MONTANA NINTH JUDICIAL DISTRICT COURT, GLACIER COUNTY

BIG SKY COLONY, INC. and DANIEL E. WIPF, Petitioners, vs. MONTANA DEPARTMENT OF LABOR AND INDUSTRY, Respondent.	)	Cause No. DV-10-4

FILED
Glacier County District Court
SEP - 6 2011
DIANE D. ANDERSON
Clerk of District Court
By
Deputy Clerk

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:

17.

> (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]

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.*

[1] This requirement is currently not being enforced by the Department of Labor and Industry pursuant to an agreement with the Colony. See Exhibit 3, State's Brief in Support of Summary Judgment.

> *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 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 Hutter 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 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

[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).

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.

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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'I 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.

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. 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

[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.

> is no more necessary to regard the collection of a general tax, for example, as '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, supra. 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 HB119 without knowledge that they were specifically targeting a particular religious group, HB119, 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 HB119. 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 only against conduct that has a religious motivation. HB 119 has been drafted with such care to apply to only Hutterites that one

[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."

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 HB119. 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 HB119 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.

HB119 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.

LAURIE MCKINNON
DISTRICT JUDGE