and the members then present shall constitute a quorum.

28. An Annual Meeting of each Conference Board shall be held at such time and at such place as the Senior Elder shall appoint.

29. Special Meetings of the Conference Board may be called at any time by order of the Senior Elder or by twenty (20) of the members of the Conference Board by notice in writing, stating the purpose of the meeting, sent by mail at least ten (10) clear days before the day fixed for the

holding of such meeting, and such meeting shall be held at the place indicated in the said notice.

30. The Conference Board will elect from among themselves, from time to time as required, five (5) members to the Board of Managers of the Church or the Conference Board may delegate the power of appointment to the Senior Elder of the Conference to appoint the Managers for that Conference, provided that the Managers appointed by the Senior Elder shall be confirmed by a majority vote of the Conference Board.

Notices

31. Irregularities in the notice of any meeting or in the giving of notice or the omission to give notice of any meeting or the non-receipt of any notice by any person entitled thereto, such irregularities being neither substantive or intentional, shall not prevent the holding of any meeting and shall not invalidate any resolutions passed or any proceeding taken at such meeting.

Organization of Colonies

32: The property, affairs, and concerns of each Colony shall be managed and the business of the Colony shall be carried on in accordance with such by-laws, rules and regulations as may be made and enacted as provided in Article 3(f) hereof.

33. No Colony shall be liable for the debts, liabilities, or any financial obligation whatsoever of any other Colony or the Church.

34. Each Colony shall appoint from among its members, delegates to serve as the represent-

atives of the Colony on the Conference Board for the Conference to which the Colony belongs. Unless otherwise specifically selected by the Colony the delegates shall be the Minister, Assistant Minister, if there be one or, if there is no Assistant Minister, the Secretary of each Colony.

Membership

35. Each Colony shall be comprised of all persons who have been elected to membership in that Colony upon their request and who have become members and communicants of the Hutterian Brethren Church in the manner set forth in the book written by Peter Rideman hereinbefore referred to, and who have been chosen and elected to membership upon a majority vote of all the voting members of that Colony at any annual, general or special meeting thereof or who are otherwise members pursuant to the articles, bylaws or other forming documents of a Colony.

Holding of Property

36. No individual member of a Colony shall have any assignable or transferable interest in any of its property, real or personal.

37. All property, rest and personal, of a Colony, from whomsoever, whensoever, and howsoever it may have been obtained, shall forever be owned, used, occupied, controlled and possessed by the Colony for the common use, interest, and benefit of each and all of the members thereof, for the purposes of such Colony.

38. All the property, both real and personal that each and every member of a Colony has, or may have, own, possessor may be entitled to at the time that he or she joins such Colony, or becomes a member thereof, and all the property, both real and personal, that each and every member of a Colony may have, obtain, inherit, possess or be entitled to, after he or she becomes a member of a Colony, shall be and become the property of the Colony to be owned, used, occupied and possessed by the Colony for the common use, interest and benefit of each and all of the members thereof.

39. None of the property, either real or personal, of a Colony shall ever be taken, held, owned, removed or withdrawn from that Colony, or be granted, sold, transferred or conveyed otherwise than by such Colony in accordance with its by-laws, rules and regulations and the provisions of these Articles and if any member of a Colony shall be expelled therefrom, or cease to be a member thereof, he or she shall not have, take, withdraw from, grant, sell, transfer or convey, or be entitled to any of the property of the Colony, or any interest thereto; and if say member of the Colony shall die, be expelled therefrom or cease to be a member thereof, his or her personal representatives, heirs at law, legatees or devisees or creditors or any other person shall not be entitled to, or have any of the property of the Colony, or interest therein, whether or not he or she owned, possessed or had any interest in or to any of the property of the Colony at the time he or she became a member thereof, or at any time before or thereafter, or had given, granted, conveyed or

transferred any property or property interest to the Colony at any time.

Rights and Duties of Members

40. Each and every member of a Colony shall give and devote all his or her time, labour, services, earnings and energies to that Colony, and the purposes for which it is formed, freely, voluntarily and without compensation or reward of any kind whatsoever, other than herein expressed.

41. The members of a Colony shall be entitled to and have their husbands, wives and children, who are not members thereof, reside with them, and be supported, maintained, instructed and educated by that Colony, according to the rules, regulations and requirements of that Colony during the time and so long as they obey, abide by and conform to the rules, regulations, instructions and requirements of that Colony and the Church.

42. Whenever any member of a Colony shall die, then his or her husband, wife and children who are not members thereof, shall have the right to remain with, and be supported, maintained, instructed and educated by the Colony, during the time, and as long as they give and devote all of their time, labour, services, earnings and energies to the Colony and the purposes thereof, and obey and conform to the rules, regulations and requirements of the Colony, the same as if the said member had lived.

43. The husbands, wives and children of the members of a Colony, who are not members thereof, shall give and devote all their time, labour,

services, earnings, and energies to that Colony and the purposes for which it is formed, freely, voluntarily and without compensation of any kind whatsoever other than as herein provided, and obey and conform to all the rules, regulations and requirements of the Colony, while they remain in or with the Colony.

44. No Colony shall be dissolved without the consent of all of its members and in the event of dissolution no individual member shall be entitled to any of the assets of the Colony but such assets shall be distributed and transferred to the Church or as otherwise provided for in the by-laws, rules and regulations of that Colony.

45. The act of becoming a member of a Colony shall be considered as a Grant, Release, Transfer, Assignment and Conveyance to that Colony of all property, whether real or personal, owned by any person at the time of his or her becoming a member of the Colony, or acquired or inherited at any time subsequent thereto; such property to be owned, occupied, possessed and used by the Colony for the common use of all its members.

Exclusion of Members

46. Any member of a Colony may be excluded from membership in that Colony or otherwise disciplined at any meeting of that Colony upon a majority vote of all the voting members thereof in accordance with the doctrine of the Church as set forth in the aforementioned work of Peter Rideman and as set forth to the New Testament. Each Colony may make its own rules and procedures with respect to the exclusion of the member and the conduct of such

meetings provided such rules and procedures are in keeping with the doctrine of the Church.

Officer Given Certain Powers

47: The officers of a Colony upon first having obtained the consent of the majority of the voting members of that Colony may from time to time if they see fit so to do, contract for, buy, sell, assign, transfer, encumber, guarantee, hypothecate, mortgage, pledge, charge, lease and dispose of any or all of the real or personal property or assets of that Colony for any purpose whatsoever consistent with this Constitution; and also as security for any monies borrowed or any part thereof may give to any money lender, mortgagee, bank, person, firm or corporation all or any bonds, debentures, warehouse receipts, bills of lading, negotiable instruments and all such other securities and documents necessary or required by or on behalf of such money lender, mortgagee, bank person, firm or corporation, and may also give to any bank securities as required under applicable legislation as security for any moneys borrowed from time to time from the bank.

Admission of Further Colonies and Reaffirmation of Existing Colonies

48. The Board of Managers, may admit to membership or continue in membership in the Church any Colony which affirms or reaffirms that it complies with and conforms to the authority of the Board of Managers and the religious doctrine and faith of the Church as expounded by Peter Rideman, and the Board of Managers may join any such Colony to one of

the Conferences as it deems appropriate. The Board of Managers may from time to time request that each Colony reaffirm that it complies with and conforms to the authority of the Board of Managers and the religious doctrine and faith of the Church as expounded by Peter Rideman, provided always that any Colony which does not, upon request of the Board of Managers, affirm or re-affirm that it complies with and conforms to the authority of the Board of Managers and the religious doctrine and faith of the Church shall cease to be a Colony of the Church and shall cease to be in the Conference to which it was joined. Any affirmation or reaffirmation provided to the Board of Managers may be accepted or rejected by the Board of Managers and a Colony which has submitted a reaffirmation that was rejected by the Board of Managers shall not be a Colony of the Church.

Amendments

49. These Articles may be repealed or amended or new Articles may be adopted from time to time at any annual, general or special meeting of the Board of Managers or at any other meeting of all the Conferences called for that purpose by the Board of Managers.

Counterpart

50. This document may be executed in any number of counterparts and it shall not be necessary for all signatories to execute the same counterpart. Each such counterpart shall be deemed to be an original instrument, but all such counterparts together shall constitute a single document and

all signature pages shall be appended to a single document.

We, the undersigned, being the proper officers and delegates in that behalf of the Colonies of the Church, having severally read over and had explained to us the foregoing Constitution and Articles of Association, and understanding the same and having been so authorized by our Colonies to which we respectively belong, DO HEREBY SEVERALLY AGREE to adopt and abide by the Constitution and Articles of Association.

IN WITNESS WHEREOF the several Colonies herein named have executed these presents by the hands of their proper officers in that behalf.

Dated effective the 21st day of July, 1993.

DARIUS-LEUT ALBERTA

HUTTERIAN BRETHERN CHURCH OF ALIX
PER: /s/ Mike Hofer
PER: /s/ J K Hofer

HUTTERIAN BRETHERN CHURCH OF ATHABASCA
PER: /s/ Ben Gross
PER: /s/ Elias Gross

THE HUTTERIAN BRETHERN CHURCH OF BEISEKER
PER: /s/ Rev Sam M Stahl
PER: /s/ Rev Peter B Stahl

HUTTERIAN BRETHERN CHURCH OF BERRY CREEK
PER: /s/ Darius S [Illegible]
PER: /s/ Rev David E Stahl

HUTTERIAN BRETHERN CHURCH OF BYEMOOR
PER: /s/ M. S. Stahl
PER: /s/ D K Stahl

HUTTERIAN BRETHERN CHURCH OF CAMERON
PER: /s/ Sam Hofer
PER: /s/ John Hofer

HUTTERIAN BRETHERN CHURCH OF CAMROSE
PER: /s/ Paul Tschetter
PER: /s/ John Tschetter

HUTTERIAN BRETHERN CHURCH OF CARMANGAY
PER: /s/ Rev Mike S Stahl
PER: /s/ Jacob R [Illegible]

HUTTERIAN BRETHERN CHURCH OF CAYLEY
PER: /s/ George E Hofer
PER: /s/ Henry [Illegible]

HUTTERIAN BRETHERN CHURCH OF CLUNY
PER: /s/ Mike [Illegible]
PER: /s/ Solomn R Tschette

HUTTERIAN BRETHERN CHURCH OF CRAIGMYLE
PER: /s/ Joe M. [Illegible]
PER: /s/ Sam K. [Illegible]

HUTTERIAN BRETHERN CHURCH OF DONALDA
PER: /s/ Peter Hofer
PER: /s/ Darius Hofer

HUTTERIAN BRETHERN CHURCH OF EAST CARDSTON (1977)
PER: /s/ David J Hofer
PER: /s/ [Illegible] Hofer

HUTTERIAN BRETHERN CHURCH OF ELKWATER
PER: /s/ Paul P Hofer
PER: /s/ John A Hofer

HUTTERIAN BRETHERN CHURCH OF ENCHANT

PER: /s/ George Hofer
PER: /s/ Chris Hofer

HUTTERIAN BRETHERN CHURCH OF ERSKINE
PER: /s/ Andy A Hofer
PER: /s/ George M Hofer

HUTTERIAN BRETHERN CHURCH OF EWELME
PER: /s/ Peter Watter
PER: /s/ George K Hofer

HUTTERIAN BRETHERN CHURCH OF FAIRVIEW
PER: /s/ John A Tscherrer
PER: /s/ Nike Tschetter

HUTTERIAN BRETHERN CHURCH OF FERRYBANK
PER: /s/ Andy Gross
PER: /s/ John [Illegible]

HUTTERIAN BRETHERN CHURCH OF GADSBY
PER: /s/ John M. Stahl
PER: /s/ Andrew R Stahl

HUTTERIAN BRETHERN CHURCH OF GRANDVIEW
PER: /s/

PER: /s/

HUTTERIAN BRETHERN CHURCH OF GRANUM
PER: /s/ G S Tschetter
PER: /s/ L L Hofer

HUTTERIAN BRETHERN CHURCH OF HIGH RIVER
PER: /s/ Jacob M Hofer
PER: /s/ David PR Hofer

HUTTERIAN BRETHERN CHURCH OF HILLRIDGE
PER: /s/
PER: /s/

HUTTERIAN BRETHERN CHURCH OF HILLVIEW
PER: /s/ Jacob M Hofer
PER: /s/ Frank L Hofer

HUTTERIAN BRETHERN CHURCH OF HOLDEN
PER: /s/ Rev John S Hofer
PER: /s/ Paul [Illegible] Stahl

HUTTERIAN BRETHERN CHURCH OF HOLT
PER: /s/ Mike [Illegible] Tschetter
PER: /s/ Peter B Tschetter

HUTTERIAN BRETHERN CHURCH OF HUGHENDEN
PER: /s/ Peter B Stahl
PER: /s/ [Illegible] Stahl

HUTTERIAN BRETHERN CHURCH OF HUXLEY
PER: /s/ John Stahl
PER: /s/ [Illegible] Stahl

IRON CREEK COLONY LTD.
PER: /s/ Elias Hofer
PER: /s/ Andy Hofer

HUTTERIAN BRETHERN CHURCH OF KEHO LAKE
PER: /s/ George K Wurz
PER: /s/ John E Hofer

HUTTERIAN BRETHERN CHURCH OF LAKESIDE
PER: /s/ Joseph K Wipf
PER: /s/ Paul A Wipf

HUTTERIAN BRETHERN CHURCH OF VEGREVILLE
PER: /s/ Daniel Tschetter
PER: /s/ Paul Tschetter

HUTTERIAN BRETHERN CHURCH OF LEEDALE
PER: /s/ Joseph A Hofer
PER: /s/ George A Hofer

HUTTERIAN BRETHERN CHURCH OF LITTLE BOW
PER: /s/ Darius M Hofer
PER: /s/ [Illegible]

HUTTERIAN BRETHERN CHURCH OF LOMOND
PER: /s/ Paul S [Illegible]
PER: /s/ Paul B [Illegible]

HUTTERIAN BRETHERN CHURCH OF MANNVILLE
PER: /s/ Peter Tschetter
PER: /s/ Mike Tschetter

HUTTERIAN BRETHERN CHURCH OF MAYFIELD
PER: /s/ Paul Stahl
PER: /s/ Joseph K Stahl

HUTTERIAN BRETHERN CHURCH OF MIXBURN
PER: /s/ Paul S Tschetter
PER: /s/ Darius Tschetter

HUTTERIAN BRETHERN CHURCH OF MORINVILLE
PER: /s/ Joseph D Wurz
PER: /s/ John M Wurz

HUTTERIAN BRETHERN CHURCH OF
MOUNTAIN VIEW
PER: /s/ David R Tschetter
PER: /s/ Jake Tschetter

HUTTERIAN BRETHERN CHURCH OF
NEW YORK
PER: /s/ Jacob [Illegible] Hofer
PER: /s/ George A Hofer

HUTTERIAN BRETHERN CHURCH OF O.B.
PER: /s/ Henry K Hofer
PER: /s/ Jacob E Tschetter

HUTTERIAN BRETHERN CHURCH OF PIBROCH
PER: /s/ George K [Illegible]
PER: /s/ Peter M [Illegible]

HUTTERIAN BRETHERN CHURCH OF
PINCHER CREEK
PER: /s/ Peter R [Illegible]
PER: /s/ Mike [Illegible]

HUTTERIAN BRETHERN CHURCH OF PINEHILL
PER: /s/ Peter S Hofer
PER: /s/ David Hofer

HUTTERIAN BRETHERN CHURCH OF
PLAIN LAKE
PER: /s/ [Illegible] John M Hofer
PER: /s/ [Illegible]

HUTTERIAN BRETHERN CHURCH OF PLEASANT
VALLEY
PER: /s/ [Illegible]
PER: /s/ [Illegible]

HUTTERIAN BRETHERN CHURCH OF
PRAIRIE VIEW
PER: /s/ John Wurz
PER: /s/ Sam Wurz

HUTTERIAN BRETHERN CHURCH OF
RED WILLOW
PER: /s/ David Hofer
PER: /s/ John Hofer

HUTTERIAN BRETHERN CHURCH OF RIBSTONE
PER: /s/ Joshua Hofer
PER: /s/ Andrew Hofer

HUTTERIAN BRETHERN CHURCH OF RIDGE
VALLEY
PER: /s/ Jacob K Tschetter
PER: /s/ Fred A Walters

HUTTERIAN BRETHERN CHURCH OF
RIVERSIDE
PER: /s/ Joe K Tschetter
PER: /s/ Joseph L Tschetter

HUTTERIAN BRETHERN CHURCH OF ROSEBUD
PER: /s/ George E Hofer
PER: /s/ Dan [Illegible] Hofer

HUTTERIAN BRETHERN CHURCH OF SANDHILL
PER: /s/ Paul B Wurz
PER: /s/ [Illegible] M Wurz

HUTTERIAN BRETHERN CHURCH OF
SCOTFORD
PER: /s/ Rev John S Hofer
PER: /s/ John B Hofer

HUTTERIAN BRETHERN CHURCH OF
SMOKY LAKE
PER: /s/ George S Hofer
PER: /s/ John Stahl

HUTTERIAN BRETHERN CHURCH OF
SPRING CREEK
PER: /s/ George E Hofer
PER: /s/ Mike S Hofer

HUTTERIAN BRETHERN CHURCH OF SPRING POINT
PER: /s/ Martin R Walter
PER: /s/ John L Walter

HUTTERIAN BRETHERN CHURCH OF SPRINGVALE
PER: /s/ [Illegible] R Wurz
Per: /s/ Andrew K Gross

HUTTERIAN BRETHERN CHURCH OF STAHLVILLE
PER: /s/ Martin Walter
PER: /s/ John L Walter

HUTTERIAN BRETHERN CHURCH OF STANDOFF COLONY
PER: /s/ Mike Wipf
PER: /s/ Sam Hofer

HUTTERIAN BRETHERN CHURCH OF STARLAND
PER: /s/ John Stahl
PER: /s/ David Stahl

HUTTERIAN BRETHERN CHURCH OF SUNNYBEND
PER: /s/ Paul K Walter
PER: /s/ John L Walter

HUTTERIAN BRETHERN CHURCH OF SUNSHINE
PER: /s/ George Walter
PER: /s/ Henry Walter

HUTTERIAN BRETHERN CHURCH OF THOMPSON
PER: /s/ John B Tschetter
PER: /s/ David M Tschetter

HUTTERIAN BRETHERN CHURCH OF TSCHETTER
PER: /s/ Dave S Stahl
PER: /s/ Jacob S Hofer

HUTTERIAN BRETHERN CHURCH OF TURIN
PER: /S/ DARIUS Walter
PER: /s/ [Illegible]

HUTTERIAN BRETHERN CHURCH OF VALLEYVIEW
PER: /s/ David [Illegible]
PER: /s/ Sam Stahl

HUTTERIAN BRETHERN CHURCH OF VALLEYVIEW RANCH
PER: /s/ Eli [Illegible] Tschetter
PER: /s/ Sam K Tschetter

HUTTERIAN BRETHERN CHURCH OF VETERAN
PER: /s/ John Stahl
PER: /s/ Joe B Stahl

HUTTERIAN BRETHERN CHURCH OF VIKING
PER: /s/ Joshua S Wipf
PER: /s/ John L Wipf

HUTTERIAN BRETHERN CHURCH OF WEST RALEY
PER: /s/ Chris B Waldner
PER: /s/ Davud Waldner

HUTTERIAN BRETHERN CHURCH OF WARBURG
PER: /s/ Rev John R Wipf
PER: /s/ Rev Jacob [Illegible]

HUTTERIAN BRETHERN CHURCH OF WATERTON
PER: /s/ Rev Elias R [Illegible]
PER: /s/ Elias S [Illegible]

HUTTERIAN BRETHERN CHURCH OF
WHITE LAKE
PER: /s/ John D Hofer
PER: /s/ Peter L Hofer

HUTTERIAN BRETHERN CHURCH OF WILSON
PER: /s/ John K [Illegible]
PER: /s/ John M [Illegible]

HUTTERIAN BRETHERN CHURCH OF
WOLF CREEK
PER: /s/ Peter [Illegible]
PER: /s/ John [Illegible]

DARIUS-LEUT BRITISH COLUMBIA

HUTTERIAN BRETHERN CHURCH OF
SOUTH PEACE
PER: /s/ Rev Peter M Hofer
PER: /s/ Mike K Tschetter

DARIUS-LEUT-MONTANA

DEERFIELD COLONY INC.
PER: /s/ David E Stahl, Pres
PER: /s/ Eli Stahl, Vice Pres

E. MALTA COLONY
PER: /s/ Paul D Hofer, Pres
PER: /s/

LORING COLONY INC.
PER: /s/ Josh B Hofer
PER: /s/ Dave K Hofer

N. HARLEM COLONY
PER: /s/ Joseph K Hofer, Pres
PER: /s/ Joe K Hofer Jr, Sec

SURPRISE CREEK COLONY
PER: /s/ Sam Hofer
PER: /s/ George Stahl

DARIUS-LEUT-SASKATCHEWAN

HUTTERIAN BRETHERN CHURCH OF
ARM RIVER COLONY LTD.
PER: /s/ Daniel K Hofer
PER: /s/ Elias A Hofer

HUTTERIAN BRETHERN CHURCH OF
BELLE PLAINE INC.
PER: /s/
PER: /s/

HUTTERIAN BRETHERN CHURCH OF
BOX ELDER INC.
PER: /s/ Jacob K Hofer
PER: /s/ Jacob R Hofer

HUTTERIAN BRETHERN CHURCH OF
DOWNIE LAKE INC.
PER: /s/ David M Stahl
PER: /s/ Josh B Stahl

HUTTERIAN BRETHERN CHURCH OF
EAGLE CREEK INC.
PER: /s/ Joe L Wurz
PER: /s/ Jerry E Wurz

HUTTERIAN BRETHERN CHURCH OF ESTUARY
PER: /s/ George Tschetter
PER: /s/ Jake Tschetter

HUTTERIAN BRETHERN CHURCH OF
FORT PITT COLONY
PER: /s/ Paul S Walter
PER: /s/ Samuel Walter

HUTTERIAN BRETHERN CHURCH OF HILLCREST
PER: /s/ Joseph Wallman
PER: /s/ John [Illegible]

HUTTERIAN BRETHERN CHURCH OF HILLSVALE
PER: /s/ Rev John S Wurz
PER: /s/ Mike M Wurz, Sec.

HUTTERIAN BRETHERN CHURCH OF HODGEVILLE INC.
PER: /s/ Joseph S Hofer
PER: /s/ Peter S Hofer

HUTTERIAN BRETHERN CHURCH OF LAJORDE
PER: /s/ Rev Jacob Hofer
PER: /s/ [Illegible] Hofer

HUTTERIAN BRETHERN CHURCH OF LAKEVIEW
PER: /s/ [Illegible]
PER: /s/ Sam E Wurz

HUTTERIAN BRETHERN CHURCH OF LEASK INC.
PER: /s/
PER: /s/

HUTTERIAN BRETHERN CHURCH OF PONTIEX
PER: /s/ Rev. Jacob S Hofer
PER: /s/ Jacob J Wallman

HUTTERIAN BRETHERN CHURCH OF QUILL LAKE INC.
PER: /s/ Paul L [Illegible]
PER: /s/ Quill Lake Colony

HUTTERIAN BRETHERN CHURCH OF
RIVERVIEW LIMITED
PER: /s/ Rev Mike S Stahl
PER: /s/ Paul [Illegible]

HUTTERIAN BRETHERN CHURCH OF
SIMMIE INC.
PER: /s/ Rev. [Illegible] A Hofer
PER: /s/ Elias Hofer

SONNINGDALE COLONY
PER: /s/ Joseph A Wurz
PER: /s/ George S Wurz

HUTTERIAN BRETHERN CHURCH OF
SPRING LAKE INC.
PER: /s/ Jacob R Hofer
PER: /s/ David K Hofer

HUTTERIAN BRETHERN CHURCH,
SPRINGWATER COLONY INC.
PER: /s/ Joseph B Stahl
PER: /s/ John S Stahl

HUTTERIAN BRETHERN CHURCH OF STAR CITY
PER: /s/ Peter S. Tschetter
PER: /s/

HUTTERIAN BRETHERN CHURCH OF
SWIFT CURRENT INC.
PER: /s/ Jacob R Hofer
PER: /s/ Paul [Illegible] Hofer

HUTTERIAN BRETHERN CHURCH OF WEBB INC.
PER: /s/ Paul S Hofer
PER: /s/ Jacob S Hofer

HUTTERIAN BRETHERN CHURCH OF
WILLOW PARK
PER: /s/ George R Wurz
PER: /s/ John [Illegible]

LEHRER-LEUT-ALBERTA

ACADIA HUTTERIAN BRETHERN LTD.
PER: /s/ John P Mandel
PER: /s/ John J [Illegible]

BIG BEND HUTTERIAN BRETHERN
PER: /s/ Joseph M Waldner
PER: /s/ Jacob L Kleinsasser

THE HUTTERIAN BRETHERN OF BOW CITY
PER: /s/ Andrew M Hofer
PER: /s/ Elias S Wurz

HUTTERIAN BRETHERN OF BRANT
PER: /s/ Andrew J Gross
PER: /s/ John D Entz

HUTTERIAN BRETHERN OF CASTOR
PER: /s/ Joseph P. Hofer
PER: /s/ Peter J Waldner

CLEAR LAKE HUTTERIAN BRETHERN OF ALBERTA
PER: /s/ Joseph J Weldner
PER: /s/ David J. Waldner

CLEARVIEW HUTTERIAN BRETHERN
PER: /s/ Joseph P Hofer
PER: /s/ Peter J Waldner

CLEAR LAKE HUTTERIAN BRETHERN OF ALBERTA
PER: /s/
PER: /s/

CRYSTAL SPRING HUTTERIAN BRETHERN
PER: /s/ Peter J Entz
PER: /s/ Abraham S Entz

DEERFIELD HUTTERIAN BRETHERN
PER: /s/ David G Waldner
PER: /s/ Edward J [Illegible]

ELMSPRING HUTTERIAN BRETHERN
PER: /s/ George J Wipf
PER: /s/ George M Mandel

FAIRLANE HUTTERIAN BRETHERN
PER: /s/ John G Waldner
PER: /s/ George J Waldner

FAIRVILLE HUTTERIAN BRETHERN
PER: /s/ Joseph E Wipf
PER: /s/ Andrew P Wipf

HANDHILL COLONY
PER: /s/ Sam Kleinsasser
PER: /s/ Jacob Wipf

HUTTERVILLE HUTTERIAN BRETHERN
PER: /s/ Jacob J Wipf
PER: /s/ Mike A Wurtz

HUTTERIAN BRETHERN CHURCH OF JENNER
PER: /s/ Jacob J Hofer
PER: /s/ Andrew J Hofer

KINGS LAKE HUTTERIAN BRETHERN
PER: /s/ Michael M Mandel
PER: /s/ Paul M Mandel

MACMILLIAN HUTTERIAN BRETHERN
PER: /s/ Sam S Entz
PER: /s/ John JP Entz

MIALTA HUTTERIAN BRETHERN
PER: /s/ Jacob A Gross
PER: /s/ Jacob J Gross

MIAMI HUTTERIAN BRETHERN
PER: /s/ David P Hofer
PER: /s/ Peter P Hofer

MIDLAND HUTTERIAN BRETHERN
PER: /s/ John M Kleinsasser
PER: /s/ Ben D Kleinsasser

HUTTERIAN BRETHERN OF MILFORD
PER: /s/ Joseph J Kleinsasser
PER: /s/ Joseph J Kleinsasser

HUTTERIAN BRETHERN OF MILTOW
PER: /s/ Sam P Wipf
PER: /s/ Sam P Wipf

NEUDORF HUTTERIAN BRETHERN
PER: /s/ David J Wipf
PER: /s/ Benjamin J Wipf

NEW DALE HUTTERIAN BRETHERN
PER: /s/ Ben S Wurtz
PER: /s/ George J [Illegible]

NEW ELM HUTTERIAN BRETHERN
PER: /s/ David M Entz
PER: /s/ Peter E Entz

NEW ROCKPORT HUTTERIAN BRETHERN
PER: /s/ Peter J Waldner
PER: /s/ John P Waldner

HUTTERIAN BRETHERN OF NEWELL
PER: /s/ Peter J Waldner
PER: /s/ Jacob S Hofer

O.K. HUTTERIAN BRETHERN
PER: /s/ John J Kleinsasser
PER: /s/ Peter P Hofer

OLD ELM HUTTERIAN BRETHERN
PER: /s/ Isaac A Wurz
PER: /s/ George Wurz

THE HUTTERIAN BRETHERN OF PARKLAND
PER: /s/ John M Wipf
PER: /s/ Arnold S Waldner

PLAINVIEW HUTTERIAN BRETHERN
PER: /s/ Paul J Waldner
PER: /s/ Jacob E Waldner

PONDEROSA HUTTERIAN BRETHERN
PER: /s/ Sam J Entz
PER: /s/ Andrew Wipf

RIDGELAND HUTTERIAN BRETHERN
PER: /s/ Joseph Kleinsasser
PER: /s/ Joseph J Hofer

RIVER BEND HUTTERIAN BRETHERN
PER: /s/ Andrew R Deeber
PER: /s/ Peter J Deeber

RIVER ROAD HUTTERIAN BRETHERN
PER: /s/ Peter Entz
PER: /s/ Daniel Entz

ROCK LAKE HUTTERIAN BRETHERN
PER: /s/ Joseph S Wurz
PER: /s/ [Illegible]

ROCKPORT HUTTERIAN BRETHERN
PER: /s/ John P Hofer
PER: /s/ David D Wipf

ROSEDALE HUTTERIAN BRETHERN
PER: /s/ George G Waldner
PER: /s/ Sam G Waldner

ROSEGLEN HUTTERIAN BRETHERN
PER: /s/ John H Entz
PER: /s/ Jacob D Mandel

HUTTERIAN BRETHERN OF SOUTH BEND
PER: /s/ John R Hofer
PER: /s/ Joseph G Kleinsasser

SPRINGSIDE HUTTTERIAN BRETHERN LTD.
PER: /s/ David P Wipf
PER: /s/ Peter P Hofer

THE HUTTERIAN BRETHERN OF SPRINGVIEW
PER: /s/ John Wurz
PER: /s/ Michael Mandel

STANDARD HUTTERIAN BRETHERN
PER: /s/ Joseph R Entz
PER: /s/ Joseph M. Entz

STARBRITE HUTTERIAN BRETHERN
PER: /s/ John R. Entz
PER: /s/ Sam S Entz

HUTTERIAN BRETHERN OF SUNCREST
PER: /s/ Paul M Hofer
PER: /s/ David J Wipf

SUNNYSITE HUTTERIAN BRETHERN
PER: /s/ Peter J. Wurz
PER: /s/ John D Hofer

SUNRISE HUTTERIAN BRETHERN
PER: /s/ David D Hofer
PER: /s/ Andrew J Hofer

TWILIGHT HUTTERIAN BRETHERN
PER: /s/ John B Wipf
PER: /s/ Sam M Entz

THE HUTTERIAN BRETHERN OF
VERDANT VALLEY
PER: /s/ Elias ES Wipf

WILD ROSE HUTTERIAN BRETHERN
PER: /s/ Elias J Kleinsasser

LEHRER-LEUT-MONTANA

BIG SKY COLONY
PER: /s/ Joseph A Wipf
PER: /s/ Daniel E. Wipf

BIG STONE COLONY
PER: /s/ Jacob A Wurz
PER: /s/ Peter A Wurz

BIRCH CREEK COLONY
PER: /s/ Samuel P. Kleinsasser
PER: /s/ Isaac J. Waldner

CASCADE COLONY
PER: /s/ Jacob Wipf
PER: /s/ Elias J Entz

DUNCAN RANCH COLONY
PER: /s/ Thomas D Waldner
PER: /s/ Paul Kleinsasser

EAGLE CREEK COLONY
PER: /s/ John Wurz
PER: /s/ Elias M. Hofer

EAST END COLONY
PER: /s/ George J Waldner
PER: /s/ Paul Kleinsasser

FAIR HAVEN COLONY
PER: /s/ John J. Entz
PER: /s/ Joshua J. Waldner

GLACIER COLONY
PER: /s/ John K Wapf
PER: /s/ John P. Entz

GLENDALE COLONY
PER: /s/ Peter P Wipf
PER: /s/ Sam S Wipf

GOLDEN VALLEY COLONY
PER: /s/ Jacob P. Wipf
PER: /s/ Peter P Kleinsasser

HILLDALE COLONY
PER: /s/ Andrew J Waldner
PER: /s/ John J Waldner

HILLSIDE COLONY
PER: /s/ David M Hofer
PER: /s/ Andrew J Wurz

KINGSBURY COLONY
PER: /s/ Mike S Kleinsasser
PER: /s/ Joe S Kleinsasser

MARTINSDALE COLONY
PER: /s/ Paul J. Wipf
PER: /s/ Joseph J. Kleinsasser

MIAMI COLONY
PER: /s/ Jacob P Mandel
PER: /s/ Jacob D Wipf

LEHRER-LEUT-MONTANA

BIG SKY COLONY
PER: /s/ Joseph A Wipf
PER: /s/ Daniel E. Wipf

BIG STONE COLONY
PER: /s/ Jacob A Wurz
PER: /s/ Peter A Wurz

BIRCH CREEK COLONY
PER: /s/ Samuel P. Kleinsasser
PER: /s/ Isaac J. Waldner

CASCADE COLONY
PER: /s/ Jacob Wipf
PER: /s/ Elias J Entz

DUNCAN RANCH COLONY
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PER: /s/ Paul Kleinsasser

EAGLE CREEK COLONY
PER: /s/ John Wurz
PER: /s/ Elias M. Hofer

EAST END COLONY
PER: /s/ George J Waldner
PER: /s/ Paul Kleinsasser

FAIR HAVEN COLONY
PER: /s/ John J. Entz
PER: /s/ Joshua J. Waldner

GLACIER COLONY
PER: /s/ John K Wapf
PER: /s/ John P. Entz

GLENDALE COLONY
PER: /s/ Peter P Wipf
PER: /s/ Sam S Wipf

GOLDEN VALLEY COLONY
PER: /s/ Jacob P. Wipf
PER: /s/ Peter P Kleinsasser

HILLDALE COLONY
PER: /s/ Andrew J Waldner
PER: /s/ John J Waldner

HILLSIDE COLONY
PER: /s/ David M Hofer
PER: /s/ Andrew J Wurz

KINGSBURY COLONY
PER: /s/ Mike S Kleinsasser
PER: /s/ Joe S Kleinsasser

MARTINSDALE COLONY
PER: /s/ Paul J. Wipf
PER: /s/ Joseph J. Kleinsasser

MIAMI COLONY
PER: /s/ Jacob P Mandel
PER: /s/ Jacob D Wipf

MILFORD COLONY
PER: /s/ John J. Kleinsasser
PER: /s/ Daniel P Hofer

MILLER COLONY
PER: /s/ Jacob P Wipf
PER: /s/ Joe D Hofer

NEW ROCKPORT COLONY
PER: /s/ Elias P. Wipf
PER: /s/ John J. Wipf

PLEASANT VALLEY COLONY
PER: /s/ Jacob J. Wipf
PER: /s/ John J. Waldner

RIMROCK COLONY
PER: /s/ Joseph Hofer
PER: /s/ Joseph A Wurz

RIVERVIEW COLONY
PER: /s/ Paul P Wipf
PER: /s/ John P Wipf

ROCKPORT COLONY
PER: /s/ George D Hofer
PER: /s/ Jacob J Hofer

SAGE CREEK COLONY
PER: /s/ David P Hofer
PER: /s/ John D Wurtz

SEVILLE COLONY
PER: /s/ John J Kleinsasser
PER: /s/ George J Waldner

SPRINGDALE COLONY
PER: /s/ Joseph M Wipf
PER: /s/ Joseph S Hofer

SPRINGWATER COLONY
PER: /s/ David A Hofer
PER: /s/ Mike M Kleinsasser

LEHRER-LEUT-SASKATCHEWAN

HUTTERIAN BRETHERN OF ABBEY
PER: /s/ Andrew A Wipf
PER: /s/ [Illegible]

BAILDON HUTTERIAN BRETHERN INC.
PER: /s/ Joseph J Wipf
PER: /s/ John P Hofer

HUTTERIAN BRETHERN CHURCH OF BEECHY INC.
PER: /s/ Andrew A Wipf
PER: /s/ David D Hofer

BENCH HUTTERIAN BRETHERN CORP.
PER: /s/ Jacob S Wipf
PER: /s/ Michael J Wipf

HUTTERIAN BRETHERN OF BONE CREEK CORP.
PER: /s/ Paul P Entz
PER: /s/ Andy Mandel

BUTTE HUTTERIAN BRETHERN INC.
PER: /s/ Peter A Kleinsasser
PER: /s/ Mike A Wurz

CARMICHAEL HUTTERIAN BRETHERN INC.
PER: /s/ Peter G Entz
PER: /s/ Peter A Entz

CLEAR SPRINGS HUTTERIAN BRETHERN CORP.
PER: /s/ Rev Peter Wurz
PER: /s/ Elias J Wipf

CYPRESS HUTTERIAN COLONY
PER: /s/ Peter J Entz
PER: /s/ Samuel G Entz

HUTTERIAN BRETHERN OF DINSMORE
PER: /s/ Rev John Hofer
PER: /s/ Joe S Mandel

EATONIA HUTTERIAN BRETHERN OF
EATONIA INC.
PER: /s/ David M Mandel
PER: /s/ David D Mandel

GLIDDEN HUTTERIAN BRETHERN
PER: /s/ Rev Joseph Kleinsasser
PER: /s/ Peter Waldner

HUTTERIAN BRETHERN OF GOLDEN VIEW
PER: /s/ Sam S Kleinsasser
PER: /s/ Peter J Hofer

HAVEN HUTTERIAN BRETHERN OF
FOX VALLEY, INC.
PER: /s/ Joseph S Entz
PER: /s/ Paul Entz

HUTTERIAN BRETHERN OF HURON LTD.
PER: /s/ John J Waldner
PER: /s/ Peter D Entz

HUTTERIAN BRETHERN OF KYLE
PER: /s/ John S Waldner
PER: /s/ Michael M Hofer

MAIN CENTRE HUTTERIAN BRETHERN INC.
PER: /s/ Mike J Wipf
PER: /s/ Peter D Hofer

ROSE VALLEY HUTTERIAN BRETHERN INC.
PER: /s/ Sam S Kleinsasser
PER: /s/ [Illegible] E Wipf

HUTTERIAN BRETHERN OF ROSETOWN
PER: /s/ Rev John Wipf Sr.
PER: /s/ Rev John P Wipf Jr.

SAND LAKE HUTTERIAN BRETHERN INC.
PER: /s/ Rev David P Kleinsasser
PER: /s/ Joe P. Kleinsasser

SMILEY HUTTERIAN BRETHERN
PER: /s/ Joe J Kleinsasser
PER: /s/ George S Kleinsasser

SPRINGFIELD HUTTERIAN BRETHERN INC.
PER: /s/ Joe S Kleinsasser
PER: /s/ John S. Kleinsasser

TOMPKINS HUTTERIAN BRETHERN CORP.
PER: /s/ Joseph P Entz
PER: /s/ Lorenz Mandel

VANGUARD HUTTERIAN BRETHERN INC.
PER: /s/ Michael P. Entz
PER: /s/ Joseph S Entz

WALDECK HUTTERIAN BRETHERN
PER: /s/ George Waldner
PER: /s/ Mike Waldner

WHEATLAND HUTTERIAN BRETHERN OF CABRI INC.
PER: /s/ Rev John M. Hofer
PER: /s/ Peter J Hofer

SCHMIED-LEUT-MANITOBA

AIRPORT COLONY OF THE HUTTERIAN BRETHERN
PER: /s/ Ben Hofer
PER: /s/ Tom Mandel

ASPENHEIM COLONY OF THE HUTTERIAN BRETHERN
PER: /s/ Ben Waldner
PER: /s/ Jacob Waldner

BLOOMFIELD COLONY OF THE HUTTERIAN BRETHERN
PER: /s/ Peter Hofer
PER: /s/ Joe Hofer

BLUMENGART HUTTERIAN MUTUAL CORPORATION
PER: /s/ John Waldner
PER: /s/ Jake [Illegible]

BONHOMME HUTTERIAN MUTUAL CORPORATION
PER: /s/ Joe Wollemann
PER: /s/ Paul [Illegible]

BROAD VALLEY COLONY OF THE HUTTERIAN BRETHERN
PER: /s/ David Wipf
PER: /s/ Paul Wipf

CONCORD COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Sam Kleinsasser
PER: /s/ Joe Kleinsasser

COOL SPRING COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Arnold Waldner
PER: /s/ J Waldner

CYPRESS COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Joseph Hofer
PER: /s/ Dave Waldner

DELTA COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Leonard M Kleinsasser
PER: /s/ Karl Kleinsasser

EVERGREEN COLONY OF THE
HUTTERIAN BRETHERN
PER: /S/ Joseph Walrner
PER: /s/ Elie Waldner

GRAND COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ [Illegible]
PER: /s/ [Illegible]

GRASS RIVER COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Joseph Waldner
PER: /s/ Sam Waldner

HIDDEN VALLEY COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Elie Mandel
PER: /s/ Paul Mandel

HILLSIDE COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ David Hofer
PER: /s/ Aaron Waldner

HURON HUTTERIAN MUTUAL CORPORATION
PER: /s/ Dave Waldner
PER: /s/ William Kleinsasser

JAMES VALLEY HUTTERIAN
MUTUAL CORPORATION
PER: /s/ John S Hofer
PER: /s/ [Illegible] Hofer

MARBLE RIDGE COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Jake Hofer
PER: /s/ Jonathan Waldon

MAYFAIR COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Jacob Gross
PER: /s/ [Illegible] Gross

NEW ROSEDALE COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Arnold Mandel
PER: /s/ James Mandel

NORQUAY COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Elias Waldner
PER: /s/ Robert Waldner

PARKVIEW COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Jacob Wallman
PER: /s/ Joseph Waldner

PEMBINA COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Paul [Illegible]
PER: /s/ David Hofer

RIVERSIDE HUTTERIAN MUTUAL
CORPORATION
PER: /s/ John J Hofer
PER: /s/ David Hofer

ROSE VALLEY COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ David Waldner
PER: /s/ Edward Waldner

SOMMERF ELD COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Michael Hofer
PER: /s/ John Hofer

SOURIS RIVER COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Michael J Waldner
PER: /s/ Edward Waldner

SPRUCE WOOD COLONY OF THE
HUTTERIAN BRETHERN
PER: /S/ JOSEph [Illegible]
PER: /s/ Joseph Waldner

STURGEON CREEK COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ David S. Mandel
PER: /s/ [Illegible] Waldner

TREESBANK COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ John Hofer
PER: /s/ Joe Hofer

WELLWOOD COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Alfred Waldner
PER: /s/ Robert Hofer

WEST ROC COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Levi Gross
PER: /s/ Ben Gross

WILLOW CREEK COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ John Hofer
PER: /s/ John Hofer

WOODLAND COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Jacob Hofer
PER: /s/ John Hofer

SCHMIED-LEUT-MINNESOTA

BIG STONE HUTTERIAN BRETHERN INC.
PER: /s/ Clarence Hofer Pres.
PER: /s/ Elmer Hofer – Sect – Treas

HEARTLAND HUTTERIAN BRETHERN INC.
PER: /s/ Joseph J. Wipf
PER: /s/ Daniel J Wipf

SPRING PRAIRIE HUTTERIAN BRETHERN INC.
PER: /s/ John Waldner
PER: /s/ Joseph Wipf

SCHMIED-LEUT-NORTH DAKOTA

FAIRVIEW HUTTERIAN BRETHERN INC.
PER: /s/ Sam Wipf
PER: /s/ Jonathan Wipf

FOREST RIVER COLONY OF THE
HUTTERIAN BRETHERN
PER: /s/ Joseph [Illegible] Mandel
PER: /s/ Paul Mandel [Illegible] Jr.

MAPLE RIVER HUTTERIAN BRETHERN
ASSOCIATION
PER: /s/ [Illegible] Waldner
PER: /s/ Jack Hofer

SUNDALE HUTTERIAN BRETHERN
ASSOCIATION
PER: /s/ Ben Hofer
PER: /s/ Sam Hofer

WILLOW BANK HUTTERIAN BRETHERN
ASSOCIATION
PER: /s/ Daniel D Wipf
PER: /s/ Len D. Wipf

SCHMIED-LEUT-SOUTH DAKOTA

BLUMENGARD HUTTERIAN BRETHERN INC.
PER: /s/ Jack Kleinsasser
PER: /s/ Paul Hofer

CEDAR GROVE HUTTERIAN BRETHERN INC.
PER: /S/ JAke J Waldner
PER: /s/ George G Hofer

CLAREMONT HUTTERIAN BRETHERN INC.
PER: /s/ Jonathan [Ilegible]
PER: /s/ Levi Tschetter Jr.

CLARK HUTTERIAN BRETHERN INC.
PER: /s/ Leonard Waldner
PER: /s/ Fred Waldner

CLEARFIELD HUTTERIAN BRETHERN INC.
PER: /s/ David Glanzer
PER: /s/ Sam Glanzer

DEERFIELD HUTTERIAN BRETHERN INC.
PER: /s/ [Illegible] Stahl
PER: /s/ [Illegible] Stahl

EVER GREEN HUTTERIAN BRETHERN INC.
PER: /s/ Fred Waldner
PER: /s/ Paul Kleinsasser

GLENDALE HUTTERIAN BRETHERN INC.
PER: /s/ Joe Kleinsasser
PER: /s/ [Illegible] Kleinsasser

GRASS RANCH HUTTERIAN BRETHERN INC.
PER: /s/ Melvin A. Wipf
PER: /s/ Rainhart J Stahl

GRASS LAND HUTTERIAN BRETHERN INC.
PER: /s/ Sam Wollman
PER: /s/ John Waldner

GREENWOOD HUTTERIAN BRETHERN INC.
PER: /s/ Samuel Glanzer
PER: /s/ Joe Glanzer

HILLCREST HUTTERIAN BRETHERN INC.
PER: /s/ George Waldner
PER: /s/ John J [Illegible]

HILLSIDE HUTTERIAN BRETHERN INC.
PER: /s/ Walter P. Glanzer
PER: /s/ Ruben Glanzer

HURON HUTTERITE MUTUAL SOCIETY
PER: /s/ Jake J. Wollmann
PER: /s/ Sam Waldman

JAMESVILLE HUTTERIAN BRETHERN INC.
PER: /s/ [Illegible] Wertz
PER: /s/ Mike Wertz

LAKEVIEW HUTTERIAN BRETHERN INC.
PER: /s/ Eli Hofer
PER: /s/ Joe Hofer

LONG LAKE HUTTERIAN BRETHERN INC.
PER: /s/ Andy Waldner
PER: /s/ John [Illegible] Jr.

MAXWELL HUTTERIAN BRETHERN INC.
PER: /s/ Job K Wipf [Illegible]
PER: /s/ Joseph Wipf

MAYFIELD HUTTERIAN BRETHERN INC.
PER: /s/ Eli F Glanzer
PER: /s/ Joseph J. Waldner

MILLERDALE HUTTERIAN BRETHERN INC.
PER: /s/ Leonard Waldner
PER: /s/ Mike Waldner

NEW ELM SPRINGS HUTTERIAN
BRETHERN INC.
PER: /s/ Mike Tschetter Pres
PER: /s/ Joseph Tschetter Sec Tres

NEWPORT HUTTERIAN BRETHERN INC.
PER: /s/ Sam J Waldner
PER: /s/ Joe Wurtz

OAK LANE HUTTERIAN BRETHERN INC.
PER: /s/ Jake D Wipf Pr
PER: /s/ John D Wipf, Sec, Treas

OLD ELM SPRINGS HUTTERIAN BRETHERN INC.
PER: /s/ Joseph Wipf Pres.
PER: /s/ Mike Wollman

ORLAND HUTTERIAN BRETHERN INC.
PER: /s/ Paul Wurtz
PER: /s/ Leonard Wurtz

PEARL CREEK HUTTERIAN BRETHERN INC.
PER: /s/ David Waldner
PER: /s/ Paul Waldner

PLAINVIEW HUTTERIAN BRETHERN INC.
PER: /s/ [Illegible] Wipf
PER: /s/ Emert Wipf

PLATTE HUTTERIAN BRETHERN INC.
PER: /s/ Dale J. Stahl
PER: /s/ Joe J.M. Waldner

PLEASANT VALLEY COLONY OF
HUTTERIAN BRETHERN INC.
PER: /s/ Andrew Tschetter
PER: /s/ Chris Hofer

POINSETT HUTTERIN BRETHERN INC.
PER: /s/ Jonathan Wollman
PER: /s/ [Illegible] Tschetter

RIVERSIDE HUTTERIAN BRETHERN INC.
PER: /s/ Kenneth Waldner
PER: /s/ Jerry Waldner

ROCKPORT HUTTERIAN BRETHERN INC.
PER: /s/ Joseph D Wipf
PER: /s/ Ben J. Wipf

ROLLAND HUTTERIAN BRETHERN INC.
PER: /s/ Rolland Sam Wipf
PER: /s/ Jonathan Wipf [Illegible]

ROSEDALE HUTTERIAN BRETHERN INC.
PER: /s/ John K. Waldner
PER: /s/ Joshua Waldner

SPINK HUTTERIAN BRETHERN INC.
PER: /s/ Mike J. Wipf
PER: /s/ John J. Wipf

SPRING LAKE HUTTERIAN COLONY INC.
PER: /s/ Joe [Illegible]
PER: /s/ [Illegible]

SPRING VALLEY HUTTERIAN BRETHERN INC.
PER: /s/ George J Stahl
PER: /s/ Joe Waldner

SUNSET HUTTERIAN BRETHERN INC.
PER: /s/ John Waldner
PER: /s/ Joe Waldner

TSCHETTER HUTTERIAN BRETHERN INC.
PER: /s/ Samuel Hofer
PER: /s/ Aaron Hofer

WHITE ROCK HUTTERIAN BRETHERN INC.
PER: /s/ Joseph Waldner
PER: /s/ Mike Waldner

WOLF CREEK HUTTERIAN BRETHERN INC.
PER: /s/ Aaron Hofer
PER: /s/ Tim Hofer

SPRING CREEK HUTTERIAN BRETHERN INC.
PER: /s/ [Illegible] Wipf
PER: /s/ Tom Wipf

GRACEVALE HUTTERIAN BRETHERN INC.
PER: /s/ Sam Hofer
PER: /s/ Paul Hofer

PEMBROOK HUTTERIAN BRETHERN, INC.
PER: /s/
PER: /s/ Henry [Illegible]

BON HOMME HUTTERIAN BRETHERN INC.
PER: /s/ David J Waldner
PER: /s/ Jacob Waldner

APPENDIX I

EXHIBIT D

Acknowledgment & Declaration of Membership

I, **Daniel E. Wipf**, a member of **Big Sky Colony, Inc**., a Montana Nonprofit Corporation located at Cut Bank, Montana (the "Corporation") acknowledge and declare as follows:

1. I am dependent upon the community fund and/or treasury of the Corporation for my support and as such I understand that I am a member of the Corporation;

2. I desire to maintain my membership in the Corporation, and I understand that the Corporation desires me to be a member of the Corporation;

3. I accept membership in the Corporation and agree to the terms and conditions of membership in the Corporation as set forth in the Articles of Incorporation and By-Laws of the Corporation as those documents now exist and as they may be modified from time to time, including, but not limited to, the following:

a. I do not and will not own any property of any nature. By my signature on this instrument I convey and transfer any and all property of any nature in which I may have an interest to the Corporation. As a condition of my continued membership in the Corporation, I will promptly transfer to the Corporation any property received by me or given or transferred to me for so long as I am a member of the Corporation. Any labor I perform or goods I sell to other parties shall be for the benefit of and belong to the Corporation;

b. To the extent I am capable and without expectation of payment, I will provide labor and support to the Corporation to assist it in its activities and operations;

c. I do not and will not have any ownership or personal interest in any of the Corporation's income or property. In the event I cease to be a member, whether voluntarily or involuntarily, I will not have any right to, and will not seek, distribution of any of the Corporation's income or property regardless whether any property was acquired by my labor or efforts. I have no right to receive payment of a wage for my labor or efforts on behalf of the Corporation. Any labor I have provided or will provide, is provided without any expectation of payment to or for me. I acknowledge that the support provided to me by the Corporation is sufficient, although not required, consideration for my contribution to the activities and operations of the Corporation;

d. I accept and agree to follow the doctrines, beliefs and practices of the Hutterian Brethren Church set forth in Peter Ridemann's Hutterite Confession of Faith as interpreted by the officers of the Corporation in subordination to the elders of the Hutterian Brethren Church. I submit to the disciplinary authority of the Hutterian Brethren Church over spiritual and doctrinal issues acting through the officers of the Corporation in subordination to the elders of the Hutterian Brethren Church;

e. I understand that only the male, baptized members of the Corporation have the right to vote with respect to the business and affairs of the Corporation;

f. I understand that the Corporation may terminate my membership at any time when it determines in its absolute discretion to do so, and that I have no legal right to membership in or support from the Corporation whether before or after termination of my membership. I understand that if my membership in the Corporation is terminated, the Corporation may also expel me from the Corporation's property and my home. I understand that if I fail to reside on the Corporation's property with the other members of the Corporation, my membership in the Corporation will automatically terminate without the need for any corporate action by the Corporation. I also understand that my membership in the Corporation is contingent upon me being in good standing with the Hutterian Brethren Church.

4. I sign this Acknowledgment & Declaration of Membership for myself, my children under 18 and any of my children born hereafter. Until they reach the age of 18 years, my children shall be subject to the terms and conditions stated in this Acknowledgment & Declaration of Membership as if it had been signed by them. As their parent, I agree to raise my children in accordance with the doctrines, beliefs and practices of the Hutterian Brethren Church. I accept responsibility to ensure my children's compliance with the doctrines, beliefs and practices of the Hutterian Brethren Church.

5. I agree that the terms of this Acknowledgment & Declaration of Membership apply to me and my minor children with respect to my relationship with any other Hutterite corporation or organization of which I become a member or upon whose property my children or I may reside. For purposes of this Acknowledgment & Declaration a Hutterite corporation or organization is one which is organized for purposes of practicing or advancing the doctrines, beliefs and practices of the Hutterian Brethren Church.

6. Any time after I sign this Acknowledgment & Declaration of Membership, I will deliver to the Corporation any additional instruments of conveyance and assignments, certificates or other documents as the Corporation may reasonably request to carry out my duties and commitments as a Member of the Corporation, or to take any other actions necessary to carry out the purposes of this Acknowledgment & Declaration of Membership.

7. I declare that my acceptance of membership and the terms and conditions of membership is a matter of my religious beliefs as expressed in the doctrine, beliefs and practices of the Hutterian Brethren Church. Among those beliefs is the commandment to live at peace with fellow believers, to resolve disputes within the Church, and not to seek redress before secular authorities whether related to secular or sectarian issues. Therefore, I agree to submit any claim or dispute arising from or related to my membership or the membership of my children in the Corporation or any interest claimed by myself or my children in the Corporation's property to resolution by the elders of the Lehrerleut Conference of the Hutterian Brethren Church. Judgment upon the elders' decision may be entered in any court other-

wise having jurisdiction. I understand that will be the sole remedy or process for resolution of any controversy or claim arising out of my membership in the Corporation or any claimed interest in the Corporation's property, and I expressly waive the right to file a lawsuit in any civil court against the Corporation, except to enforce the decision of the elders of the Hutterian Brethren Church.

This Acknowledgment & Declaration of Membership is given by my voluntary act this the 18th day of March, 2009. I have read, studied and understand the provisions hereof for myself and my children under 18 years of age and any children born hereafter until they reach the 18 years of age. I have had an opportunity to read the Corporation's Articles of Incorporation and By-Laws.

/s/ Daniel E. Wipf
Daniel E. Wipf, Member

The Corporation acknowledges delivery of this Acknowledgment & Declaration of Membership and affirms the membership of Daniel E. Wipf and his minor children in the Corporation. The Corporation agrees to the dispute resolution process set forth above as the sole remedy or process for resolving disputes with Daniel E. Wipf regarding his membership or interest in the Corporation and that of his minor children. The Corporation expressly waives the right to file a lawsuit in any civil court against Daniel E. Wipf or his minor children except as provided herein.

Dated the the 18th day of March, 2009.

Big Sky Colony, Inc.

/s/ Daniel E Wipf
Daniel E. Wipf, First Minister & President

APPENDIX J

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MONTANA NINTH JUDICIAL DISTRICT COURT
GLACIER COUNTY

Cause No. DV-10-4

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

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,
Respondent.

AFFIDAVIT OF KEITH MESSMER

STATE OF MONTANA)
: ss
County of Lewis and Clark)

1. I am employed by the Department of Labor and Industry and am Bureau Chief of the Workers' Compensation Regulation Bureau

2. Prior to the passage of House Bill 119, some religious organizations, including Hutterite colonies and members, were not considered by the Department to be subject to the Workers' Compensation Act because they did not pay wages to their members and therefore did not directly fit within the definition of an employer or employee.

3. During the 10 years prior to the 2009 Legislative session, the Department received numerous complaints about Hutterite colonies competing with other Montana businesses, such as contractors, without having to provide workers' compensation insurance.

4. In response to these complaints, and to protect the Uninsured Employers' Fund from potential liability for a catastrophic injury to a Hutterite member, the Department included sections 6 and 7 within the larger House Bill 119.

/s/ Keith Messmer
Keith Messmer

SUBSCRIBED AND SWORN to before me this 09 day of November, 2010.

/s/ Aaron West *Signed*
/s/ Aaron West *Printed Name*
Notary Public for the State of Montana.
Residing at Helena, Montana.
My commission expires: _____
[Notary Seal]

APPENDIX K

IN THE SUPREME COURT OF THE
STATE OF MONTANA

[Filed February 1, 2012]

Supreme Court Cause No. DA 11-0572

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,
Appellant,

v.

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

BRIEF OF APPELLEE

On Appeal from:
Montana Ninth Judicial District Court,
Glacier County,
Before The Honorable Laurie McKinnon.

APPEARANCES:

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MONTANA ATTORNEY GENERAL
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

This 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? This issue implicates the constitutional doctrines of free exercise, establishment of religion, and equal protection. Each of these constitutional doctrines requires a separate analysis of the issue.

STATEMENT OF THE CASE

This is a case about a religious group that was targeted for unfavorable special treatment by the Montana Legislature at the request of the Montana Department of Labor and Industry (the "Department") and construction industry groups. Big Sky Colony, Inc. (the "Colony") and Dan Wipf petitioned the District Court for a declaration that Montana Code Annotated §§ 39-71-117(1)(d) & 118(1)(i) are unconstitutional based upon the religion and equal protection provisions of the United States and Montana Constitutions. Both sides served written discovery. Cross-motions for summary judgment supported by affidavits were filed. As agreed by the parties, no issues of material fact were disputed. The District Court granted summary judgment for the Colony and Wipf. The Department disagrees with the District Court's legal analysis.

STATEMENT OF THE 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." 2009 Mont. Laws 1439 (emphasis added). The "certain conditions" happen to be targeted at and unique to Hutterites.

Section 6 of HB 119 amended Montana Code Annotated § 39-71-117(1) to add the following text to the definition of "employer":

> (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":

> (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). References to "HB 119" throughout this brief are references to Sections 6 and 7 only.

The legislative history shows that these definitions were added because the Department and the Legislature were under pressure from some members of the construction industry and their lobbying organizations. The Department and the construction industry are under the mistaken impression that Hutterites have a competitive advantage because Hutterite colonies do not pay workers' compensation insurance premiums. The construction industry apparently does

not know about the Hutterite Medical Trust or the fact that members of the Colony are given full, no fault, medical care regardless of the reason for their illness or injury. This is comprehensive coverage at substantial cost to the Colony. Hutterite colonies provide more for their members than the workers' compensation system requires. Members receive care regardless of the cause or source of their injury or illness.

Colonies provide their members all the necessities of life including food, housing, and clothing, regardless of work performed, which is more than the construction industry standard compensation package. Hutterites can do this because they live communally and without luxury. As an act of faith and worship, each individual is committed to the group. They have no television, vacations, home improvement loans, or college tuition to pay for. Workers' compensation premiums do not even enter into the analysis of overhead expenses, because the Colony provides so much more for its members than a construction company does for its employees. The Hutterite advantage, if you can call it that, is that Hutterites are willing to live without the luxuries of secular society. Contractors and their employees could also have this perceived advantage by living without modern consumer luxuries.

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. Aff. Daniel Wipf, ¶ 4 (Dkt. 11). 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 5.

The Hutterische Church, or Hutterian Brethren Church (the "Church"), was founded during the Anabaptist movement by Jacob Hutter in the 1500s in Germany. *Id*. at ¶ 7. Hutterites split from other Anabaptists because Hutterites' core belief is 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. Hutterite adherents continued to practice their beliefs as they migrated throughout Europe for centuries. Hutterites fled Europe for North America in the 1800s seeking religious freedom. *Id*. Members of the Church continue to live a communal lifestyle in colonies located in the Prairie Provinces of Canada, Minnesota, the Dakotas, Montana, and Washington. *Id*. at ¶¶ 7 & 11; *see The Encyclopedia of Religion* vol. 6, 542 (Mircea Eliade ed., MacMillan Publishing Co. 1987); *Encyclopedia of the American Religious Experience* vol. I, 625-26 (Charles H. Lippy & Peter W. Williams eds., Charles Scribner's Sons 1988) (excerpts attached to Pet. Resp. Mot. S.J. & Brf. Supt. X-Mot. S.J. (Dkt. 10) as exhibits B & C). There are three conferences of the Church, each with slight differences: Lehrerleut,

Dariusleut, and Schmeidleut. Big Sky Colony is aligned with the Lehrerleut conference, as shown on the Hutterite Constitution attached as Exhibit C to the Affidavit of Daniel E. Wipf.

Big Sky Colony, like other colonies, is completely communal. Colony members share religious services, eat communal food together in the communal dining hall, 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 as an exercise of their religious faith and without expectation of or entitlement to pay, wages, salary, or other compensation. *Id*. at ¶ 15. Membership is voluntary. *Id*. at ¶ 12. Members can and do leave the Colony from time to time and are free to return.

All members of the Colony 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 punishable by excommunication which terminates colony membership. *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 Hutterite Confession of Faith forbids resolution of claims between members by secular courts.

The Colony provides all the necessities 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 provide modern medical care for members at a manageable cost. *Id*. at ¶ 17. Effective since 1999, the

Hutterite Medical Trust allows several Lehrerleut colonies to pool their resources so that each colony can afford to care for its members. See *id*. at Ex. E. The terms of the Hutterite Medical Trust do not limit an individual colony's provision of full medical care to each member regardless of the cause of the medical condition. *Id*.

HB 119 is the product of pressure from construction industry lobbying organizations. Representative Chuck Hunter of 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) (for ease of reference to the transcript attached to the State's Summary Judgment Brief (Dkt. 6), legislative history is cited as follows: "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. No evidence of an actual inequity was ever presented to or considered by the Legislature. One legislator called a spade a spade, saying, ". . . 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." Tr. 10, Sen. Stewart-Peregoy (Mar. 11, 2009).

STANDARD OF REVIEW

The same standard of review applies to all issues here. Summary judgment is appropriate, "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). "When the material facts are undisputed, we review a district court's conclusions of law for correctness. *Edwards v. Cascade Co. Sheriff's Dept*., 2009 MT 451, ¶ 38, 354 Mont. 307, 223 P.3d 893." *Griffith v. Butte School Dist. No. 1*, 2010 MT 246, ¶ 21, 358 Mont. 193, 244 P.3d 321.

SUMMARY OF ARGUMENT

The judgment of the District Court should be affirmed because the religion and equal protection clauses do not allow the State to discriminate against religious groups without a good reason. HB 119 has no rational basis. The stated purpose for HB 119, leveling the playing field, is not consistent with the purpose of the Workers' Compensation Act, nor is it supported by the facts. HB 119 was passed because some members of the construction industry, without all of the facts, complained about Hutterites. Hutterites are an easy target for discrimination because they look, dress, talk, and live differently than the rest of Montana does. Hutterites do not vote, making them an easy political target. These differences also illustrate why HB 119 is unconstitutional regulatory persecution.

Hutterites do not need wage loss protection, because they receive no wages. Hutterite colonies do not

need liability protection, because Hutterites do not make claims. There has never been a workers' compensation claim asserted by a member of a Hutterite Colony. They do not own property or vote. If a Colony member gets hurt, the Colony takes care of the member and the member's family. The Hutterite Medical Trust helps Lehrerleut Hutterite colonies provide full, no fault medical care for members at substantial expense. The Colony could even use the Hutterite Medical Trust to self-insure for workers' compensation at low cost. In spite of this, the Department wants to use HB 119 to drive a wedge between the Colony and its members, creating divisive property rights between the Colony and its members, to be enforced by members against their church. HB 119 is particularly offensive because it strikes at the very core of the Hutterite religion and the basic relationship between the member and the church.

The Department cannot justify this burden on religion with a rational purpose. The Department's stated purpose for HB 119 is to "level the playing field" by adding workers' compensation premiums to the Colony's overhead expenses. But the Department already admitted that the current medical care provided by the Colony can be structured to fit within workers' compensation Plan No. 1 at very little additional cost to the Colony. Compliance with Plan No. 1 will hardly cost the Colony any more than it already spends, if it costs more at all. HB 119 does not add the financial tax on the Colony that the Department says HB 119 intended.

The District Court's order is entirely consistent with federal and Montana law. *St. John's Lutheran Church v. State Compensation Insurance Fund*, which is relied on by the Department, is so distin-

guishable that it is mostly irrelevant. The religious beliefs of Lutherans are different from Hutterites. Other opinions of this Court are more applicable. The most analogous U.S. Supreme Court case to this analysis is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*. That case held that a law is unconstitutional if it was enacted because of, rather than in spite of, a religious group. If Hutterites did not live in Montana, HB 119 would not have been enacted.

Each of the constitutional doctrines identified in the issue statement will be addressed in turn. HB 119 violates the Colony's and Wipf's right to free exercise because it makes it illegal for them to live communally. HB 119 fails the *Lemon* test, because it requires the State to decide when a colony member is acting within the scope of his religious duties and to review excommunications. HB 119 violates equal protection because it treats communal religious groups differently than other groups.

ARGUMENT

I. HB 119 VIOLATES THE COLONY AND WIPF'S RIGHT TO FREE EXERCISE OF RELIGION BECAUSE IT REQUIRES THEM TO CHOOSE BETWEEN VIOLATING THE LAW OR 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 Compen. Ins. Fund*, 252 Mont. 516, 524-25, 830 P.2d 1271, 1277 (1992) (citing *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 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.

This Court has used the older and more restrictive *Thomas* test to analyze free exercise. The test is:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

Griffith v. Butte School District No. 1, 2010 MT 246, ¶ 62, 358 Mont. 193, 244 P.3d. 321 (quoting *Valley Christian Sch. v. Montana High Sch. Assoc.*, 2004 MT 41, ¶ 7, 320 Mont. 81, 86 P.3d 554 and *Thomas*, 450 U.S. at 717-18).[1] The Department has not disputed the sincerity of the Colony's or Wipf's religious beliefs, so this argument focuses on the effect that HB 119 has on Hutterite religious beliefs.

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[1] The District Court analyzed the case below under federal law. Ord. Granting Pets.' Mot. S.J., 7 n.3 (Dkt. 17).

Lukumi is analogous to this case. In *Lukumi*, a Santeria church sued the city to challenge ordinances prohibiting the ritual slaughter of animals, which was a Santeria ritual. The district court upheld the ordinances, holding that their purpose 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. Only Santeria adherents believed in ritual animal sacrifice, like only Hutterites believe in communal living and community of goods. The fact that the animal sacrifice ordinances were enacted **because of** Santeria beliefs rather than in spite of them, showed that the ordinances were intended to burden Santeria religious exercise. *Id*. at 540-41. The same is true of HB 119.

A. HB 119 is neither neutral nor generally applicable.

The new definitions in HB 119, on their face, only apply to religious groups engaged in activities unique to Hutterites. The Department says HB 119 was directed at religious organizations generally, but "primarily the Hutterites." Brf. Appellant, 35. The Department has yet to identify any other religious organization affected by HB 119, because there are none.

The Department argues that HB 119 simply removed an exemption to the generally applicable Act. HB 119 did not remove an exemption. HB 119 added a special Hutterite exception to the general exemptions of the Act. The District Court correctly stated that, "HB 119 has been drafted with such care

to apply only to Hutterites that one statesperson suggested that it just specifically name 'Hutterites'." Ord. Granting Pets.' Mot. S.J., 17-18 (Dkt. 17) (quotes in original).

B. HB 119 forces Hutterites to choose between breaking the law or disobedience of church doctrine.

The Department incorrectly states that HB 119 does not affect whether Colony members are compelled to own property by HB 119. Brf. Appellee, 14. HB 119 forces Colony members to own a claim against the Colony if they are injured. The Act prevents an employee from waiving his or her rights under the Act. Mont. Code Ann. § 39-71-409 (2011). In violation of the Act, the acknowledgment executed by every member contains their promise to convey all property to the Colony as an exercise of their religious belief in communal living and community of goods. Aff. Wipf, ¶ 13 (Dkt. 11). That includes conveyance of workers' compensation claims. *See* Mont. Code Ann. § 70-2-101. Even if the Act allowed a member to convey his claim to the Colony, the Colony would then hold a claim against itself. That makes no sense.

Additionally, the Act forbids employers from terminating employees for filing workers' compensation claims. *Id*. at § 39-71-317. But if a member does not convey his claim to the Colony he will be excommunicated from the Church in violation of the Act. Aff. Wipf, ¶ 14 (Dkt. 11). To make matters worse, a violation of § 39-71-317 cannot be enforced because it would require an analysis of a church excommunication. Such an analysis is unconstitutional. *Davis v. Church of Jesus Christ of Latter Day Saints*, 258 Mont. 286, 300-01, 852 P.2d 640, 650 (1993), over-

ruled 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' ability to live communally. Colony members either own a claim against the Colony, which is their church, or they illegally convey their claim against the Colony to the Colony. Compliance with Hutterite religious doctrine cannot be reconciled with the Act. The Petitioners may only comply with one or the other. The Department's and the Legislature's failure to consider the impact on the Colony's and Wipf's religious exercise is inexcusable. The U.S. Supreme Court said in *Lukumi*, "Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." *Church of the Lukumi Babalu Aye, Inc.*, at 524. The Department must share in that commitment.

HB 119 affects the Colony's and Wipf's faith and the Church's mission, not just outward physical acts. The Department relies on *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990), for the proposition that HB 119 is a permissible regulation of Hutterite external religious practice. Brf. Appellant, 15. The Department's reliance is misplaced and inaccurate. HB 119 overlays and regulates the relationship of each Hutterite member with that member's church and injects the State in the member's act of worship, which is the daily commitment of labor for the activities of the Colony. Hutterites' agrarian lifestyle is a unique part of their religious beliefs, because that is the method that allows them to support themselves, communally, and

to insulate themselves from the temptations of the secular world.

The U.S. Supreme Court recently explained again the difference between outward physical acts and internal church affairs in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 2012 WL 75047 (U.S., Jan. 11, 2012). That case was an employment discrimination suit brought by the EEOC which sued after a "called" teacher at a church school was terminated. The district court held that the EEOC's suit was barred by the ministerial exception of the First Amendment, the Sixth Circuit vacated, and then the Sixth Circuit was reversed by the U.S. Supreme Court. The Supreme Court rejected the EEOC's reliance on *Smith*, explaining that judicial review of a minister's termination, ". . . concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Id*. at 12. So too, does HB 119 affect the beliefs and mission of the Hutterische Church by regulating their ability to live communally.

HB 119 cuts into the heart of the Colony, pitting the Colony and its members against one another and changing a sectarian relationship into a secular relationship. As the *Hosanna-Tabor* court said, pitting the Colony against its members, ". . . is unlike an individual's ingestion of peyote." *Id*. "The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Id*. Members of the Colony have chosen to dedicate their labor to the activities of the Colony without pay. That is an expression of each member's faith. The Department cannot regulate that act without violating each

member's right to freely exercise his or her religious beliefs.

C. The Department's stated purposes for HB 119 are inconsistent with the purpose of the Act and factually unsupported.

The State has two excuses for targeting HB 119 at Hutterites. One is to prevent catastrophic claims against the unemployed insurers' fund. Brf. Appellant, 4; State's Brf. Spt. Mot. S.J., 3 (Dkt. 6). The other is to address a perceived Hutterite competitive advantage by "leveling the playing field." Appellant's Brief, 3; State's Brf. Spt. Mot. S.J., 3 (Dkt. 6). Neither purpose bears out in fact.

1. There is no threat of a catastrophic claim against the uninsured employers' fund.

There is no threat of any claim, let alone a catastrophic claim, against the uninsured employers' fund. This was addressed in discovery and brought to the District Court's attention. Pets.' Resp. Mot. S.J. & Brf. Spt. X-Mot. S.J., 17 & Ex. A (Dkt. 10). There are religious reasons for this. One is that Hutterites do not sue for damages. Aff. Wipf, ¶ 18 (Dkt. 11). Another is that Hutterites are fully cared for by their colonies regardless of the reason for their injury. *Id*. at ¶¶ 16-17. There is no threat of any catastrophic claim when no claim has ever been made by a Hutterite and to make a claim would violate Hutterite religious beliefs. Moreover, if members of the Colony are not covered by the workers' compensation system, as was generally recognized prior to HB 119, members would have no claim against the uninsured employers fund.

2. The level playing field is a myth.

The idea that HB119 leveled the proverbial playing field is not supported by any facts, nor is it consistent with the legislative purpose of the Workers' Compensation Act. The purpose of the Act is to protect workers from wage loss due to work related injuries at a reasonable cost to employers. Mont. Code Ann. § 39-71-105; *see also State Farm Fire & Casualty Co. v. Bush Hogg, LLC*, 2009 MT 349, ¶ 13, 353 Mont. 173, 219 P.3d 1249. Equality of premiums between employers is not a purpose of the Act. Workers' compensation premiums are based upon several different factors relating to insurability. Admin. R. Mont. 2.55.311 (2010). The District Court was right to call HB 119 a financial penalty. Ord. Granting Pets' Mot. S.J., 17 (Dkt. 17).

The level playing field myth is also factually incorrect. The Colony provides greater care for its members than they would get from the workers' compensation system and at greater cost to the Colony. Aff. Wipf, ¶ 16 (Dkt. 11). HB 119 does not add the financial burden that the Department intended to level the playing field. The Department admitted that the Colony is essentially self-insuring already and that the cost to bring the Hutterite Medical Trust into compliance with workers' compensation Plan Number 1 would be "relatively small." State's Brf. Spt. S.J., 10 (Dkt. 6). How then, does HB 119 promote fairness?

The Constitutions of the United States and the State of Montana were designed to protect the Hutterite way of life by allowing interference with religion only with sufficient justification. As an expression of faith, Colony members choose to live a life free of material goods. To the extent that gives

colonies a perceived competitive advantage in the marketplace, that is the cost of the fundamental right of each member of our society to freely exercise his or her religious beliefs. It is a small cost well worth paying. Hutterites have been a round peg in a square hole for over five-hundred years, traveling from country to country wanting only to live according to their Confession of Faith. Many who do not understand them attack them. HB 119's regulatory persecution is only the latest example.

D. *Stahl v. U.S.* should not be considered because it was not raised below and is distinguishable.

For the first time on appeal, the Department cites to *Stahl v. U.S.*, 626 F.3d 520 (9th Cir. 2010) to make the unstated point that Hutterites will argue any side of an issue so long as there is money to be made. That is not true. This Court has said that it does not address issues raised for the first time on appeal, nor address changes in legal theories. *Unified Indus., Inc. v. Easley*, 1998 MT 145, 1115, 289 Mont. 255, 961 P.2d 100 (citing *Day v. Payne*, 280 Mont. 273, 276, 929 P.2d 864, 866 (1996)).

The Department did not argue *Stahl* to the District Court despite having the opportunity to do so. The *Stahl* opinion was issued in between the time the Department filed its principal summary judgment brief and the time the Colony and Wipf filed their response. The Colony and Wipf cited to *Stahl* and distinguished it. Pet. Resp. Mot. S.J. & Brf. Supt. X-Mot. S.J., 16 n.3 (Dkt. 10). The Department did not respond in its reply brief. State's Resp. X-Mot. S.J. & Reply (Dkt. 12). Nor did the District Court refer to *Stahl* in its order. Still, the Department discussed

Stahl at length in its principal appellate brief. Brf. Appellant, 11, 19-20.

Stahl is distinguishable in any event. *Stahl* was a tax case. *Stahl* did not involve any of the constitutional issues in this case. There is no evidence that either Big Sky Colony or any other Lehrerleut colony has ever made any of the arguments at issue in *Stahl* in any judicial or administrative forum. There is no evidence in *Stahl* that the members of that colony had executed an acknowledgment like the one executed by the members of Big Sky Colony. See Aff. Wipf, Ex. D (Dkt. 11). Finally, *Stahl* was confined to the issue of reporting federal income tax deductions. Big Sky Colony does not take federal tax deductions at the corporate level for members personal expenses like the colony in *Stahl*. *Id*. at ¶ 6. *Stahl* does not apply here.

The Department offers *Stahl* to paint the Colony, Wipf, and all Hutterites as people who will say anything to gain a financial advantage. That is not true. The Colony already pays more for the Hutterite Medical Trust than the Colony would pay if it were only required to provide the minimal protection of workers' compensation. The Department admitted that the cost to bring the Hutterite Medical Trust into compliance with workers' compensation Plan Number 1 is small. State's Brf. Spt. S.J., 10 (Dkt. 6). The real cost of HB 119 is not monetary. The cost is the burden on religion imposed by the Department's insertion of itself into the faith based relationship between the Colony and its members. This case is about religious freedom, not money.

E. St. John's Lutheran Church v. State Fund, is inapposite.[2]

St. John's Lutheran applies to a way of life that is vastly different from the Hutterite way of life. *St. John's Lutheran* arose out of a Workers' Compensation Division audit of a Lutheran church. *St. John's Lutheran Church v. State Fund*, 252 Mont. 516, 520, 830 P.2d 1271, 1274 (1992). The Division decided that the pastor needed workers' compensation coverage. The Workers' Compensation Court agreed and this Court affirmed, saying, "[T]here is no internal impact or infringement on the relationship between the church and its pastor, or on their sincerely held religious beliefs." *Id*. at 526, 830 P.2d at 1278.

The relationship between a Lutheran church and pastor is not the same as the relationship between a Hutterite colony and its members. While they both believe in Jesus Christ as their Lord and Savior, they have many fundamentally different beliefs. Lutheran pastors are hired in what is known as a "call" to service, are paid a wage, and it is not unheard of to have an employment contract. An Internet search turns up several Lutheran pastor job postings for ordained clergy. They are hired to provide a spiritual service, but outside of their ministry a Lutheran pastor's life is almost as secular as a lawyer's. Lutheran pastors own property, but Colony members do not.

Life on the Colony stands in stark contrast. There are no "secular shades of gray" on a Hutterite colony. *See Decker v. Tschetter Hutterian Brethren, Inc*., 594

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[2] St. John's Lutheran is a Montana case, but the District Court's analysis was based on federal law. Ord. Granting Pets.' Mot. S.J., 7 n. 3 (Dkt. 17).

N.W.2d 357, ¶ 23 (S.D. 1999). Hutterites live communally, dress alike, speak a unique language, eat together, and worship together. Aff. Wipf, ¶ 12 (Dkt. 11). The followers of Jacob Hutter live vastly different lives from the followers of Martin Luther. The Hutterite lifestyle is an act of faith and worship with no secular aspect. Hutterites seek to emulate the early Christian church's characteristic of daily and constant fellowship and worship.

Further, *St. John's Lutheran* did not deal with the same legal issues that are present here. The Petitioners' case is more like *Miller v. Catholic Diocese of Great Falls, Billings*, where this 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 makes a workers' compensation claim against the Colony, the Workers' Compensation Court will have to analyze the propriety of the religious duties performed by the member in violation of the rule in *Miller*.

Nor did *St. John's Lutheran* analyze the church autonomy doctrine which is applicable here. Analysis of a pastor's workers' compensation claim may require 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 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 Benedictine Monastery, 895 P.2d 286, 289 (N.M. App. 1995) (novice monk not employee of monastery in workers' compensation context because 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 Workers' Compensation Court cannot evaluate Hutterite workers' compensation claims without unconstitutionally analyzing the scope of the member's religious duties. Further, the court would have to analyze the member's commitment to the Colony to relinquish all property rights, as Wipf has done. The factual differences between this case and *St. John's Lutheran* mean that this Court does not have to overrule *St. John's Lutheran* to affirm the District Court, but it could.

II. HB 119 EXCESSIVELY ENTANGLES THE STATE IN HUTTERISCHE CHURCH AFFAIRS BY FORCING THE STATE TO EVALUATE THE SCOPE OF RELIGIOUS DUTIES AND TO REVIEW EXCOMMUNICATIONS.

HB 119 is an unconstitutional establishment of religion. 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 Co., Ky. v. A.C.L.U. of Ky.*, 545 U.S. 844, 875 (2005). The three part *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 advanc-

ing nor inhibiting religion; and, 3) not excessively entangle religion and government. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Each element is addressed in turn.

HB 119 does not have a secular purpose. Even with the stated purpose of a level playing field, HB 119 was enacted because of Hutterites' religious beliefs, not in spite of them. For this reason, the District Court found that the primary purpose of HB 119 was religious. Ord. Granting Pets.' Mot. S.J., 20 (Dkt. 17).

The Colony and Wipf's argument to the District Court went a step beyond that, based on *McCreary* County. An "absentminded objective observer," knowing: 1) that HB 119 was passed because of complaints about Hutterites; and 2) that Hutterites provide better care to their members than would be required by the Act, should have a hard time believing the Department's level playing field argument. *McCreary County*, at 857. The playing field was level before HB 119 and HB 119 does not even impose the intended financial tax on the Colony.[3] Therefore the real purpose of HB 119 was to relieve political pressure by picking on a religious group. That is not a secular purpose.

The primary purpose of HB 119 is to inhibit communal living and community of goods. The District Court correctly concluded that HB 119 puts Colony members in an adversarial relationship with the Colony, which is their church. Ord. Granting Pets.'

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[3] The level playing field argument is belied by the fact that the Department asserts that the cost of compliance is minimal. Thus, HB 119 does not accomplish its stated purpose of imposing an equalizing cost to create the perception of competitive equality.

Mot. S.J., 21 (Dkt. 17). The Department argues, "there is no probative evidence of a religious purpose in the legislative record." Brf. Appellant, 30. The evidence is the fact that HB 119 was targeted at a particular religious group and the unrefuted affidavit of Dan Wipf (Dkt. 11) about HB 119's effect on Hutterites. Like the ordinances in *Lukumi*, the purpose of HB 119 was to affect religious organizations that only do things Hutterites do. As Senator Stewart-Peregoy said, ". . . if we're going to target a group, we should have just put Hutterite religious organizations and let's be done with it." Tr. 10, Sen. Stewart-Peregoy (Mar. 11, 2009). HB 119 was custom made for the Hutterites' religious lifestyle. The Legislature painted a big target on Hutterites, but now says it was not shooting at them.

HB 119 excessively entangles the State in Hutterische Church affairs by requiring the State to monitor and adjudicate the relationship between the Colony and its members. The Department argues that HB 119 only subjects the colonies to the same compliance analysis as secular businesses. The employees of secular businesses do not work for the same reason as a colony member. Employees work for wages. The Act recognized that before HB 119. Members of the Colony work as an expression of faith with no expectation of remuneration or entitlement to wages. Aff. Wipf, ¶ 15 (Dkt. 11). The State cannot require Wipf to change the religious reason for which he works. To do so would interfere with internal church affairs in violation of long standing constitutional precedent. *E.g. Hosanna-Tabor Evangelical Lutheran Church and Sch*. at 12. It would also involve the State in too many aspects of the Hutterische Church. *Walz v. Tax Commn. City of New York*, 397 U.S. 664 (1970).

HB 119 requires the State to evaluate and adjudicate workers' compensation claims by colony members. That requires an analysis of whether the injury occurred in the course and scope of the claimants's so-called "employment." That is an analysis of whether or not the claimant was acting within the course and scope of his or her religious duties. The Establishment Clause and church autonomy doctrine forbid the State from making such a determination.

The Department cannot constitutionally identify the secular commercial parts of a Colony member's day. For example, the Colony consumes some of the pork it raises. How can work in the hog barn be segregated between work for hogs consumed on the Colony and hogs for sale? What about work in the kitchen? The communal kitchen is used to prepare food for everyone on the Colony, who in turn are likely engaged in "agricultural production, manufacturing, or a construction project" under HB 119. Are activities in the kitchen covered by workers' compensation? What if a Colony member is hurt on the way to church? What about a minister? The Department cannot change the fact that there is no time clock on the Colony. Colony members are always doing things for the Colony. There is no place to draw the line, so either every activity of every member is covered or no activity is. It does not make sense to cover every aspect of colony life.

Likewise, if a colony excommunicates a member for exerting ownership over a claim, the rule of *Davis* precludes the State from enforcing § 39-71-317's prohibition against firing employees for making workers' compensation claims. The District Court correctly determined that, "comprehensive, discriminating, and continuing state surveillance will in-

evitably be required to ensure that only particular areas of Hutterite activities are scrutinized and that First Amendment rights are otherwise respected." Ord. Granting Pets.' Mot. S.J., 23 (Dkt. 17).

The Department argues on appeal that if the District Court is affirmed, Hutterites will become a law unto themselves and could use their religious beliefs as an excuse to violate any law. Brf. Appellant, 11, 15, 19, 30. There is no such slippery slope. The Colony and Wipf are not asking to be elevated to privileged status, they are asking not to be singled out for discriminatory treatment based upon their religious beliefs. There is also a slippery slope to the Department's argument, the logical end of which is to require Hutterites to buy unwanted consumer goods in the interest of leveling the playing field. Will the next step be to require the Colony to pay its members a wage? Certainly that is unconstitutional.

This is not the first time Hutterites have been discriminated against by the State of Montana, nor the first time the discrimination has come under the guise of economic fairness. *See generally* Douglas E. Sanders, *The Hutterites: A Case Study in Minority Rights*, 42 Can. B. Rev. 225, 226 & 234 (1964). Hutterites settled in Canada and the United States for religious freedom. Hutterites were once driven from the United States to Canada by violent persecution during the First World War because they would not assimilate. *The Encyclopedia of Religion* at 542. Now attempts at assimilation come as regulatory persecution.

The Department's argument that affirming the District Court would make Hutterites a law unto themselves is as much of a stretch as it would be for the Colony and Wipf to suggest that the Montana

Legislature would have Hutterites burned at the stake like Jacob Hutter. Neither of those statements are true. What is true? The fact that HB 119 obligates the State to interpret the religious doctrine of the Hutterische Church in violation of the Establishment Clause.

III. HB 119 SINGLED HUTTERITES OUT FOR DISCRIMINATORY TREATMENT IN VIOLATION OF THEIR 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. Mont. 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.

The District Court correctly concluded that HB 119 treats Hutterites differently than other religious organizations because Hutterites are the only religious organization addressed by HB 119. Ord. Granting Pets.' Mot. S.J., 24 (Dkt. 17). The Department does not seem to dispute that HB 119 creates similarly situated classes because its argument focuses on the inequality of HB 119. The Department says that HB 119 was directed at religious organizations generally, but "primarily the Hutterites." Brf. Appellant, 35. The Department has yet to identify any other

religious organization that is affected by HB 119. There are none.

HB 119 treats Hutterites different from other religious groups by preventing them from excommunicating members who own property. As discussed above, the Act would prevent the Colony from excommunicating a member who makes a workers' compensation claim. As argued to the District Court, the Catholic Church is still free to excommunicate adherents for participating activities which are legal but violate church doctrine. Even if a Colony member recovers on a claim, the member has already committed to pay the proceeds to the Colony. That circular process defies logic and renders application of the law meaningless. The Colony is free to excommunicate members who violate their religious beliefs by making workers' compensation claims.

The District Court also said that HB 119 targets religious organizations generally. Ord. Granting Pets.' Mot. S.J., 24 (Dkt. 17). The District Court raised a good point. With the increasing popularity of cooperative farms, HB 119's specific application to communal religious groups is problematic. What about communal secular groups? Hippie communes may not be as popular as they once were, but they do still exist.[4] Communal secular groups would be exempt from the Act because they do not pay a wage in the same way the Colony does not pay a wage. Why should communal secular groups be exempt from the Act if communal religious organizations are not.

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[4] A review of Internet resources, such as the Federation of Egalitarian Communities website at www.thefec.org, is illustrative, though not authoritative.

There is no rational basis for HB 119 because it does not accomplish its stated purposes or the purpose of the Act. The Department cannot change the fact that members of the Colony are not entitled to receive a wage. They have no need for wage loss protection. Nor does the Colony need protection from potential claims because its members do not make claims and are obligated to convey them to the Colony anyway. The increased cost to bring the Hutterite Medical Trust into compliance with workers' compensation Plan Number 1 is so small that it cannot possibly be thought to level any playing field. The existence of any inequality was never established anyway. HB 119 exists only to appease members of the construction industry from complaining to the Department. As such, HB 119 violates the Colony's and Wipf's rights to be free from arbitrary and discriminatory laws.

CONCLUSION

The District Court should be affirmed. The only effective purpose of HB 119 is to relieve the political pressure put on the Department by the construction industry. There has been no Hutterite claim against the uninsured employers fund during the nearly two years since the Department agreed not to enforce HB 119 in exchange for colonies doing what they already do, which is provide medical care for their members. There is no future threat to the uninsured employers fund.

HB 119 does not accomplish its stated purpose of leveling the playing field. Nor does HB 119 further the purposes of the Workers' Compensation Act. Because of their religious beliefs, the Colony and its members have more and better protection than they would get with workers' compensation. In spite of

this, the Department wants to drive a wedge between the Colony and its members. This attempt at assimilation is unconstitutional regulatory persecution and the District Court should be affirmed.

DATED this 31st day of January, 2012.

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

By: /s/ Michael P. Talia
Michael P. Talia
Attorneys for Big Sky Colony, Inc. and Daniel E. Wipf

CERTIFICATES OF SERVICE AND COMPLIANCE

This is to certify that on the 31st day of January, 2012, the foregoing document was served by U.S. Mail upon the individual whose name and address appears below:

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/s/ Michael P. Talia
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This is to certify that this brief is formatted with double line spacing and a proportionately spaced Arial typeface in 14 point font and to further certify that this brief contains 7,625 words as calculated by my Word Perfect X4 word processing system.

/s/ Michael P. Talia
Michael P. Talia

APPENDIX L

[Filed
February 15, 2012]

IN THE SUPREME COURT OF THE
STATE OF MONTANA

———

No. DA 11-0572

———

BIG SKY COLONY, INC., AND DANIEL E. WIPF,
Petitioners and Appellees,

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,
Respondent and Appellant.

———

REPLY BRIEF OF APPELLANT

———

On Appeal from the Montana
Ninth Judicial District Court, Glacier County,
The Honorable Laurie McKinnon, Presiding

———

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Pursuant to Mont. R. App. P. 12(3), the Department submits the following reply.

ARGUMENT

In its response brief, Petitioners admit that there is ultimately no burden on the Colony because it can simply self-insure. Petitioners nevertheless go to great lengths to show that, despite the evidence to the contrary, the real purpose behind HB 119 was to interfere with their religious belief in communal living and to "drive a wedge between the Colony and its members." (Resp. Br. at 10.) This argument is not only unfounded and contradictory, but presumes that the Legislature could have fathomed the intricate, hypothetical scenarios suggested by Petitioners.

Ultimately, HB 351 affects the Colony's external relationship with the State, not the Colonies internal relationship with its members. It thus passes constitutional muster.

I. REQUIRING WORKERS COMPENSATION COVERAGE DOES NOT BURDEN THE COLONY.

In their response brief, Petitioners repeatedly assert that the burden on the Colony is at most minimal. The Colony may self-insure, which the Colony is essentially already doing via the Hutterite Medical Trust. (Resp. Br. at 10 ("The Colony could even use the Hutterite Medical Trust to self-insure for workers' compensation at low cost.")). The Colony is thus able to comply with the workers' compensation insurance requirement "at very little additional costs . . . if it costs more at all." (Resp. Br. at 3, 11.) The District Court was therefore mistaken in con-

cluding HB 119 acts as a "financial tax" or "penalty" on the Colony. (D.C. Doc. 17; Resp. Br. at 11.)

The Department has consistently represented to the Colony that self-insurance is a viable option that complies with the Workers' Compensation Act. (*See* Ex. 5 to D.C. Doc. 6.) Under the self-insurance model a "claim" would be made to the Colony itself, similar to a claim for health benefits under the Medical Trust. Mont. Code Ann. § 39-71-2103. There would then be no need to determine whether the member is possessing property or must relinquish benefits to the Colony. Instead, the Colony simply pays for the member's work-related injuries out of its own insurance fund. The burden on the Colony, if any, is thus "indirect and di-minimus [sic], and in no way prohibits the [Colony's] free exercise of [its communal] belief." *Saint John's Lutheran Church v. State Fund* ("*St. John's*"), 252 Mont. 516, 525, 830 P.2d 1271, 1277 (1992).

Petitioners nevertheless focus on the potential conflict that a member's workers' compensation claim may create within the Colony, but this burden also turns out to be at most minimal. The Colony already divides its income on a pro rata basis for income tax purposes. (Wipf Aff., D.C. Doc. 11 at ¶ 6.) Considering its members as employees for workers' compensation purposes, and determining coverage on a pro rata basis, is no more of a risk to free exercise. Petitioners make it clear that members do not own property and do not sue. (Resp. Br. at 6-7.) And while Mont. Code Ann. § 39-71-409 prohibits an employee from waiving their *prospective* rights regarding a future injury, it does not prevent an injured employee from choosing to not file a claim for benefits at the time of injury. *See In re Noonkester v. State Fund*, 2004 MTWCC 61,

¶ 15 ("a worker cannot be compelled to seek workers' compensation benefits").

A member, then, does not have to seek benefits, and if they do, they would presumably pass those benefits back to the Colony per the agreement between the Colony and the members. (Resp. Br. at 6-7.) The proposed conflicts therefore will not occur according to Petitioners. This Court should also take notice that a Hutterite plaintiff from a colony in Washington viewed the burden of being considered an employee of his colony for regulatory purposes so minimal that he advocated for that position in a lawsuit. *Stahl v. United States*, 626 F.3d 520 (9th Cir. 2010).[1]

The risks suggested by Petitioners are also completely speculative and should not be considered in this facial challenge. The hypothetical claims against the Colony can be adjudicated if and when such claims are made on an as-applied basis. If a member does "go rogue" and makes a claim against the Colony or sues claiming that the Colony may not repossess the member's benefits, then a court may at that time determine whether the First Amendment protects the Colony. For example, if an internal decision is questioned, such as whether a member may be excommunicated for withholding property from the Colony, then a court may, at that time, determine whether the Constitution protects that decision from adjudication by courts or regulation by the State. It is likely, in fact, that the Colony would win such a case. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Employment*

[1] Petitioners' contention that this Court should not consider the *Stahl* case is addressed below in part II(C).

Opportunity Commission, 2012 U.S. LEXIS 578, *32 (2012) ("*Hosanna-Tabor*") (attached as Ex. 1) (noting that a court may not inquire into "quintessentially religious controversies") (citation omitted).

Because the Colony has failed to establish an actual burden imposed upon it by the requirements of HB 119, free exercise is not implicated. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("*Lukumi*") (before reaching strict scrutiny, a law must "burden religious practice.")

II. HB 119 DOES NOT VIOLATE FREE EXERCISE BECAUSE THE "RELIGIOUS AUTONOMY" OF THE COLONY IS UNAFFECTED.

A. The Colony's Internal Relationships and Beliefs Are Not Affected.

Even if this Court accepts Petitioners" hypothetical burdens, free exercise is not implicated by HB 119 because designating members as employees of the Colony solely for purposes of workers' compensation coverage does not affect the internal relationship between the Colony and its members, "or on their sincerely held religious beliefs." *St. John's*, 252 Mont. at 526, 830 P.2d at 1277-78. Although the issue presented in St. John's is identical to the issue presented in this case, and therefore the case is controlling, Petitioners seek to distinguish *St. John's* by highlighting the differences between the Hutterite and Lutheran faiths. In particular, Petitioners rely on the fact that the Hutterite religious lifestyle is all-encompassing: "there are no secular shades of gray." (Resp. Br. at 25.)

Petitioners' argument misses the mark. The relationship between the Church and its pastor was

fundamental to the religious practice of the Lutheran Church regardless of whether the pastor was paid or had a secular life outside of his religious duties. In fact, the Church claimed that considering the pastor as an employee "place[d] an almost insurmountable obstacle in the way of carrying out his duties and responsibilities to God to proclaim the word of God." *St. John's*, 252 Mont. at 525, 830 P.2d 1271 at 1277. And it certainly is not this Court's place to weigh the importance of these relationships to the Church and the Colony, or to calculate the amount of time that adherents spend on secular activity. *See Hosanna-Tabor* at *38 (refusing to place emphasis upon the relative amount of time spent by the teacher on secular duties).

Instead, this Court should focus, as it did in *St. John's*, on whether requiring workers' compensation coverage impacts the internal religious decisions and beliefs of the Colony. In *St. John's* this Court determined that the Lutheran Church's free exercise rights were not violated by designating "the pastor as an employee for purposes of workers' compensation," because this designation, even though it was placed on a minister, affected only the external, regulatory relationship between the Church and the workers' compensation program. 252 Mont. at 526, 830 P.2d at 1277-78. There was "no internal impact or infringement on the relationship between the church and its pastor, or on their sincerely held religious beliefs." *Id*.

This distinction between external and internal effects has been recognized and fleshed out by the United States Supreme Court in the recent *Hosanna-Tabor* decision. There the Supreme Court considered whether there is a "ministerial exception" to equal

employment laws for the hiring and firing of church ministers. *Hosanna-Tabor* at *28-29. The Supreme Court contrasted regulation of external, "outward physical acts," such as ingesting peyote, with "interference with an internal church decision that affects the faith and mission of the church itself," such as the hiring or firing of a minister, determining that only the latter implicates free exercise or the Establishment Clause. *Id*. at *32. Judge Alito, concurring, added to this theme, noting that the Religion Clauses ultimately protect "religious autonomy," including the "objective functions" of "religious leadership, worship, ritual, and expression." *Id*. *48-49. *See also, Miller v. Catholic Diocese of Great Falls, Billings*, 224 Mont. 113, 117, 728 P.2d794, 796 (1986) (recognizing that parochial schools play "an important role in the religious mission of the Roman Catholic Church" and thus "involve substantial religious activity and purpose.") (citation omitted).

Like the regulatory relationship in *St. John's*, but unlike the scenarios in *Hosanna-Tabor* or *Miller* dealing with a church's choice as to whether to retain unwanted ministers or religion teachers, the impact of HB 119 on Petitioners is external. It regulates "outward physical [and commercial] acts" and therefore does not affect the Colony's religious autonomy. The Colony must obtain workers' compensation insurance covering any member working on an agricultural, manufacturing, or construction project for payment from nonmembers. As in *St. John's*, designating a member "as an employee for purposes of workers' compensation only affects the relationship between the [Colony] and the workers' compensation system." 252 Mont. at 526, 830 P.2d at 1277-78.

The internal relationship between the Colony and its members is thus unaffected. The Colony is free to practice its religion as it sees fit. It maintains control over ecclesiastical decisions affecting "the faith and mission of the [Colony]" such as whether members are paid or possess property, whether members live communally, and who may be excommunicated and for what reasons.

B. HB 119 Does Not Intentionally Burden Religious Conduct.

Free exercise is also not implicated because HB 119 is a neutral and regulatory law. As explained in the Department's opening brief, a law that is neutral and generally applicable, that is a law the only incidentally burdens religious conduct, does not violate free exercise. *Employment Div., Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872, 878 (1990); *Lukumi*, 508 U.S. at 531 ("a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the *incidental effect* of burdening a particular religious practice.") (emphasis added).

Petitioners, citing to *Lukumi*, assert that HB 119 was enacted "because of" Hutterites and their religious practices. (Resp. Br. at 14-15.) But that is simply not the case as evidenced by the record. The law in *Lukumi* was intentionally directed against animal sacrifice, a central religious belief of the Santeria religion that the city council found distasteful and vowed to eliminate. 508 U.S. at 534-35.

HB 119, on the other hand, was enacted for commercial and regulatory purposes only. Aspects of the Hutterite religion were never discussed during debate on HB 119. Hutterites were mentioned by

name, but only because the colonies were visibly competing against, and underbidding, secular businesses, not due to prejudice against the Hutterites religious lifestyle. (D.C. Doc. 6, Ex. 4); (Tr., Jan. 8 hearing at 4, remarks of Rep. Hunter; March 16 session at 2-3, remarks of Sen. Barkus.) HB 119 merely amended the definition of employer and employee to include religious organizations that had previously been exempt, due to agency interpretation, from compliance with workers' compensation requirements. (Doc. 6, Ex. 4.) And neither Big Sky Colony nor any other colony informed the Legislature that simply considering Hutterite colonies to be employers for workers' compensation purposes would create the hypothetical hardships the Colony now claims in this lawsuit.

It is also not the case, as claimed by Petitioners, that Hutterites are the only religious organization affected by HB 119's requirements. The bill is broadly and neutrally written, and applies to any religious organization that performs work for pay from nonmembers in a covered commercial area. The Department is not aware of another religious organization in Montana that lives communally, though such a group may exist. But HB 119 does not apply only to groups that live communally. Any religious organization that uses its members as a workforce in one of the specific commercial areas for payment by nonmembers would be covered. Mont. Code Ann. §§ 39-71-117(1)(d) and -118(1)(i). Therefore any other religious groups that participate in the "commercial arena," such as the Amish, would be covered if fellow members of that religious group provided the labor. *See* Donald B. Kraybill and Carl F. Bowman, *On the Backroad to Heaven*, pp. 124-25, Donald B. Kraybill, ed., The John Hopkins University Press (2001) (noting

that some Amish engage in commercial manufacturing and construction).

Ultimately Petitioners' claim that this law was intended to interfere with their religious lifestyle relies on the fact that every aspect of the life of a colony member is religious, because communal living and "the daily commitment of labor" are central to their beliefs. (Resp. Br. at 17.) But the commercial activities regulated by HB 119 must be viewed from the perspective of society at large which considers such work to be secular. *See Hosanna-Tabor* at *32 (distinguishing between "outward physical acts" and "internal church decision[s]); *Id*. at *38 (listing managing finances, supervising secular personnel, and "upkeep of facilities" as "secular duties").

The Free Exercise Clause does not permit a religious adherent to "become a law unto himself" nor does it require this Court to elevate religious adherents to a "privileged status, above all other[s], *because* of their religious beliefs." *Smith*, 494 U.S. at 885; *Hofer v. DPHHS*, 2005 MT 302, ¶ 42, 329 Mont. 368, 124 P.3d 1098 (emphasis in the original). This is especially true where "followers of a particular sect enter into commercial activity as a matter of choice." *United States v. Lee*, 455 U.S. 252, 261 (1982) (upholding Social Security tax as to Amish).

The workers' compensation system is a neutral and generally applicable regulatory scheme. Requiring Hutterites to provide workers' compensation coverage therefore does not intentionally burden the religious beliefs of Hutterites, and thus does not violate free exercise.

C. Stahl Is Relevant to Several Issues Addressed by the Department Below.

In furtherance of its position that HB 119 is a neutral law that only affects the Colony's external relationship with the workers' compensation system, the Department discussed, in its opening brief, the Ninth Circuit's decision in *Stahl*, where a Hutterite argued he should be treated as in an employee/employer relationship with his colony for tax-deduction purposes. (Opening Br. at 19-21.) Petitioners, however, claim this Court should not consider the import of *Stahl* because this Court does not address issues raised for the first time on appeal. (Resp. Br. at 22.)

This disingenuous argument has no merit, primarily because it was Petitioners themselves that cited to *Stahl* in briefing before the District Court. (Resp. Br. at 22; D.C. Doc. 10.) Additionally, the issue of whether HB 119 is a neutral law, whether the internal beliefs of the Colony are affected by the law's requirements, and whether the Colony's religious lifestyle insulates it from regulatory compliance, were raised repeatedly below by the Department. (*See* D.C. Docs. 6, 12.) There is no rule of appellate procedure preventing a party from citing to new cases to support issues or theories raised below, and even if there were it would not apply to a situation like this where the opposing party cited the case below. *Stahl* is thus fair game and is properly considered by this Court.

Stahl is also relevant to the matters at hand, though Petitioners misunderstand its relevance. As explained by Petitioners, all Hutterite colonies are "completely communal." (Resp. Br. at 6.) Though there are three "conferences" of the Hutterite Church,

there are only "slight differences" between them. (*Id*.) And we know that the Hutterite colony at issue in *Stahl*, like Big Sky Colony, did "not pay wages to its Hutterite workers." 626 F.3d at 526. Similarly, if the members were paid wages, they "would merely donate them back to [the colony] itself; their religion demands that." *Id*. The relationship between the members and the colony in *Stahl* is therefore extremely similar, if not identical, to the relationship between Big Sky Colony and its members. *See* D.C. Doc. 11, ¶¶ 6-11 (describing the importance of communal life for all Hutterites).

On balance, the Ninth Circuit determined that the members of the Hutterite colony "should be seen as common law employees of [the colony] insofar as they perform the work of that business." *Id*. at 527. In two different courts, therefore, Hutterites have made opposing claims concerning the relationship between the colony and its members. In fact, the plaintiff in *Stahl* convinced the Ninth Circuit that his view that members should be seen as employees is correct.

Highlighting the contrary position maintained by the Hutterite in *Stahl* is not intended to paint Big Sky Colony in a negative light as argued by Petitioners. (Resp. Br. at 23). The point is that the workers' compensation requirements in this case, like the tax laws in *Stahl*, only affect the colonies external relationship with a regulatory system. Otherwise the plaintiff in *Stahl* would not have argued that he should be considered an employee of his colony for tax purposes. HB 119 therefore does not violate free exercise, regardless of the extent of the Colony's religious lifestyle.

III. THE ESTABLISHMENT CLAUSE IS NOT IMPLICATED BECAUSE ONLY EXTERNAL, COMMERCIAL ACTIVITY IS REGULATED.

As evidenced by the effect of the law and as discussed during debate on the bill, the purpose and effect of HB 119 is secular: to require religious organizations to provide workers' compensation coverage to their members when engaged in certain commercial activities. (Tr., Jan. 8 hearing at 4, remarks of Rep. Hunter; March 16 session at 2-3, remarks of Sen. Barkus.) The Legislature determined that the law was necessary in order to "level the playing field," out of concern for the Hutterites' commercial practices, not their religious beliefs. (*Id*.)

Unable to find evidence of a desire to curtail the Hutterites' religious practices in the record, Petitioners instead argue by innuendo, insisting the stated purpose must be a "sham." But the United States Supreme Court in *McCreary County v. ACLU* made clear that an expressed secular purpose will only be considered a "sham" where there is probative evidence that the true purpose of a law is "pervasively religious." 545 U.S. 844, 870-72 (2005). As explained above, it cannot be presumed that the Legislature knew of the problems the Colony claims it will face if it provides workers' compensation coverage to its members, because the Legislature was never made aware of these potentialities. And simply asserting that the Legislature was responding to "political pressure" gets Petitioners nowhere, since the contractors concerns were entirely secular and commercial, and it is certainly appropriate for the Legislature, and the Department for that matter, to respond to constituent concerns.

HB 119 also does not risk entanglement because, as explained above, the effect of the law is external only. Providing workers' compensation coverage for its members will not affect the Colony's internal relationship with its members or its internal ecclesiastical decisions. *See Hosanna-Tabor* at *30 (explaining that the Establishment Clause "prohibits government involvement in . . . ecclesiastical decisions."). The Department's relationship with the Colony, likewise, will only result in monitoring of commercial, secular activity. Petitioners are concerned that it will be hard to distinguish what is and is not a covered commercial activity. (Resp. Br. at 30-31.) But the Colony already divides up its income on a pro rata basis for tax purposes and makes Medicaid or Healthy Montana Kids claims, actions requiring the Colony to divide resources for regulatory purposes. (D.C. Doc. 11 at ¶¶ 6, 17.) Petitioners of course have the option to self-insure, which will alleviate these concerns.

The Colony's religious autonomy therefore remains intact, as it may continue to "govern [itself] in accordance with [its] own beliefs." *Id*. at *48 (J. Alito concurring). In contrast, the parade of horribles proposed by Petitioners, including a law requiring Hutterites to buy consumer goods or pay its members a wage (Resp. Br. at 32), are examples of internal decisions that are protected by the Constitution. Such laws, unlike HB 119, would likely interfere "with the internal governance of the [Colony]" and its "right to shape its own faith and mission." *Hosanna-Tabor* at *29-30.

HB 119 does not interfere with internal religious decisions of the Colony, nor did the Legislature intend it to do so, and the State's involvement in the

Colony's affairs is limited to commercial activity. As such the Establishment Clause is not violated.

IV. EQUAL PROTECTION IS NOT IMPLICATED BECAUSE HB 119 TREATS THE COLONY IN AN EQUIVALENT FASHION TO SECULAR ORGANIZATIONS.

HB 119 requires the Colony to provide workers' compensation coverage for its members when it is engaged in certain commercial activities. Because secular organizations engaged in these same areas of commerce already pay workers' compensation coverage, the law merely treats religious organizations in the same manner as it treats secular organizations, and Petitioners therefore cannot demonstrate that it treats them in an "unequal manner." The equal protection claim thus fails. *Powell v. State Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877. As such, this Court need not consider whether the law adopts a classification that affects similarly situated groups differently.

Petitioners nevertheless claim that HB 119 treats them differently than other religious groups by, for example, "preventing them from excommunicating members who own property." (Resp. Br. at 34). On the contrary, neither HB 119 nor the Workers" Compensation Act speaks to excommunication. As explained above, it is unlikely that the Colony would ever be faced with this situation because members have agreed to transfer property to the Colony. If a member is excommunicated for religious reasons, regardless of whether the decision stems from a workers' compensation claim, that "ecclesiastical decision" involving the "governance of the [Colony]" may be addressed in an as applied challenge and is

likely protected by the Religion Clauses. (*Hosana-Tabor* at *29-30.)

Additionally it is not this Court's place to compare and contrast the doctrines of the Hutterite Church and other religions such as the Catholic Church. As Petitioners acknowledged below, the difference, if any, in how HB 119 will affect Hutterites as opposed to other religious organizations is a reflection of "the doctrines" of the different religions themselves, not a result of the law. (D.C. Doc. 10 at 12.)

HB 119 also does not treat religious organizations unequally. The law undoes an agency interpretation that had previously exempted religious organizations such as the Hutterites from compliance with workers' compensation. (Doc. 6, Ex. 4.) That agency interpretation did not contemplate secular communes, *id*., and it was religious organizations, primarily the Hutterites, that were competing against secular businesses in the commercial arena. Hence HB 119 speaks to "religious organizations."

And while Senator Stewart-Peregoy suggested the amendments "targeted" the Hutterites, she made this comment during a discussion about whether "agriculture" should be included within the economic activities covered by the amendments. (Tr., March 11 hearing at 1-10.) The discussion had nothing to do with Hutterite religious beliefs or practices. Instead, it was focused solely on the colonies' commercial activities. (*See e.g*., *id*. at 2 and 3, remarks of Chairman Balyeat ("the one thing I'm concerned about is the agricultural projects" and "I see a distinction between the agricultural activity of the colonies and the construction and manufacturing . . . ."); *id*. at 3, remarks of Senator Stewart-Peregoy ("I think the major issue has been the fact that they've expanded

into manufacturing and construction and are competing on that wider basis.").) Tellingly, Senator Stewart-Peregoy was supportive of the amendments in general, other than the agriculture issue, and ultimately voted for moving HB 119 out of committee as amended. (*Id*. at 14.)

Petitioners also argue that rational basis review is not met because HB 119 is ineffective. Specifically, they claim that the law "does not accomplish its stated purpose of leveling the playing field." (Resp. Br. at 36.) But whether a law is effective in practice is not part of the rational basis analysis. Instead, rational basis asks whether the objective of the law is legitimate and whether the law is rationally related to that objective. *Jaksha v. Butte-Silver Bow County*, 2009 MT 263, ¶ 21, 352 Mont. 46, 214 P.3d 1248. If all ineffective laws were unconstitutional, several laws would be at risk and this Court would have no end of people claiming laws they disagree with are "ineffective."

In any case, the objective of HB 119 is to level the playing field, not by equalizing expenses, but by requiring workers' compensation coverage for religious organizations competing in the commercial arena. This objective is directly met by HB 119. The equal protection claim therefore fails.

CONCLUSION

For the above-stated reasons, the District Court's judgment should be reversed, and summary judgment granted for the Department.

Respectfully submitted this 15th day of February, 2012.

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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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DATED_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____
J. STUART SEGREST

IN THE SUPREME COURT OF THE
STATE OF MONTANA

———

No. DA 11-0572

———

BIG SKY COLONY, INC., AND DANIEL E. WIPF,
Petitioners and Appellees,

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,
Respondent and Appellant.

———

APPENDIX

Hosanna-Tabor ..... Ex. 1

APPENDIX M

IN THE SUPREME COURT OF THE
STATE OF MONTANA

[Filed December 9, 2011]

No. DA 11-0572

BIG SKY COLONY, INC., AND DANIEL E. WIPF,
Petitioners and Appellees,

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,
Respondent and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana
Ninth Judicial District Court, Glacier County,
The Honorable Laurie McKinnon, Presiding

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STATEMENT OF THE ISSUES

I. Does a law that removes an exemption, and thereby regulates religious organizations in the same manner as secular businesses, violate the Free Exercise Clause?

II. Does a law that is intended to require that religious organizations provide workers' compensation coverage for commercial activities, and that results in external, regulatory enforcement by the State, violate the Establishment Clause?

III. Does a law that obligates religious organizations to provide workers' compensation coverage on par with secular businesses violate the Equal Protection Clause?

STATEMENT OF THE CASE AND FACTS

I. HB 119 AMENDS THE DEFINITION OF EMPLOYER AND EMPLOYEE TO REQUIRE WORKERS' COMPENSATION COVERAGE FOR RELIGIOUS ORGANIZATIONS ENGAGED IN COMMERCIAL ACTIVITY.

The Worker's Compensation Act (Mont. Code Ann. tit. 39, ch. 7) is a no-fault, employer-funded insurance system that provides medical and wage-loss benefits to employees who are injured or killed in the course and scope of covered employment. In exchange for providing that no-fault insurance coverage, the employer is immune from tort liability for its negligence related to the injury. *State Farm Fire & Cas. v. Bush Hog*, 2009 MT 349, ¶¶ 12-13, 353 Mont. 173, 219 P.3d 1249. However, "[i]n order for the system to work . . . employers must maintain insurance in compliance with the statutes.'" *Id.*, ¶ 13 (citation omitted).

Employers are provided three alternatives under the Act to provide the required insurance: self-insurance (compensation plan No. 1); insurance from a private company (compensation plan No. 2); or insurance from the state-operated insurance company, the Montana State Fund (compensation plan No. 3). Mont. Code Ann. § 39-71-401(1).

House Bill (HB) 119 (2009 Mont. Laws, ch. 112, § 30), the law at issue in this case, is a large bill that amends the Workers' Compensation Act. It is primarily a "general revisions bill," though there are substantive sections as well. (D.C. Doc. 6, Ex. 1, Legislative Transcript (Tr.), Jan. 8 hearing at 4, remarks of Rep. Hunter.)) Section 6, one of the specific sections at issue in this case, amends the definition of employer to include:

> "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."

Section 7, the other section at issue, amends the definition of employee to include:

> "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 [section 6]."

Sections 6 and 7 are codified as Mont. Code Ann. §§ 39-71-117(1)(d) and -118(1)(i).

Under HB 119, Big Sky Colony, a Hutterite religious corporation (D.C. Doc. 1, ¶ 1), if it is engaged in agricultural, construction or manufacturing projects for payment from nonmembers, meets the definition of "employer" for purposes of the Workers' Compensation Act. Mont. Code Ann. § 39-71-117(1)(d). Similarly, any member performing services for the Colony under these conditions is an "employee." Mont. Code Ann. § 39-71-118(1)(i). The Act, except for the exemptions listed at Mont. Code Ann. § 39-71-401(2), "applies to all employers and to all employees." Mont. Code Ann. § 39-71-401(1). The Act therefore applies to the Colony if it is engaged in a covered economic activity. This requirement is currently not being enforced by the Department of Labor and Industry ("the Department") pursuant to an agreement with the Colony. (D.C. Doc. 6, Ex. 3.)

II. THE LEGISLATURE "LEVELS THE PLAYING FIELD" BY REQUIRING THAT RELIGIOUS ORGANIZATIONS PROVIDE WORKERS' COMPENSATION COVERAGE.

Prior to the enactment of HB 119, the Department did not consider Hutterite colonies or members to be subject to the Workers' Compensation Act because the colonies did not pay "wages" to their members, and thus did not fit within the definition of an "employer" or "employee" under the Act. (D.C. Doc. 6, Ex. 4, Aff. of Keith Messmer.) The colonies nevertheless were competing with secular contractors and others who were required to provide workers' compensation coverage for their employees. Consequently, the Department received numerous complaints for several years leading up to the 2009 Legislative session. (D.C. Doc. 6, Ex. 4.) In response, and to protect the Uninsured Employers' Fund from

potential liability for a catastrophic injury, the Department included sections 6 and 7 as part of the larger HB 119. (*Id*.)

Representative Hunter, when presenting these sections, acknowledged that the amendment was primarily in response to the commercial activities of Hutterite colonies. (Tr., Jan. 8 hearing at 4, remarks of Rep. Hunter ("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.").) Representative Hunter also spoke of the need to create "a fair playing field . . . ." (*Id*.) Despite the desire to "keep everyone on equal footing," this version of sections 6 and 7 was amended out of the bill on the floor of the House because affected religious organizations, such as the Hutterites, had not been contacted. (Tr., Jan. 20 session at 3, remarks of Rep. Milburn.)

HB 119 then moved to the Senate, where several contractors and others spoke in favor of placing the amendment back in the bill as a matter of "fairness." (Tr., Mar. 5 hearing at 7-9.) As explained by a representative for the building industry, "it is our belief that if you are acting like a business, you should be treated like a business." (*Id*. at 7, comments of Dustin Stewart.) During the next hearing of the Senate Committee on Business and Labor, Senator Barkus moved to reinstate the amendment "on a more limited basis." (Tr., Mar. 11 hearing at 2.) The amendment was restructured by adding the current language limiting the definition to remuneration from nonmembers for manufacturing, construction or agricultural projects. (*Id*.)

During the March 11 hearing, Senator Stewart-Peregoy, while arguing against including "agriculture" within the covered economic activities, suggested that the amendments were "targeting" the Hutterites. (*Id*. at 10.) The discussion up to this point was not focused on the Hutterites' religious practices, however. (*Id*. at 1-10.) Instead, it was focused solely on the colonies' commercial activities. (*See, e.g., id*. at 2 and 3, remarks of Chairman Balyeat ("the one thing I'm concerned about is the agricultural projects" and "I see a distinction between the agricultural activity of the colonies and the construction and manufacturing . . . ."); *id*. at 3, remarks of Senator Stewart-Peregoy ("I think the major issue has been the fact that they've expanded into manufacturing and construction and are competing on that wider basis.").) Senator Stewart-Peregoy was supportive of the amendments in general, other than the agriculture issue, and in fact ultimately voted for moving HB 119 out of committee as amended. (*Id*. at 14.)

On the floor of the Senate, Senator Barkus reiterated the theme that the purpose of sections 6 and 7 was "to level the playing field with [religious] organizations where they are competing [with] for profit businesses in the outside community." (Tr., Mar. 16 session at 2-3.) Senator Keane agreed that the amendment "is about leveling the playing field" as otherwise the religious organizations would be "at a distinct advantage" over secular businesses that are required to pay for workers' compensation coverage. (Tr., Mar. 16 session at 6.) HB 119, including sections 6 and 7, went on to pass the Senate 39 to 8 and the House 79 to 21. Though notified of the bill by the time it reached the Senate (Tr., Mar. 5 hearing at 14, remarks of Rep. Hunter), the Hutterite colonies failed to testify against the bill or take any other

steps to inform the Legislature of the potential hardships to Hutterite colonies that Petitioners' now claim. (Tr., D.C. Doc. 13 at 2 (admitting that Petitioners "did not lobby the legislature.").)

Despite HB 119's regulatory nature and its goal of equalizing workers' compensation requirements, Big Sky Colony and Daniel Wipf subsequently filed a declaratory judgment action against the Department. (D.C. Doc. 1.) Petitioners claim that by requiring workers' compensation coverage when the Colony engages in commercial activities, HB 119 violates their right to freely exercise their religion, the Establishment Clause, and equal protection. After cross-motions for summary judgment, (D.C. Docs. 5 and 8), the Court granted judgment for Petitioners on all claims: free exercise, establishment and equal protection. (D.C. Doc. 17; "Order," attached as Appendix A.)

STANDARD OF REVIEW

This Court reviews a district court's conclusions of law for correctness, and its findings of fact under the clearly erroneous standard. *Jaksha v. Butte-Silver Bow County*, 2009 MT 263, ¶ 13, 352 Mont. 46, 214 P.3d 1248 (citation omitted). Specifically, this Court exercises plenary review over questions of constitutional law. *Id*. (citation omitted). Statutes enjoy a presumption of constitutionality, and the person challenging a statute's constitutionality bears the burden of proving it unconstitutional. *Id*.

SUMMARY OF THE ARGUMENT

The District Court's grant of summary judgment should be reversed because it is out of step with this Court's precedents, as well as those of the United States Supreme Court. The Court's ruling is prem-

ised on the faulty conclusion that the Hutterites' all-encompassing religious way of life shields them from complying with workers' compensation regulations, regardless of the commercial nature of the activity. Taken to its logical conclusion, this decision would empower Petitioners to avoid any burdensome regulation, because that regulation would necessarily affect some aspect of their religious lifestyle.

Under free exercise jurisprudence, however, a religious adherent is not entitled to an exemption from a generally applicable regulatory law, even if the law imposes burdens on their religious beliefs. *Saint John's Lutheran Church v. State Fund* ("St. John's") 252 Mont. 516, 526, 830 P.2d 1271, 1278 (1992); *Employment Div., Oregon Dept. of Human Resources v. Smith*, 494 U.S. 872, 878-84 (1990). Otherwise, religious beliefs would be "superior to the law of the land, and [would] permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)). HB 119, a law that simply requires religious organizations such as the Colony to provide workers' compensation insurance when engaged in certain commercial activities, is exactly the kind of regulatory law that has withstood challenge under the Free Exercise Clause. *St. Johns*, 252 Mont. 516 at 526, 830 P.2d at 1271 (upholding workers' compensation coverage for Lutheran pastor); *United States v. Lee*, 455 U.S. 252, 261 (1982) (upholding Social Security tax on Amish); *Smith*, 494 U.S. at 882 (upholding law criminalizing peyote use as applied to adherents of the Native American Church).

Despite this established precedent, and without distinguishing *St. John's*, the District Court determined that HB 119 violates the Free Exercise Clause

based on the assumptions that the burden on the Colony is unique (D.C. Doc. 17 at 16) and the law targets "only the Hutterite religious practice of communal living." (D.C. Doc. 17 at 17.) The legislative record is clear, however, that the Legislature was concerned with the Hutterites' commercial, not religious, activities. The effect on Hutterite colonies is external and regulatory. The law does not speak to, or infringe upon, a colony's internal relationship with its members. If the district court's holding were allowed to stand, therefore, this Court would have to overrule *St. John's* and would be in conflict with the *Smith* standard.

Similarly, HB 119 does not violate the Establishment Clause. The record shows that the purpose and effect of the law was entirely secular: to "level the playing field" by requiring workers' compensation insurance for covered commercial activity. Undeterred, Petitioners, and the District Court, go to extraordinary lengths to show that, despite the lack of reference to Hutterite religious beliefs or practice in the legislative record, the true intent of the law was to suppress the Hutterite religion, specifically the belief in communal living.

This approach is not only unfounded but is legally incorrect. Even a finding that a specified purpose is a "sham" must be supported by evidence. *McCreary County v. ACLU*, 545 U.S. 844, 870-72 (2005) (relying on "perfectly probative evidence"). The regulatory nature of the law also belies the assertion that it will require State entanglement with the Hutterite religion. Because the regulatory relationship will be "external," like the workers' compensation requirement in St. John's, no entanglement will occur. As with taxes, Medicaid, children's health insurance

programs and building codes, interaction with the State for purposes of the workers compensation program is "necessary and permissible." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

Finally, HB 119 does not treat religious organizations unequally, and therefore cannot violate equal protection. In fact, HB 119 seeks to do the opposite—to level the playing field by treating religious organizations engaged in commercial activity the same as secular organizations for purposes of workers' compensation coverage requirements. While the Hutterites were specifically addressed by the Legislature during debate on HB 119, and one Legislator even suggested they were targeted, the focus was solely on the Hutterites commercial, not religious, activities.

The District Court should be reversed, and summary judgment granted for the Department.

ARGUMENT

I. HB 119, WHICH REMOVES AN EXEMPTION AND THEREBY REGULATES RELIGIOUS ORGANIZATIONS IN THE SAME MANNER AS SECULAR BUSINESSES, DOES NOT VIOLATE THE FREE EXERCISE CLAUSE.

Given that what Petitioners ultimately seek is an accommodation from a regulatory law for religious reasons, this case should have been handled strictly as a matter of free exercise. The fact that Petitioners instead claimed, and the District Court concluded, that the Establishment Clause and equal protection were also implicated highlights the problem with Petitioners' reliance on the argument that all activities performed by members of a Hutterite colony are "purely religious." Essentially this argument boils

down to an assertion that Petitioners are "a law unto themselves" and not subject to regulation if they choose not to be. And this does appear to be a choice, as is highlighted by the *Stahl* case, where a Hutterite colony argued it *should be* treated as in an employee/employer relationship with its members for tax deduction purposes. *Stahl v. United States*, 626 F.3d 520 (9th Cir. 2010). Because HB 119's regulatory requirements affect external, commercial activities, and are thus neutral and generally applicable, the law does not violate free exercise.

A. This Case Is Controlled by *St. John's*.

This Court has already ruled upon the free exercise challenge brought by Petitioners: whether requiring workers' compensation coverage for a religious organization that opposes the employer/employee relationship for religious reasons violates free exercise. In *St. John's*, this Court rejected a Church's claim that requiring it to consider its pastor as an "employee" for workers' compensation purposes intruded upon "a matter of singular ecclesiastical concern," and therefore violated its right to free exercise of religion. 252 Mont. at 525, 830 P.2d at 1277. Specifically, the Church alleged that "the pastor was not an employee of the church, but that the relationship was that of shepherd to flock." *Id*. at 520, 830 P.2d at 1274.

This Court determined free exercise was not violated because designating "the pastor as an employee for purposes of workers' compensation only affects the relationship between the church and the workers' compensation system [as there] is no internal impact or infringement on the relationship between the church and its pastor, or on their sincerely held religious beliefs." *Id*. at 526, 830 P.2d at 1277-78. The relationship was external, affecting the church's

regulatory duty to provide workers' compensation coverage, not how the church internally interacted with its pastor.

Though *St. John's* is directly on point, the District Court failed to distinguish, or even discuss, the case. (D.C. Doc. 17.) In fact, the Court only cites to *St. John's* once, in a string cite. (*Id*. at 10.) Petitioners attempted below to distinguish *St. John's* by claiming that providing workers' compensation coverage is more burdensome to Hutterites' "fundamental beliefs" than to the beliefs of Lutherans. (D.C. Doc. 10 at 10; D.C. Doc. 13 at 3.) The Lutheran Church in *St. John's*, however, would disagree. It claimed that considering the pastor as an employee "places an almost insurmountable obstacle in the way of carrying out his duties and responsibilities to God to proclaim the word of God." 252 Mont. at 525, 830 P.2d 1271 at 1277.

More importantly, the Free Exercise Clause does not require, or even permit, this Court to determine whether one religion's "fundamental beliefs" are more affected by a particular law than another religion's. *See Lee*, 455 U.S. at 257 ("courts are not arbiters of scriptural interpretation") (brackets and citation omitted). And that is what Petitioners are asking this Court to do here. In order to distinguish *St. John's* as suggested, this Court would have to hold that the Hutterite belief in communal living is more fundamental than the Lutheran belief that a pastor is answerable only to God.

Fortunately, there is no need to do so. As in *St. John's*, HB 119's requirement to provide workers' compensation coverage for certain commercial activities results in "no *internal* impact or infringement" on the relationship between colony and member. 252

Mont. at 526, 830 P.2d at 1278 (emphasis added). Instead, the impact on Petitioners is regulatory and external: the Colony must obtain workers' compensation insurance covering any member working on an agricultural, manufacturing, or construction project for payment from nonmembers. The internal relationship between the Colony and its members—e.g., whether they are paid or possess property, and how decisions are made concerning projects—is unaffected.

The holding in *St. John's*, moreover, is in line with the holdings of the United States Supreme Court in *Smith* and *Lukumi*. A law that only externally affects religious practices for regulatory purposes meets the *Smith* requirement of neutrality and general applicability, and therefore does not violate free exercise regardless of the burden imposed on a particular religious adherent.

B. HB 119 Is Neutral and Generally Applicable Because It Does Not Intentionally Burden Religious Conduct.

1. Any Burden Imposed on Petitioners' Beliefs Is Incidental.

As noted by the District Court, the United States Supreme Court in *Smith* changed the dynamic of free exercise jurisprudence. (D.C. Doc. 17 at 11-12.) A law that is neutral and generally applicable does not violate the Free Exercise Clause even if it prohibits (or prescribes) conduct that is prescribed (or prohibited) by an individual's religion. *Smith*, 494 U.S. at 878-84 (concluding that a law outlawing the use of peyote did not violate free exercise even though peyote use was central to the practice of the Native American Church). Importantly, a neutral and gener-

ally applicable law does not have to be supported by a compelling governmental interest even though it may substantially burden religion. *Id*. at 883.

In *Smith*, the Native American Church, like Petitioners here, urged the Court to hold "that when otherwise [regulable] conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation." *Id*. at 882 (emphasis added). But the Court had never so held and refused to do so in *Smith*. *Id*. While laws "cannot interfere with mere religious belief and opinions, they may with practices." *Id*. at 879 (quoting *Reynolds*, 98 U.S. at 166-67) (emphasis added); *cf. St. John's* at 526, 830 P.2d at 1277-78 (distinguishing between internal and external effects on religion). Otherwise, except where the state's interest is "compelling," an individual "by virtue of his beliefs" would "become a law unto himself." *Id*. at 885 (quoting Reynolds, 98 U.S. at 167).

The Court in *Smith* explained, as an example of this general principle, that a general tax does not prohibit free exercise, even where a religious adherent believes that support of organized government is sinful. If prohibiting the exercise of religion "is not the object of the tax but merely the *incidental effect* of a generally applicable and otherwise valid provision," free exercise is not violated. *Smith*, 494 U.S. at 878 (emphasis added); followed by *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the *incidental effect* of burdening a particular religious practice.") (emphasis added).

The key, then, is whether the law burdens religion "incidentally" or its opposite, "intentionally." A law that is either not neutral or not generally applicable cannot be said to "incidentally" burden religion. Instead, such a law intentionally does so by "regulat[ing] or prohibit[ing] conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. In *Lukumi*, for example, the challenged law was crafted by the city council with the specific purpose of restricting the Santeria religious practice of animal sacrifice. *Id*. at 534. Prior city resolutions had recited residents' concerns that "certain religions" may engage in religious practices, namely animal sacrifice, that were "inconsistent with public morals, peace or safety." In response, the city committed itself to prohibiting "any and all [such] acts of any and all religious groups." *Id*. at 535. The Santeria religious practice, therefore, was "singled out for discriminatory treatment." *Id*. at 538.

In *Smith*, on the other hand, the law prohibiting peyote use only incidentally burdened religious conduct. Though a core religious practice of the Native American Church was severely affected, the law outlawed peyote use for everyone instead of being crafted to only prohibit religious peyote use. Like the law in *Smith*, HB 119 does not intentionally burden religious conduct. The conduct that is regulated is secular commercial activity: agriculture, manufacturing or construction performed for remuneration from nonmembers. Mont. Code Ann. § 39-71-117(1)(d). Unlike *Lukumi*, where the conduct proscribed was effectively limited to religious use, here the conduct is secular and commercial and of the type that also requires workers' compensation coverage for secular businesses: commercial agriculture, fence building, construction, etc.

As defined in *Lukumi*, HB 119 is neutral because it does not intentionally "infringe upon or restrict practices *because of* their religious motivation." *Id*. at 543 (emphasis added). HB 119 is also generally applicable, because it does not "in a selective manner impose burdens *only on* conduct motivated by religious belief . . . ." *Id*. (emphasis added). Prior to HB 119, religious organizations, like the Hutterites, were exempted by agency interpretation from providing workers' compensation coverage because they did not pay wages, and thus did not fit into the prior definition of "employer" and "employee." (D.C. Doc. 6, Ex. 4.) Because the colonies were visibly competing against, and underbidding, secular businesses, HB 119 amended the definition of employer and employee to include religious organizations engaged in certain commercial activities. (*Id*.); (Tr., Jan. 8 hearing at 4, remarks of Rep. Hunter; March 16 session at 2-3, remarks of Sen. Barkus.).

HB 119 thus regulates commercial (and external) *practices*, not internal religious activities. Further, the burden of providing workers' compensation coverage for these commercial activities is not placed only on religious conduct. All organizations engaged in these commercial activities as a matter of choice, whether religious or secular, are required to provide workers' compensation insurance for its workers. Thus any burden on the Petitioners' religious conduct is an incidental, not intentional, effect of the law. *See also Lee*, 455 U.S. at 261 ("every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs [especially where] followers of a particular sect *enter into commercial activity as a matter of choice* . . . .") (emphasis added).

2. Petitioners' Religious Lifestyle Does Not Insulate It From Regulatory Compliance.

Though HB 119 only regulates the Colony's commercial, external practices, the District Court concluded that HB 119 is neither neutral nor generally applicable. The District Court primarily rested its holding on the determination that "HB 119 unquestionably targets the Colony and the religious practice of their [sic] communal lifestyle" because the governmental interest "is being pursued only against conduct that has a religious motivation." (D.C. Doc. 17 at 16.) While the District Court focuses on parts of the legislative record where the Hutterites are mentioned by name, and even alleged to be "targeted," it fails to cite to one instance where the Hutterites' religious beliefs or conduct is discussed. To get around this, the District Court followed the argument of Petitioners that whenever "a member performs work for the colony, he or she is engaged in a religious activity." (D.C. Doc. 13 at 7.)

But, as addressed, above, this is not the standard. A law may regulate religious practices, as long as it does not intentionally interfere with religious beliefs and opinions. *Smith* at 879; *St. John's* at 526, 830 P.2d at 1277-78. All discussion in the Legislative record, even when Hutterites are mentioned by name, involves commercial activity. This is because the Department, the contractors, and the Legislature were not concerned with the colonies' religion. They were concerned with the fact that the Hutterites were not paying for workers' compensation insurance while competing against secular contractors who were. (Tr., Jan. 8 hearing at 4, remarks of Rep. Hunter; March 16 session at 2-3, remarks of Sen. Barkus.) Whether or not the Hutterites consider

these activities to be a religious practice is thus irrelevant. Otherwise, the Colony would become a law unto itself, and only have to follow those regulations that it considered beneficial, even where it has entered into commercial activity as a matter of choice. *Lee*, 455 U.S. at 261.

For example in *Stahl*, the leader of a Hutterite colony made the opposite argument as that currently maintained by Petitioners. There, the plaintiff claimed he should be considered to be *in an employer/employee relationship* with the colony for tax purposes. 626 F.3d at 523. Thus, his medical and meal expenses should be deductible at the corporate level. *Id*. Like Big Sky Colony, Stahl's colony did "not pay wages to its Hutterite workers." *Id*. at 526. If the members were paid wages, they "would merely donate them back to [the colony] itself; their religion demands that." *Id*. On balance, the Ninth Circuit determined that the members "should be seen as common law employees of [the colony] insofar as they perform the work of that business." *Id*. at 527.

In two different courts, therefore, Hutterites have made opposing claims concerning the relationship between the colony and its members. In *Stahl*, the member was content to be considered an employee for tax purposes where the relationship resulted in a financial advantage. Here, on the other hand, where accepting the employer/employee designation would result in some additional expense to the Colony, Petitioners claim that considering members as employees, even if only for purposes of workers' compensation, would be detrimental to their religious practices.

This example is not meant to bring into question whether Petitioners' beliefs are sincerely held. In-

stead, it shows why neutral, regulatory laws, such as HB 119, do not violate free exercise even if religious practices are affected. In short, the Constitution does not require that religious adherents be elevated to a "privileged status, above all other[s], *because* of their religious beliefs." *Hofer v. DPHHS*, 2005 MT 302, ¶ 42, 329 Mont. 368, 124 P.3d 1098 (emphasis in the original); *see also Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 n.27 (if petitioner "seeks preferential, not equal, treatment [it] cannot moor its request for accommodation to the Free Exercise Clause").

3. The Legislature Did Not Intend to Restrict, or Even Affect, Petitioners' Religious Beliefs or Practices.

Despite a lack of evidence of malice in the record, the District Court also determined that HB 119 is intended to be a "tax" or "financial penalty" on the Hutterites in order to accomplish the stated goal of leveling the playing field. (D.C. Doc. 17 at 17.) The Court assumed that there is no other viable "reason or purpose consistent with the legislative policy of the Workers' Compensation Act" because "Hutterites already provide for their members no-fault comprehensive medical insurance." (*Id*.) Fairness, however, is a viable legislative goal, and the Legislature is entitled to take steps to ensure that the workers' compensation system is fair to all participants, whether religious or secular. HB 119 does not seek to penalize; instead it seeks parity between secular organizations and religious organizations like the Hutterites that engage in commerce as a matter of choice.

Furthermore, the fact that the Colony already pays for comprehensive medical insurance cuts both ways. The Colony may choose to self-insure, which it is

already doing in the medical insurance context, and thereby avoid having to estimate the wages earned by its members. *See* Mont. Code Ann. § 39-71-401(1); (D.C. Doc. 6, Ex. 5). The small burden on the Colony if it self-insures would be "indirect and di-minimus [sic], and in no way prohibits the [Colony's] free exercise of [its communal] belief." *St. John's Lutheran Church*, 252 Mont. at 525, 830 P.2d at 1277.

Additionally, the argument that the field is "already level," and thus the Legislature must have had an ulterior motive—specifically interfering with the Petitioners' religious, communal lifestyle—does not hold water. (D.C. Doc. 17 at 17; D.C. Doc. 13 at 7.) There is no evidence in the record of hostility to the Hutterite religion or consideration of the intricacies of the Hutterite communal arrangement.

The "field is level" argument was also not presented to the Legislature when it debated this bill. To now question that policy decision—whether or not the field was level and whether or not requiring religious organizations to provide workers' compensation will affect their ability to underbid secular competitors—is too little too late, and certainly does not transform a secular purpose into a plot to suppress religion. It is unreasonable to assume that the Legislature, when debating this bill, was aware that simply defining Hutterite colonies to be employers for workers compensation purposes would create the potential hardships to Hutterite religious practices proposed by Petitioners. Unlike Petitioners in this lawsuit, the Legislature was not concerned with the Hutterites' religious practices, but with their commercial practices.

Part of the problem with Petitioners' and the District Court's analysis is that it considers sections 6

and 7 of HB 119 in isolation. A law should instead be considered in context. *Oster v. Valley County*, 2006 MT 180, ¶ 17, 333 Mont. 76, 81, 140 P.3d 1079, 1083 ("[T]his Court must harmonize statutes relating to the same subject, as much as possible, giving effect to each"). When analyzed in the full context of the Workers' Compensation Act, it is clear that HB 119 is merely intended to require workers' compensation coverage when a religious organization engages in a covered economic activity: nothing more and nothing less. The amendment refers to religious organizations directly for the neutral purpose of undoing an exemption. The effect on the Hutterites' religious practice is thus external and incidental and does not violate free exercise.

C. Even If Strict Scrutiny Is Applied, Workers' Compensation Is an "Overriding Governmental Interest."

HB 119 "*need not be justified* by a compelling governmental interest" because it is "neutral and of general applicability." *Lukumi*, 508 U.S. at 531 (emphasis added). If this Court nevertheless engages in a scrutiny analysis, the law would in fact meet strict scrutiny. To meet strict scrutiny, a law "restrictive of religious practice" must be narrowly tailored to meet a compelling governmental interest. *Id*. at 546. This Court has already determined that the workers' compensation system is an "overriding governmental interest." *St. John's*, 252 Mont. at 524-26, 830 P.2d at 1277-78 (upholding Workers' Compensation Court determination). And HB 119 is narrowly tailored to meet that interest by defining religious organizations and their members as employers and employees only to the extent necessary to meet the goal of ensuring

that religious organizations, *when engaged in commerce with non-members*, provide workers' compensation coverage.

In a similar case, the United States Supreme Court analyzed whether requiring the Amish to pay social security taxes, which they did not believe in, violated their right to free exercise of religion. *Lee*, 455 U.S. at 254.[1] *Lee* was decided prior to *Smith*, and therefore applied strict scrutiny even though social security taxes are a neutral and generally applicable law. *See Lee*, 455 U.S. at 263 (Stevens, J., concurring) (articulating the standard, later adopted in *Smith*, that there should be no constitutional exemption "on religious grounds from a valid tax law that is entirely neutral in its general application.").

In applying strict scrutiny, the Court noted that social security, like workers' compensation, "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants . . . ." *Lee*, 455 U.S. at 258. While Congress had been sensitive to the Amish's free exercise rights, "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." *Id*. at 261. This is especially true where, as with Hutterite colonies, "followers of a particular sect enter into commercial activity as a matter of choice." *Id*. The limits the

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[1] The District Court at page 18 of its Order notes that Congress has exempted certain religious organizations from the payment of social security taxes. Congress has made an exemption for certain religious groups who are conscientiously opposed to acceptance of social security benefits, such as the Amish, but this exemption is found at 26 U.S.C. § 1402(g), not (h), and "is available only to self-employed individuals and does not apply to employers or employees." *Lee*, 455 U.S. at 256.

followers place on themselves for religious reasons "are not to be superimposed on the statutory schemes [like the Workers' Compensation Act] which are binding on others in that activity." *Id*. Therefore, while strict scrutiny need not be applied to this neutral and generally applicable law, it is in fact met.

II. HB 119, WHICH REQUIRES THAT RELIGIOUS ORGANIZATIONS PROVIDE WORKERS' COMPENSATION COVERAGE FOR COMMERCIAL ACTIVITIES, AND THUS RESULTS IN EXTERNAL, REGULATORY ENFORCEMENT BY THE STATE, DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

HB 119 neither condones nor disapproves of any religion, nor does it foster "excessive government entanglement" with religion. Instead, it seeks to level the playing field, which is appropriate as the Establishment Clause does not demand that those with religious beliefs be elevated to a "privileged status." *Hofer*, ¶ 42.

The District Court relied on (and misapplied) the well-known *Lemon* test when ruling upon Petitioners' establishment claim. This Court also utilizes the *Lemon* test when considering establishment claims. *See In re S.P.*, 241 Mont. 190, 201, 786 P.2d 642, 649 (1990). The United States Supreme Court, in *Lemon*, established three considerations for evaluating an Establishment Clause claim. *See McCreary County*, 545 U.S. at 859 (reaffirming the *Lemon* test). To be considered constitutional, the government conduct at issue must (1) have a secular purpose, (2) not have as its principal or primary effect advancing or inhibiting religion and (3) not foster an excessive government

entanglement with religion. *Lemon*, 403 U.S. at 612-13.

A. As Evidenced by the Legislative Record, the Purpose and Effect of HB 119 Is Secular.

HB 119 seeks to level the playing field, as described above, by requiring workers' compensation coverage when religious organizations are engaged in certain commercial activities. This is a purely secular purpose. The secular purpose prong asks only whether the "actual purpose is to endorse or disapprove of religion." *American Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002) (*cert denied*, 537 U.S. 886 (2002) (citation omitted). A law will stumble on this prong "only if it is motivated *wholly* by an impermissible purpose." *Id*. (emphasis in the original) (citation omitted). Therefore, a law will generally not fail this prong "in the face of a plausible secular purpose." *Id*. (citation omitted).

HB 119 defines religious organizations and their members as employers and employees for the purpose of requiring workers' compensation coverage when they are engaged in certain commercial activities for payment from nonmembers. Mont. Code Ann. §§ 39-71-117, -118. More specifically, the purpose is to create a level playing field, at least concerning workers' compensation requirements, between religious and secular organizations competing in these areas. The purpose of this amendment is therefore not only plausibly secular, but wholly so. Although it necessarily refers to religious organizations in order to undo the prior exemption and require coverage for religious organizations, there is no intent to "disapprove of religion."

Similarly, the primary effect of HB 119 does not inhibit religion. A court makes the determination of whether the primary effect of a law is to advance or inhibit religion "from the perspective of a 'reasonable observer' who is both informed and reasonable." *American Family Ass'n*, 277 F.3d at 1122 (citation omitted).

The primary effect, like the purpose, of HB 119 is to require religious organizations to provide workers' compensation coverage for their members when an organization is engaged in certain commercial activity. Mont. Code Ann. §§ 39-71-117, -118. As explained above, a religious organization may comply by self-insuring, obtaining private insurance, or utilizing the State Fund. A reasonable, objective observer would therefore view the primary effect of HB 119 as requiring regulatory compliance, not inhibiting religion.

Though the secular purpose of HB 119 is obvious from the text and Legislative history of the law, the District Court, citing to *McCreary County*, nevertheless found that the professed secular purpose is a "sham." (D.C. Doc. 17 at 20.) Specifically the court noted that the "situation" the law sought to remedy "result[ed] entirely from the religious practices of Hutterite communal living." (*Id*.) Once again, then, the Court rests its decision on the fact that all aspects of Hutterite life, including commercial work for payment from nonmembers, is religious and may not be regulated. As with free exercise, however, that is not the standard for establishment claims.

In *McCreary County*, the United States Supreme Court made clear that it will only look past a stated secular purpose when presented with "perfectly probative evidence" that the true purpose of the display was "pervasively religious." *Id*. at 870-72. There two

counties initially sought to put up at their respective courthouses "large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the book of Exodus." 545 U.S. at 851. The Ten Commandments is "undeniably a sacred text." *Id*. at 859. After a preliminary injunction was entered against the counties, they changed the display twice, both times adding extra documents, considered historic but also containing "specific references to Christianity," to the Ten Commandments display. *Id*. at 851-57.

The counties disregarded the history of the displays, which point to a religious purpose, instead claiming that the true official purpose is "unknowable." *Id*. at 859. The Court acknowledged that a legislature's stated purpose "will generally get deference," and that a law or state action must be "*entirely motivated* by a purpose to advance religion" to fail the purpose prong. *Id*. at 864 (emphasis added). Still, "in those unusual cases where the claim was an apparent sham, or the secular purpose secondary" the law will fail this prong. *Id*. at 865.

Ultimately, the Court found that the history of the displays failed to "suggest a clear theme that might prevail over evidence of the continuing religious object." *Id*. at 872. The Court relied on several previous cases where the primary purpose of a law or act was determined to be religious, all containing probative evidence of "a predominantly religious purpose." *Id*. at 862-63 (citing cases dealing with school prayer; teaching creationism; required Bible study in public schools; and a prior display of the Ten Commandments case.) The Court, in these cases, refused "to turn a blind eye to the context in which [the] policy arose." *Id*. at 866 (citation omitted).

In this case there is no probative evidence of a religious purpose in the legislative record. The District Court, ignoring the "clear theme" of leveling the playing field as well as statutory context, instead relied on Petitioners' argument that because the commercial activities, from the Hutterites' perspective, were part of "the religious practices of Hutterite communal living," the law must be viewed as targeting their "communal lifestyle." (D.C. Doc. 17 at 20.) But as with free exercise claims, the Establishment Clause does not permit a religious adherent to become a law unto himself, nor does it "demand that we elevate a group of persons to privileged status, above all other[s], because of their religious beliefs." *Hofer*, ¶ 42 (emphasis added).

Unlike a display of the Ten Commandments, or religious instruction in school, the intent behind requiring religious organizations to provide workers' compensation coverage was entirely secular. It is undisputed that the Hutterites were not paying workers' compensation coverage while competing with secular businesses that did have to pay for coverage. As evidenced by the language of HB 119, the Department's reasons for introducing the bill, and the Legislative transcript, the purpose behind HB 119 was to level the playing field by requiring religious organizations, which had previously been exempt, by agency interpretation, to provide workers' compensation coverage to its members when they are engaged in certain areas of commerce. (D.C. Doc. 6, Ex. 4; Tr., Jan. 8 hearing at 4, remarks of Rep. Hunter; March 16 session at 2-3, remarks of Sen. Barkus.)

The District Court also determined that the effect of HB 119 is "to inhibit the Hutterites' free exercise of

religion by forcing them into an adversarial employer-employee relationship . . . ." (D.C. Doc. 17 at 21.) For the reasons stated above, however, Petitioners' free exercise rights have not been violated because HB 119's requirements are external and regulatory. *St. John's*, 252 Mont. 516 at 526, 830 P.2d at 1271. Additionally, we know that Hutterites in other regulatory circumstances are not threatened by, and in fact embrace, defining members of a colony as employees. *Stahl*, 626 F.3d at 523. As with tax deductions in *Stahl*, HB 119 defines a colony's members as employees only for purposes of workers' compensation. Unlike Petitioners, the Legislature was not concerned with the Hutterites' *religious* practices, but with their *commercial* practices. An objective observer, familiar with the legislative history of HB 119, would therefore consider the primary purpose and effect of this law to be secular.

B. HB 119 Creates a Permissive Regulatory Relationship, Not Excessive Government Entanglement With Petitioners' Religion.

HB 119 also does not cause an excessive government entanglement with religion. Total separation is not required, as some relationship between government and religion is inevitable, indeed "necessary and permissible," especially in regulatory areas such as "[f]ire inspections, building and zoning regulations, and . . . compulsory school-attendance laws . . ." *Lemon*, 403 U.S. at 614. To the extent there is some relationship between the State and Petitioners' religious activities, it is within a similar regulatory context that applies to all Montanans engaged in commerce, and is thus "necessary and permissible."

Nevertheless, the District Court concluded that HB 119 would involve excessive entanglement because it

would require the State to take an accounting of "a member's work [which] is always an expression of faith, worship, and service to the Church and God." (D.C. Doc. 17 at 22-23.) The court relied on the United States Supreme Court case of *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), for the premise that regulating religious entities, even in the commercial arena, unnecessarily entangles the state. (*Id*. at 21-22.)

Walz, however, is inapposite to the facts of this Case. *Walz* considered whether a *tax exemption* for Church property violated the Establishment Clause—the opposite of the question posed here. 397 U.S. at 667. *Walz* does not stand for the premise that taxation of religious organizations violates the Establishment Clause. It could not, because religious organizations are assessed income taxes, when income is derived by the organization, as well as social security taxes when additional workers are employed. *Stahl*, 626 F.3d at 523; *Lee*, 455 U.S. at 261.

In any case, the entanglement the Court fears is either nonexistent or equivalent to regulatory interaction already accepted by Hutterites. The amount of wages, for example, need not be estimated if the Colony chooses to self-insure. Even if the Colony chooses to insure with State Fund or a private insurer, estimating wages in this context is not much different that dividing up the Colonies income on a pro rata basis for tax purposes, or making Medicaid or Healthy Montana Kids claims, actions the Colony already undertakes. (D.C. Doc. 11 at ¶¶ 6, 17.)

The fact that these secular and commercial activities (indeed "capitalist" as noted by Petitioners (D.C. Doc. 10 at 20)) have religious implications for the Colony "should not completely shield [the activities]

from legal scrutiny." *Hofer*, ¶ 42. Instead, they are properly "subject to the same [compliance] analysis" as secular businesses. This "is the essence of neutrality." *Id*. In fact, the documents reviewed in *Hofer*, which contained some religious language, arguably entailed more state intrusion into religious practices than would compliance monitoring of these commercial activities under HB 119. HB 119 therefore does not violate the Establishment Clause.

II. HB 119, WHICH OBLIGATES RELIGIOUS ORGANIZATIONS TO PROVIDE WORKERS' COMPENSATION COVERAGE ON PAR WITH SECULAR BUSINESSES, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Generally, a claim that a person or group is treated unequally on the basis of their religion is analyzed under the Free Exercise Clause. *See Lukumi*, 508 U.S. at 542-43 ("[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment'") (citation omitted). As explained in section I, HB 119, a neutral and generally applicable law, does not violate free exercise. Likewise, and for essentially the same reasons, HB 119 does not violate equal protection.

"Both the Fourteenth Amendment to the United States Constitution and Article II, section 4 of the Montana Constitution provide that no person shall be denied the equal protection of the laws." *Powell v. State Fund*, 2000 MT 321, ¶ 16, 302 Mont. 518, 15 P.3d 877. The constitutionality of a statute, however, "is prima facie presumed." *Id*., ¶ 13. Therefore, every "possible presumption must be indulged in favor of the constitutionality of a legislative act" and the "party challenging a statute bears the burden of proving that it is unconstitutional . . . ." *Id*. To meet

this substantial burden, a party must demonstrate: (1) the state has adopted a classification; (2) that affects two or more similarly situated groups; (3) in an unequal manner. *Id*., ¶ 22.

There can be no violation of equal protection here because HB 119 does not treat the Colony in an unequal manner. Instead, the law puts the Colony on an equal playing field with secular organizations in Montana engaged in commerce. Hutterites, or any other religious organization, when engaged in commerce with nonmembers in these particular areas, have the same obligation as secular organizations: to provide workers' compensation coverage. (*See, e.g*., Tr., Jan. 8 hearing at 4, remarks of Rep. Hunter; Mar. 16 session at 2-3, remarks of Sen. Barkus.) HB 119 therefore does not treat the Colony or Wipf in an unequal manner, and the equal protection claim must fail.

Although HB 119 merely requires workers' compensation coverage for religious organizations in an equivalent manner to the coverage already required of secular businesses, the District Court determined that HB 119 was "discriminatory." Specifically, the Court concluded that HB 119 "creates a classification that treats Hutterites differently from other religious organizations and further targets religious organizations generally." (D.C. Doc. 17 at 24.) Once again, the Court fails to consider HB 119 in context.

While the law admittedly is directed towards "religious organizations," it does so only because religious organizations were previously exempt, by agency interpretation, from providing workers' compensation coverage. Because religious organizations, primarily the Hutterites, were involved in commercial activities and competing against secular businesses, the Leg-

islature made the policy choice to equalize the workers' compensation obligation in these areas. In this manner, HB 119 treats religious organizations the same as the numerous other entities defined as "employers" by Mont. Code Ann. § 39-71-117, such as corporations, public agencies, and nonprofit associations. Like the Medicaid program considered in *Hofer*, the workers' compensation system "does not discriminate in favor of or against [Petitioners] or anyone else on the basis of their religious beliefs." ¶ 41.

HB 119 also does not treat Hutterites different than other religious organizations. The law, on its face, applies to all religious organizations engaged in these commercial activities. Any religious organization, regardless of its religious tenets, is required to provide workers' compensation coverage when commercially providing manufacturing, construction, or agricultural services or products. This law will likely affect Hutterites more than other religions, but that is due to the Hutterites pervasive commercial activities. And while those activities may be seen part of the Hutterites' religious practices, the difference, as explained by Petitioners, is "in the doctrines," not in the law. (D.C. Doc. 10 at 12.) Hutterites are not entitled to preferential treatment over secular businesses or other religious organizations.

The Government may not discriminate against a group because of their religious beliefs. But it may focus on commercial activities, just as it does whenever a law regulates a particular area of commerce, or a particular trade (*see Wiser v. State*, 2006 MT 20, 331 Mont. 28, 129 P.3d 133 (regulating denturists)), even if those activities are performed by religious organizations. Treating all religious organizations in

an equal manner to secular businesses cannot, and does not, violate equal protection.

CONCLUSION

For the above-stated reasons, the District Court's judgment should be reversed, and summary judgment granted for the Department.

Respectfully submitted this 9th day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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J. STUART SEGREST

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. DA 11-0572

BIG SKY COLONY, INC., AND DANIEL E. WIPF,
Petitioners and Appellees,

v.

MONTANA DEPARTMENT OF LABOR AND INDUSTRY,
Respondent and Appellant.

APPENDIX

Order Granting Petitioner's Motion for
Summary Judgment ..... Appendix A