IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 16-_____

MONTANA QUALITY EDUCATION COALITION,

Petitioner-Applicant Intervenor,

v.

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY, HONORABLE DAVID M. ORTLEY, PRESIDING.

Respondent.

PETITION FOR WRIT OF SUPERVISORY CONTROL

From the Eleventh Judicial District Court, Flathead County, Montana
Espinoza, et al. v. Montana Department of Revenue and Kadas
Cause No. DV-15-1152D
Honorable David M. Ortley

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INTRODUCTION AND RELIEF SOUGHT

Petitioners seek supervisory control over the District Court, which denied the Montana Quality Education Coalition's ("MQEC") timely and unopposed motion to intervene in a case challenging the constitutionality of administrative rules preventing the transfer of tax dollars to private religious schools through a tax credit program created by the 2015 Montana State Legislature.[1] This Court previously issued a writ in a remarkably similar case when a public interest group's efforts to intervene in a case seeking to defend a ballot initiative it supported were denied. *Sportsmen for I-143 v. Fifteenth Judicial District Court*, 2002 MT 18, 308 Mont. 189, 40 P.3d 400. Because the MQEC supported the promulgation of the challenged rules, because the intervention motion was unopposed, and because MQEC had a right to intervene under M.R.Civ.P. 24(a), a writ should issue here.

Further, in the same order denying MQEC's intervention, the District Court denied the Department of Revenue's efforts to delay ruling on a motion for summary judgment filed one day after the State's *Answer* so it could conduct discovery. This means the case is now heading for decision without any development of the factual record. Because the District Court appears poised to prematurely rule on the substance of the case, which involves constitutional issues

[1] The "Order on Pending Motions" issued by the District Court is attached as Exhibit 1

of statewide significance, Petitioners also seek a stay of further proceedings in the District Court pending the resolution of this Petition, per M.R.App.P. 14(7)(c).

Ultimately, MQEC seeks supervisory control to permit its intervention in this matter as well as an opportunity to meaningfully participate by engaging in discovery prior to resolution by the District Court.

NECESSITY OF A WRIT

Petitioners seek a Writ of Supervisory Control to protect their legal interest in defending the administrative rules which enforce Montana's constitutional requirement that no "direct or indirect appropriation or payment" of public money be made to private religious schools. A writ is appropriate because: (1) appeal from a final judgment is wholly inadequate, creating circumstances of an emergency nature; (2) there are no factual issues in dispute regarding an unopposed motion to intervene and the Court's denial is purely a question of law; (3) the District Court's denial of MQEC's intervention is a mistake of law causing gross injustice; and (4) the underlying litigation involves statewide issues of constitutional significance. Moreover, justice and judicial economy are served by the Court's exercise of supervisory control over the lower court, as it is the proceeding by which the validity of SB410 as a whole is likely to reach this Court.

BACKGROUND

The 2015 Montana State Legislature enacted SB410, now codified as Sections 15-30-3101, et seq., MCA. The law creates a "tax replacement program" that allows for state income tax credits for donations to student scholarship organizations that, in turn, provide scholarships to students to attend private schools, including private religious schools. *Sections 15-30-3101 & -3102(9).* The Legislature budgeted $3,000,000.00 for these tax credits for this fiscal year.

The Montana Constitution disallows "any direct or indirect appropriation or payment from any public fund or monies … for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect or denomination." *Mont. Const. Art. X, § 6.*

SB 410 specifically directed that "(t)he tax credit for taxpayer donations under [sections 7 through 17] must be administered in compliance with Article V, section 11(5), and Article X, section 6 of the Montana constitution." It provided the Department of Revenue the authority to implement administrative rules to govern the tax credit program.

In October 2015, the Department promulgated Rule 1, which limited the definition of education providers eligible to receive funds from the scholarship organizations to those that are not owned or controlled by any church, religious

sect or denomination, essentially mirroring the language in the Constitution. MQEC and its members supported the adoption of Rule 1, now codified at ARM 42.4.802. *Affidavit of Diane Burke in Support of MQEC's Motion to Intervene,* ¶¶ 14, 15.[2] The MQEC is a statewide coalition of public education advocates who primarily seek to ensure adequate funding to provide a quality education to Montana students. *Id.* at ¶ 3. Its membership includes 90 AA, A, B, C and independent elementary school districts and six public education advocacy organizations, including the MEA-MFT, the Montana School Boards Association and the School Administrators of Montana. *Id.* at ¶ 4.

In November 2015, the Legislature, when it was not in session, conducted a poll of its membership pursuant to Section 2-4-403, MCA. The results of poll were that, notwithstanding the express purpose of SB410, Rule 1 was contrary to the intent of a majority of lawmakers. By statute, the poll, conducted outside of the session without public input or public participation, must be admitted into evidence, and Rule 1 "conclusively presumed to be contrary to legislative intent in any court proceeding involving its validity." *Section 2-4-404, MCA.*

On December 16, 2015, before Rule 1 became effective, a group of parents of children attending a private religious school in Flathead County brought suit, challenging the validity on Rule 1 on the grounds that it allegedly violates the Free

[2] Attached as Exhibit 2.

Exercise, Equal Protection, and Establishment clauses of the state and federal constitutions.

On January 28, 2016, the Plaintiffs filed a motion for a preliminary injunction to prevent the Department of Revenue from enforcing Rule 1. On February 1, 2016, the Department of Revenue filed an M.R.Civ.P. 12(b) motion to dismiss, challenging the standing of the Plaintiffs who brought the case.

On March 31, 2016, the District Court denied the Department's motion to dismiss and granted the preliminary injunction[3]. "Based on argument and evidence that it has received up to this point, the Court finds that the Plaintiffs have established that they are likely to succeed on the merits of their claims." *Order on Plaintiffs' Motion to Preliminary Injunction and Defendants' Motion to Dismiss*, p. 13. The District Court ordered the Department to file an Answer, which it did on May 12, 2016.

One day later, on May 13, 2016, the Plaintiffs moved for summary judgment, essentially recycling the arguments on which they obtained the preliminary injunction and which the District Court found likely to succeed.

On May 20, 2016, eight days after the Answer was filed, MQEC moved to intervene either as a matter of right or permissively under M.R.Civ.P. 24.[4]

[3] The Preliminary Injunction Order is attached as Exhbit 3.
[4] The Motion to Intervene and the brief in support of the motion are attached as Exhibit 4.

On May 25, 2016, the Department of Revenue moved, pursuant to M.R.Civ.P. 56(f), for the opportunity to conduct discovery before responding to the motion for summary judgment.

On June 1, 2016, the Plaintiffs wrote that they did not oppose MQEC's intervention, but groused that intervention should not delay the "prompt resolution of this suit."

The District Court took no action until August 4, 2016, at which time it denied MQEC's efforts to intervene and the Department's motion to conduct discovery ahead of summary judgment briefing. It found that M.R.Civ.P. 24 is a discretionary rule and "the expertise of counsel for MQEC will not serve to further elucidate the issues before the Court, nor enhance any earlier preliminary determination of those issues as this case makes its procedural journey to the Montana Supreme Court, as it most certainly will." *Order* at 2.

Thus, a case of first impression involving the first successful legislative effort to divert money from public to private sectarian schools, and complicated issues involving the First Amendment of the U.S. Constitution and Mont. Const. Art. X, § 6 and the authority of the legislature to essentially nullify a rule while not in session all will be decided without the input of Montana public education advocates and without any discovery whatsoever; notwithstanding the District

Court's issuance of a preliminary injunction to prevent any possible harm to Plaintiffs.

STANDARDS FOR A WRIT

Article VII, Section 2(2) of the Constitution grants this Court "general supervisory control over all other courts." This Court assumes supervisory control over a district court to direct the course of litigation if the court is proceeding based on a mistake of law which, if uncorrected, would cause significant injustice for which appeal is an inadequate remedy. *Simms v. Montana Eighteenth Judicial District*, 2003 MT 89, ¶18, 315 Mont. 135, 68 P.3d 678. Whether supervisory control is appropriate is determined on a case-by-case basis. *Id*. Acceptance of supervisory control is limited to cases involving purely legal questions, in which the district court is proceeding under a mistake of law causing gross injustice or in which constitutional issues of statewide importance are involved. M.R.App.P. 14(3)(a)-(b). "We have held that supervisory control is an appropriate remedy where a speedy remedy via supervisory control is necessary to serve justice." *BNSF v. Sixth Judicial District Court*, 365 Mont. 556, 286 P.3d 591 (2012).

DISCUSSION

This Court follows federal precedent holding that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Sportsmen for I-143* at ¶12, citing *Idaho Farm Bureau*

v. Babbitt, 59 F.3d 1392, 1397 (9th Cir. 1995). Here, both MQEC and its constituent members supported Rule 1, which has been challenged by Plaintiffs in the underlying case. *Burke Affidavit* ¶¶ *11, 13 & 14.* The District Court erred by failing to follow this precedent. However, even under a more-typical intervention analysis a writ should issue because of the District Court's errors. This Petition will establish that: (1) appeal is an inadequate remedy; (2) failing to permit MQEC's intervention was legal error; and (3) the case involves constitutional issues of statewide significance.

A. POST-JUDGMENT APPEAL IS AN INADEQUATE REMEDY.

Montana does not permit the appeal of denied motions to intervene until final judgment is entered. M.R.App.P. 6(3); *Continental Ins. Co. v. Bottomly*, 233 Mont. 277, 279, 760 P.2d 73, 75 (1988); *DeVoe v. State,* 281 Mont. 356, 363, 935 P.2d 256 (1997). For more than 50 years this Court has held that a writ of supervisory control is an appropriate mechanism to review the denial of intervention:

> If we were not to review this decision immediately, and the pending lawsuit went to completion without the joinder of a proper intervenor, the intervenor would be left at the end of the suit without a proper remedy at law.

State ex rel. Palmer v. Ninth Judicial District Court, 190 Mont. 185, 619 P.2d 1201, 1203 (1980); *Abel v. First Judicial District Court*, 140 Mont. 117, 368 P.2d

572 (1962). See, also, *Sportsmen for I-143* at ¶5; *In re Estate of Bennett*, 2013 MT 230, ¶8, 371 Mont. 275, 308 P.3d 63.

Here, a post-judgment appeal will not protect MQEC's ability to participate in the litigation, briefing and argument of the substantive issues in the case. Rather, the case will have proceeded without it as a party or participant, leaving MQEC unable to develop a factual record upon which the challenged rule it supported can withstand scrutiny. Accordingly, appeal after a final judgment would be an inadequate remedy.

Because post-judgment appeal is inadequate, this prerequisite to the issuance of a writ of supervisory control is satisfied. Furthermore, if intervention was proper and the District Court erred, the ongoing litigation taking place without MQEC as a party is 'needless litigation,' a separate ground on which supervisory control has historically ben granted. *State ex rel. First Bank v. Eighth Judicial District Court*, 240 Mont. 77, 84, 782 P.2d 1260 (1989).

B. THE DISTRICT COURT MADE A LEGAL ERROR IN DENYING THE UNOPPOSED MOTION TO INTERVENE.

Notwithstanding the unopposed nature of the motion to intervene, the District Court, in its *Order on Pending Motions*, found "there is no basis upon which [the district court] can conclude that MQEC is either entitled to intervene or should be allowed to do so." *Order on Pending Motions* at 1.

M.R.Civ.P. 24 provides for both intervention as a matter of right, as well as permissive intervention. MQEC moved to intervene under both prongs of Rule 24. This Court reviews a denial of a motion to intervene under M.R.Civ.P. 24(a) (matter of right) *de novo*. It reviews a denial of a motion to intervene under M.R.Civ.P. 24(b) (permissive) for an abuse of discretion. *In re Adoption of C.C.L.B.*, 2001 MT 66, ¶16, 305 Mont. 22, 22 P.3d 646; *Connell v. Department of Social and Rehab Svcs*., 2003 MT 361, ¶13, 319 Mont. 69, 81 P.3d 1279.

To intervene as a matter of right, an applicant must (1) be timely; (2) show an interest in the subject matter of the action; (3) show that the protection of that interest may be impaired by the disposition of the action; and (4) show that the interest is not adequately represented by an existing party. M.R.Civ.P. 24(a), *JAS, Inc. v. Eisele*, 2014 MT 77, ¶26, 374 Mont. 312, 321 P.3d 113. "Montana's rule is essentially identical to the federal rule which is interpreted liberally." *Sportsmen for I-143* at ¶7, citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983)("Rule 24 traditionally has received a liberal construction in favor of applica[tions] for intervention.")

Neither the District Court nor any of the named parties contend that the application filed only eight days after the *Answer* was filed was untimely or that Montana's largest public school advocacy coalition lacks an adequate protectable

interest in the case—in fact the District Court praised MQEC's past advocacy work, including its support of the challenged administrative rule. *Order* at 2.

The District Court instead rests its denial entirely on the fourth prong – whether MQEC's interests are adequately represented by the Department of Revenue – and its erroneous conclusion "that the expertise of counsel for MQEC will not serve to further elucidate the issues before the Court, nor enhance any earlier preliminary determination of those issues as this case makes its procedural journey to the Montana Supreme Court as it most certainly will." *Order on Pending Motions* at 2.

While the District Court rests its decision only on the fourth prong, this Petition will address each prong of Rule 24(a), starting with the one identified as problematic by the District Court.

1. MQEC's Interests Are Not Adequately Protected by the Department.

The burden of showing inadequacy of representation by other parties is "minimal." *Southwest Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 822-823 (9th Cir. 2001). An applicant-intervenor need only show that the existing parties "may" inadequately represent its interests. *Id*. at 823. In permitting private parties to intervene alongside government, the federal courts recognize the fact that "[t]he interest of government and the private sector may diverge." *Id*. at 823-24.

In assessing the adequacy of representation, the focus should be on the "subject of the action," not just the particular issues before the court. *Id*. at 823.

In this case, the Department seeks vindication of its administrative rules. The MQEC, additionally, seeks to ensure legislative acts strictly conform to the requirements of Montana's Constitution, especially those provisions that separate the funding for public and private education. One way to do that is through the vindication of the administrative rules. However, if that is not possible, MQEC can press the concomitant question that an adverse ruling raises: If a Legislative act is constitutionally valid only with an administrative rule that prevents unconstitutionality, must the act itself fail upon the invalidation of the administrative rule? This is raised squarely in the First Affirmative Defense to the Intervenor's Answer attached to MQEC's Motion to Intervene:

> Without Rule 1 in place, the scholarship program created by SB410 is invalid and violates Art. X, §6 of the Constitution, which prohibits direct or indirect appropriations to sectarian schools.

A state agency is far less likely to vigorously challenge the constitutionality of legislative acts passed by the government body that creates the law and funds the state agency. Moreover, it may be inappropriate for state agencies to challenge legislative acts.

Federal courts test the adequacy of representation by considering: (1) whether the interest of a present party is such that it will undoubtedly make all the

intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect. *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996).

In this case, the Department of Revenue may not be in a position to challenge the underlying constitutionality of SB410, and it may not be in a position to challenge the legislature's use of its polling statute which formed part of the basis of the District Court's grant of a preliminary injunction. It is unlikely a state agency is willing to so directly challenge the legislative branch of government—that is a job for public interest groups such as MQEC. Additionally, MQEC and its constituent members have considerable experience in the area of requiring state compliance with the educational funding mandates of our Constitution and that experience will provide important input to the proceedings that could be overlooked by the religious education advocates representing Plaintiffs and the Department of Revenue.

Accordingly, MQEC's interests are not adequately represented by the Montana Department of Revenue, and intervention should be allowed.

The District Court erred by focusing on the individual capabilities of the Department's counsel, which are not in dispute. A court considering the adequacy of representation should instead focus on the minimal showing required, the liberal

interpretation of M.R.Civ.P. 24, and the fact that a state governmental agency is not likely to go beyond the defense of its administrative rules and fully advocate against the legislative branch's actions.

2. The Motion to Intervene Was Timely.

As stated above, the District Court did not find MQEC's Motion to Intervene—filed eight days after the Department of Revenue's *Answer*—was untimely. Indeed, it is difficult to draft an *Intervenor's Answer* (required by M.R.Civ.P. 24(c)) without an opportunity to reference the named party's *Answer*. Moreover, prior to the Department of Revenue filing its *Answer*, it had a pending motion to dismiss which could have obviated the need for intervention at all.

A motion to intervene has been found untimely when filed: six weeks after actual notice of an entry of judgment, *Grenfell v. Duffy*, 198 Mont. 90, 95, 643 P.2d 1184, 1187 (1982); 16 months after the initiation of a personal injury case, *Estate of Scwenke v. Becktold*, 252 Mont. 127, 132, 827 P.2d 808, 811 (1992); two and one half years after becoming aware of a promissory note at issue, *Archer v. LaMarch Creek Ranch*, 174 Mont. 429, 433, 571 P.2d 379, 382 (1977); and three years after a suit was filed, *Continental Ins. Co. v. Bottomly*, 233 Mont. 277, 280, 760 P.2d 73, 75 (1988).

The primary concern of the timeliness requirement is that the existing parties to the case are not prejudiced. Here, however, no prejudice to the Plaintiffs is

possible because the District Court has already granted them a preliminary injunction preventing the Department of Revenue from enforcing the challenged administrative rule.

3. Applicant-Intervenors Have a Requisite Interest in the Subject of the Case.

The District Court did not find MQEC lacks a requisite interest in ensuring Montana's prohibition on public funding for private religious education is followed.

To intervene as a matter of right, "it is generally enough that the interest [asserted] is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Sierra Club v. USEPA,* 995 F.2d 1478, 1484 (9th Cir. 1993). Here, our Constitution protects against direct and indirect appropriations or payments to private religious schools. This case involves the determination of whether an administrative rule enacted to prevent such payments is valid.

Further, public interest groups may intervene when they have a significant interest in the outcome of litigation. So, for example, in *Idaho v. Freeman,* 625 F.2d 866 (9th Cir. 1980), Idaho and Arizona sued the General Services Administration over the procedures for ratification of the Equal Rights Amendment. The National Organization for Women (NOW) was permitted to

intervene because the amendment it supported "would as a practical matter be significantly impaired by an adverse decision[.]" *Freeman* at 887.

MQEC is a broad-based statewide public school advocacy organization with a long-standing considerable interest in public school funding issues. *Burke Affidavit*, ¶¶ 7 – 14. The outcome of this litigation as a practical matter would impair or impede its mission by permitting diversion of public money away from public education. This factor is met.

4. Disposition of the Case Below May Impair or Impede MQEC's Interests.

Again, the District Court did not find that this factor was not met. MQEC and its members have long worked to increase funding to public education and oppose measures that would divert funding to private schools. *Id.* SB410 creates a means by which $3,000,000 per year is taken from public coffers and moved into the hands of private religious schools. This litigation serves as a "test case" for further legislative efforts to direct public funds to private schools, the precise sort of action MQEC opposes. Thus, the decision in the District Court may impair or impede MQEC's interests.

C. THIS CASE INVOLVES STATEWIDE ISSUES OF CONSTITUTIONAL SIGNIFICANCE.

The action proceeding in the district court will determine whether or not the Montana Legislature may use "tax credits" to move a preordained amount of money to private religious schools—money that would otherwise be paid to the

State in the form of tax receipts. The Montana Constitution forbids both indirect and direct appropriations and payments to private religious schools. *Mont. Const. Art. X, §6.*

Our state constitutional prohibition on aid to religious education is stronger than any prohibition in the federal constitution and was ratified in the 1972 Montana State Constitution—and has rarely been tested since. But, see, *Kaptein ex. rel. Kaptein v. Conrad School Dist*., 931 P.2d 1311, 1319 (1997)(J. Grey, J. Nelson concurrence). The case below is not the run-of-the mill squabble between private litigants, but an engine that has the potential to bring significant change to the way education is funded in Montana. It clearly involves issues of statewide constitutional significant and a writ of supervisory control should issue.

CONCLUSION

MQEC respectfully requests this Court stay the proceedings in the District Court pursuant to M.R.App.P. 14(7)(c) so no ruling on the premature summary judgment motion is made. MQEC further requests this Court issue a Writ of Supervisory Control to permit its intervention in the case and its meaningful opportunity to participate through discovery and briefing, including provision of a reasonable amount of time to develop a factual record.

DATED this 19th day of August, 2016.

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By: _____
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(9)(b) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionally spaced, Times New Roman typeface of 14 points and that the text of this Petition contains fewer than 4,000 words as counted using the Microsoft Word program.

By: _____
JONATHAN McDONALD

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this PETITION FOR WRIT OF SUPERVISORY CONTROL was mailed, postage prepaid upon the following:

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