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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER, Plaintiffs, v. MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE, Defendants.	))))))))))))))))	Cause No. DV 15-1152A Judge David M. Ortley **PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION**

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I. INTRODUCTION

Plaintiffs are mothers of children attending the Stillwater Christian School in Kalispell, Montana. Despite receiving modest amounts of financial aid, they struggle to afford the tuition for their children's continued attendance and hope to benefit from Montana's newly enacted Scholarship Tax-Credit Program ("Tax-Credit Program" or "Program"). Because of the actions of Defendants Department of Revenue ("DOR") and its director, Mike Kadas, however, they will be unable to receive any potential scholarships generated by the new Program, solely because their children attend a religious school.

The Legislature passed the Program last May in order to provide all families with school choice, regardless of the size of their bank account. The way the Program works is by providing a modest tax credit (up to $150 annually) to individuals and businesses who donate to private scholarship organizations. Those scholarship organizations (SOs) will then use the donations to give scholarships to families who want to send their children to private schools. The statute authorizing the Program allows families to select any "qualified education provider," defined broadly to include virtually any private school in the State.

Last month, however, DOR promulgated a rule that improperly narrowed the statutory definition of "qualified education provider" to include only non-religious private schools. ("Rule 1"). Not only does Rule 1 defy the plain text of the Program, but it also violates the Religion and Equal Protection Clauses of the state and federal Constitutions. Plaintiffs seek a preliminary injunction from this Court prohibiting the Defendants from enforcing Rule 1.

DOR bases Rule 1 on two provisions of the Montana Constitution, Article V, § 11(5) and Article X, § 6(1). Neither of these provisions justifies excluding religious schools from the class of schools at which the Legislature intended parents to be able to use scholarships generated by tax credits for their children.

First, Article V, § 11(5) addresses bills passed by the Legislature and provides that "No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state." This provision is intended to prevent private bills, in tandem with the next section, § 12, "Local and special legislation," which provides that "[t]he legislature shall not pass a special or local act when a general act is, or can be made, applicable." This provision is limited

to "appropriations" and has no applicability to a tax-credit program. Indeed, the case law is unanimous on this point.

Second, Article X, § 6(1), entitled "Aid prohibited to sectarian schools," states:

> The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property 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.

Similar to Article V, § 11(5), this provision is limited to "direct or indirect appropriation[s]," "payment from ... public fund[s] or monies," and "grant[s] of lands or other property," none of which encompass tax credits. Nor are such tax credits provided "for [a] sectarian purpose," nor "to aid" "any church [or] school." The purpose of the tax credits is to help raise scholarships for families, not to aid whatever schools those families happen to select for their children.

Because DOR has no proper legal grounds to narrow the statutory definition of "qualified education provider," DOR's Rule is *ultra vires*. Specifically, it violates the Montana Administrative Procedure Act, which prohibits agencies from enacting rules that are inconsistent with the statute being implemented. § 2-4-305(6)(a), MCA. Moreover, DOR's exclusion of religious schools violates Plaintiffs' rights under the Religion Clauses and the Equal Protection Clauses of the Montana and U.S. Constitutions by discriminating against religion. For these reasons, and because Plaintiffs' rights are being irreparably harmed, Plaintiffs request this Court issue a preliminary injunction enjoining implementation of Rule 1.

II. FACTUAL BACKGROUND

A. Introduction.

With the enactment of Montana's Tax-Credit Program, Montana joined a rapidly growing number of states that are enhancing the ability of parents to choose their children's schools. These states, including Montana, have expanded parents' opportunities to select a private school education for their children. These private-school choice programs fall into two broad categories determined by their legal structures.

The first category consists of scholarship programs funded by the state through appropriations, in which a state agency awards scholarships to eligible families to attend participating private schools. These programs are often characterized by opponents as "voucher"

programs rather than as "scholarship" programs, because while most people understand what scholarships are, far fewer people understand what vouchers are. There are currently 27 of these programs enacted in 16 states and the District of Columbia.[1]

The second category of scholarship programs consists of programs where states use personal and/or corporate income tax credits to generate privately-funded scholarships for eligible students. Montana's new tax-credit program falls within this category. Arizona enacted the first such program in 1997. It was promptly challenged under the federal Establishment Clause and Arizona's Blaine Amendment[2] for allowing parents to choose religious schools. The Arizona Supreme Court upheld the inclusion of religious schools in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999), holding that tax credits are not appropriations of state funds subject to that state's Blaine Amendment. The Arizona Supreme Court based its rejection of the federal Establishment Clause challenge on *Mueller v. Allen*, 463 U.S. 388 (1983), which upheld state tax deductions for tuition payments, almost all of which went to religious schools, and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), which upheld property tax exemptions for the property of churches and religious schools.

A large number of states before Montana have followed Arizona's lead and enacted tax-credit scholarship programs, including Alabama, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Virginia.[3] Many of these states have Blaine Amendments similar to Montana's in their state constitutions, but to date, no tax-credit scholarship program has been struck down on the basis of allowing parents to choose religious schools—despite a number of challenges on that basis.[4] The

[1] The Friedman Foundation for Educational Choice, *The ABCs of School Choice*, 2015 edition, lists 23 such programs, and since that document's publication, Arkansas, Mississippi, Nevada, and Tennessee have enacted additional programs.

[2] Arizona's Blaine Amendment, found at Article II, § 12 of its Constitution, provides that: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." This provision, and others like it, are referred to as "Blaine Amendments" because they were modeled after a failed federal constitutional amendment proposed by Congressman James G. Blaine in 1875.

[3]These programs are described in *The ABCs of School Choice*, *supra* note 1.

[4] *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("Like contributions that lead to charitable tax deductions, contributions yielding [SO] tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."); *Magee v. Boyd*, 175 So. 3d 79, 136 (Ala. 2015) (finding that a refundable school choice tax-credit program was

case law is unanimous that tax credits and other tax benefits do not constitute the appropriation of state funds subject to the prohibitions on appropriating state funds to religious schools.[5] In fact, every school-choice tax-credit program that has been so far challenged on *any* basis has been upheld.

B. Montana's Tax-Credit Program.

The Montana Legislature passed the Montana Tax-Credit Scholarship program on May 8, 2015 as part of SB 410, to "provide parental and student choice in education." SB 410, § 7 (Attached as Ex. A). The Program went into effect on January 1, 2016. *Id.* § 31.

The Program encourages the formation of private scholarship organizations for the purpose of receiving donations. The SOs raise funds through donations, which they must distribute as scholarships to families who wish to start sending their children to private schools or who have children already attending private schools. *Id.* § 9. Eligible children must be Montana residents who are at least five years old and not older than 18 years old by September 10 of the school year in which they wish to use the scholarship. *Id.* § 8(2). SOs must allow

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constitutional in part because "a tax credit cannot be equated to a government expenditure"); *Kotterman*, 972 P.2d at 618 ¶ 40 ("For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before."); *Toney v. Bower*, 744 N.E.2d 351, 357 (Ill. App. Ct. 2001) (finding that the terms "public fund" and "appropriation" were not broad enough to encompass a tax credit and concluding that to find otherwise would "endanger the legislative scheme of taxation"), *appeal denied*, 754 N.E.2d 1293 (Ill. 2001); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. Ct. 2001) (same), *appeal denied*, 755 N.E.2d 477 (Ill. 2001); *McCall v. Scott*, No. 2014 CA 002282, slip op. at 4 (Fla. Cir. Ct. May 18, 2015) (concluding that tax-credit-eligible donations to private scholarship organizations are not public appropriations); *see also Bush v. Holmes*, 886 So. 2d 340, 356 (Fla. Dist. Ct. App. 1st Dist., 2004), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006) (stating that under Article 1, § 3, state government may provide "a form of assistance to a religious institution through such mechanisms as tax exemptions, revenue bonds, and similar state involvement" because "[t]hese forms of assistance constitute substantially different forms of aid than the transfer of public funds").

[5] *Id.* at n.4. *See also Manzara v. State*, 343 S.W.3d 656, 661 (Mo. 2011) ("The tax exemptions in [another case] and the tax credits here are similar in that they both result in a reduction of tax liability. The government collects no money when the taxpayer has a reduction of liability, and no direct expenditure of funds generated through taxation can be found."); *State Bldg. & Constr. Trades Council v. Duncan*, 162 Cal. App. 4th 289, 294, 299 (2008) (finding that "[t]ax credits are, at best, intangible inducements offered by government, but they are not actual or de facto expenditures by government" and thus "tax credits do not constitute payment out of public funds" under a state statute); *Olson v. State*, 742 N.W.2d 681, 683 (Minn. Ct. App. 2007) (concluding that tax credits and tax exemptions are not public expenditures).

recipients of their scholarships to use their scholarships at any private school. *Id.* at §§ 8(9)(b)&(c), 9(1)(b).

Individuals and corporations who donate at least $150 to a scholarship organization ("SO") can receive a maximum $150 tax credit against their annual state income tax. *Id.* § 14(1). A donor cannot receive a tax credit that exceeds the donor's tax liability, and the credit must be applied in the year the donation is made. *Id.* § 14(3) & (4). Donors also cannot receive a tax credit for any amount they deducted on their state taxes as a charitable contribution to a § 501(c)(3) organization. *Id.* § 14(6). Donors additionally may not direct or designate their donations to a parent, legal guardian, child, or school. *Id.* § 14(1).

The maximum aggregate amount of annual tax credits allowed for the Program is $ 3 million, beginning in tax year 2016. *Id.* at 14(5)(a)(i). Every year the maximum is met, the maximum amount will increase by 10 percent for the next year. *Id.* at 14(5)(a)(ii). The Department of Revenue must approve the tax credits on a first-come, first-served basis. *Id.* § 14(5)(b).

SOs are free to consider a family's financial need in selecting scholarship recipients. However, SOs cannot give any scholarship that exceeds 50 percent of the average amount the state spends on children attending the public schools,[6] nor can any scholarship recipient accept two or more scholarships that total more than 50 percent of that amount. *Id.* §§ 9(1)(d), 10(2); *see also id.* § 22. In addition, SOs' average scholarship amount cannot exceed 30 percent of that amount.[7] *Id.* § 9(1)(e). SOs must distribute at least 90 percent of the donations received as scholarships, retaining at most 10 percent for administrative expenses. *Id.* § 8(9)(b).

The SOs must register with DOR and must acquire tax-exempt organization status with the IRS under § 501(c)(3) of the Internal Revenue Code. *Id.* § 8(9)(a). SOs must undergo an annual fiscal review by an independent certified public accountant and submit the fiscal review report to DOR. *Id.* § 11(1)(b)&(c). DOR has the power to inspect the documents of the SOs and to terminate an SO if it fails to operate in compliance with the Program. *Id.* § 16.

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[6] According to the Montana Office of Public Instruction, the per-pupil average of total public school expenditures in Montana for fiscal year 2013 was $10,418. Mont. Office of Public Instruction, Tax Credits for Education Donations, http://opi.mt.gov/pub/PDF/SchoolFinance/TaxCreditsEdDonations.pdf. Fifty percent of $10,418 is $5,209.

[7] Thirty percent of that amount is $3,125.40.

Scholarship recipients may use their scholarships at "any qualified education provider." *Id.* at §§ 8(9)(b)&(c), 9(1)(b). SB 410 defines a "qualified education provider" very broadly to allow virtually all private schools to participate in the Program, whether religious or nonreligious. *Id.* § 8(7).[8] The legislative history and a recent poll of the Legislature confirm that the Legislature intended that the Program allow scholarship recipients to select both religious and nonreligious schools.[9]

Indeed, as designed, scholarships awarded under the Program are used at whatever private schools the parents select. The SOs have no say in the selection because they must allow parents to use the scholarships at any private school. Similarly, the donors cannot target their donations to any particular student, school, or group of schools, because of the Program's rules, including the rule that SOs must allow free choice of schools by the scholarship recipient families. Accordingly, the only way scholarship proceeds can enter the coffers of any private school, religious or otherwise, is as payment from parents for educational services rendered to their children.

C. DOR's Rule 1.

Arguing that the statute authorizing the Program is inconsistent with Article V, § 11 and Article X, § 6 of the Montana Constitution, DOR proposed Rule 1 on October 15, 2015 as part of a notice of public hearing on rules implementing the Program. Rule 1 excludes from the definition of qualified education provider any school or individual "owned or controlled in whole or in part by any church, religious sect, or denomination," including any school accredited "by a

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[8] The definition of "qualified education provider" in § 8(7) is an education provider that is not a public school or a home school. The education provider must also (1) be accredited, provisionally accredited, or seeking accreditation by a state, regional, or national accreditation organization or (2) have advised a student's parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation. The education provider must meet the applicable health and safety requirements for private schools in Montana. It must also administer a nationally recognized standardized assessment test or criterion-referenced test for all 8th grade and 11th grade students, provide the overall scores on a publicly accessible private website or provide the composite results of the test to the office of public instruction for posting on its website, and make the results available to the child's parents or legal guardian. The provider must also qualify for an exemption from compulsory enrollment under 20-5-102(2)(e) and 20-5-109, MCA.

[9] Results of the Poll of the Legislature: MAR Notice No. 42-2-939 (Dec. 1, 2015) (Attached as Ex. B).

faith based organization."[10] After receiving a significant number of comments both pro and con, including at a public hearing held on November 5, 2015, DOR announced on December 14, 2015 that it was adopting Rule 1 without change.

In its "Notice of Adoption," DOR addressed the written and oral comments it had received[11] and stated in response to a comment from Senator Llew Jones, the sponsor of SB 410, that "[i]n the department's opinion the tax credit is at the very least an indirect payment, and therefore may not be made available to sectarian schools."[12] In response to another comment, DOR stated that "[t]he tax credits here are unique to donations to private schools and are limited by these two specific constitutional provisions [Article V, § 11(5) and Article X, § 6], which distinguishes this tax credit from other allowable tax credits."[13]

The Institute for Justice, a public interest law firm based in Arlington, Virginia that has represented parents in school choice lawsuits since its founding in 1991, and which represents Plaintiffs here, presented oral and written comments asserting that Rule 1 is unjustifiably inconsistent with the Program statute as written and that it violates the Montana and federal Constitutions.

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[10] Rule 1 states:

> (1) A "qualified education provider" has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, may not be:
>
> (a) a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination; or
>
> (b) an individual who is employed by a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination when providing those services.
>
> (2) For the purposes of (1), "controlled in whole or in part by a church, religious sect, or denomination" includes accreditation by a faith-based organization.

(Attached as Ex. C).

[11] Notice of Adoption at 2334-2347 (Attached as Ex. D).

[12] *Id.* at 2334 ("Response 6").

[13] *Id.* at 2335 ("Response 9").

Dale Schowengerdt, Solicitor General for Montana, also filed written comments, in which he concluded that Rule 1 is not authorized or required by the Montana Constitution and "would put Montana's Constitution in conflict with the U.S. Constitution."[14] Mr. Schowengerdt's comments also stated that if DOR persisted in its view and adopted Rule 1, the Department of Justice would be unable to defend DOR's position.[15] DOR rejected these comments.

Stillwater Christian School, where Plaintiffs send their children, is accredited by the Association of Christian Schools International ("ACSI"), a faith-based organization.[16] Under Rule 1, Stillwater Christian School cannot be a "qualified education provider" and scholarships generated by the Tax-Credit Program cannot be used there. Consequently, Plaintiffs' children are and will continue to be ineligible to receive Program scholarships as long as they continue at Stillwater Christian, unless this Court enjoins implementation of Rule 1.

III. LEGAL STANDARD

Plaintiffs have the burden of establishing a right to a preliminary injunction; here, Plaintiffs more than meet the requisite standard. A preliminary injunction may be issued if:

> (a) it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
>
> (b) it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant; [or]
>
> (c) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual.[17]

§ 27-19-201, MCA; *Mont. Cannabis Indus. Ass'n v. Montana*, 2012 MT 201, 14, 366 Mont. 224, 228, 286 P.3d 1161. The Legislature's language is in the disjunctive, so a party moving for a

[14] *Id.* at 2344 ("Comment 35").

[15] Comments from Dale Schowengerdt, Solicitor General, Mont. DOJ, to Mont. Dep't of Rev (Nov. 17, 2015) (Attached as Ex. E).

[16] Association of Christian Schools International Homepage, https://www.acsi.org/.

[17] The statute also sets forth two other prongs, (d) & (e), which relate to property disputes and orders of protection. These prongs are not applicable here. *See* § 27-19-201, MCA.

preliminary injunction is entitled to relief even if only one prong is met. *Sweet Grass Farms, Ltd v. Bd. of Commrs. of Sweet Grass County*, 2000 MT 147, ¶ 27, 300 Mont. 66, 72 2 P.3d 825. Here, Plaintiffs are entitled to relief on each of the three prongs.

IV. ARGUMENT

Although Plaintiffs need satisfy only one of the three prongs for injunctive relief, they establish all three. On the first prong, they are entitled to the relief sought because Rule 1 is based on clear misinterpretations of the two constitutional provisions upon which DOR relies, and is thus *ultra vires*. On the second prong, they are being irreparably harmed by the chilling effect that Rule 1 is having on both SO creation and fundraising, which make it almost certain that Plaintiffs will be unable to receive scholarships for the 2016-2017 school year if they were to prevail in this action. On the third prong, DOR's implementation of Rule 1 threatens to violate Plaintiffs' rights to religious liberty and equal protection under both the Montana and U.S. Constitutions. Plaintiffs address the second and third prongs, before addressing the first.

A. If DOR Is Not Enjoined from Implementing Rule 1, Plaintiffs Will Suffer Irreparable Harm.

The Program became effective on January 1, and DOR's Rule is already severely crippling its implementation. By excluding the majority of private schools from participating, the Rule dramatically reduces both the incentive of SOs to form and of donors to give. As a result, even if Plaintiffs were to prevail in this action as early as this summer, it would still be too late for them—and families like them—to receive Program scholarships to send their children to a religious private school for the 2016-2017 school year.

Plaintiffs should not have to spend months—and even years—suffering anxiety and financial hardship as they struggle to pay tuition during the pendency of this litigation. If Plaintiffs are unable to receive scholarships for the next school year, they may even have to pull their children out of their school. This irreparable harm can all be avoided with an immediate injunction.

In order for the Program to be successful in the 2016-2017 school year, SOs need to form and vigorously fundraise this winter. Indeed, having a successful SO takes several time-intensive steps, almost all of which need to happen in the next few months for an SO to be able to award scholarships in time for the 2016-2017 year. These steps include: (1) forming the SO, (2) applying for tax exempt status under § 501(c)(3) of the Internal Revenue Code, (3) soliciting donations from taxpayers, including by publicizing the availability of the new tax credits to the

public, (4) establishing internal procedures for accepting applications and selecting applicants, (5) publicizing the availability of new scholarships to potential applicants, and (6) beginning to accept applications.

Importantly, an SO must notify its scholarship applicants as soon as possible on whether they will be awarded a scholarship, so that families can make an informed decision about where they can send their child for the next year. That means that typically, all SO scholarships are awarded by early summer—and usually earlier.

But Rule 1 is severely inhibiting this process. By excluding the lion's share of the private school marketplace,[18] the Rule substantially reduces both the incentive of SOs to form and the likelihood that Montana taxpayers will make use of the available tax credits by donating to SOs. This will in turn reduce the number of scholarships SOs can make available to the intended beneficiaries of the Program.

Thus, even if Plaintiffs were fortunate enough to prevail in this action before the next school year starts, the Rule would still prevent them from obtaining scholarships for that year; the little money that SOs would have been able to raise under the crippled program would have already been given to children attending nonreligious schools. Indeed, by this summer, it will most likely already be too late for families who wish to use scholarships at a religious school to even *apply* to an SO. Plaintiffs—and families like them—would have no choice but to wait yet another school year for a scholarship.

This is a wait that Plaintiffs cannot afford. Plaintiffs are all low-income families who make tremendous financial sacrifices to afford to send their children to Stillwater Christian. *See* Espinoza Aff. ¶¶ 2, 5-8, 12-14; Anderson Aff. ¶¶ 1, 6, 13-16; Schaefer Aff. ¶¶ 4, 8-9. Kyndra and Jeri are single moms and Kyndra and Jaime have both taken on extra work just to make ends meet. *Id.* They do not know on a year-to-year basis whether they will be able to continue paying tuition. *Id.* Plaintiffs should not have to continue to bear this emotional and financial burden—and risk pulling their children out of the schools in which they thrive—while they wait for their constitutional rights to be vindicated.

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[18] According to Private School Review, there are 126 private schools in Montana, of which 85 (67 percent) are religiously affiliated. *See* Montana Private Schools, Private School Review, http://www.privateschoolreview.com/montana.

B. DOR's Rule Threatens the Rights of Plaintiffs that Are the Subject of this Action.

DOR's Rule threatens two constitutional rights of the Plaintiffs: (1) their right to direct the education of their children, and (2) their right to religious liberty.

Parents have a constitutional right to direct the education of their children. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). In *Pierce*, the U.S. Supreme Court rejected the Oregon electorate's efforts to require that all children attend the public schools by making it illegal for them to attend private schools. Similarly, the Montana Supreme Court recognized, in *In the Matter of the Adoption of A.W.S. and K.R.S. v. A.W.*, 2014 MT 322, ¶ 16, 377 Mont. 234, 238, 339 P.2d 414, 417, that the right to parent is a fundamental right under the Montana and U.S. Constitutions, noting that the U.S. Supreme Court has said that a parent's interest in the custody of a child "is perhaps the oldest of the [recognized] fundamental liberty interests." (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). For all too many families, however, the right to send their children to private schools is ineffective because the families lack the financial means of paying for a private school education. School choice programs such as Montana's Program seek to enhance parents' ability to exercise this fundamental right to direct their children's education.

Parents also have a right to religious liberty guaranteed by the Religion Clauses of both the Montana and U.S. Constitutions. Montana's Constitution Article II, § 5 provides that "[t]he state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This language is obviously modeled on the First Amendment to the U.S. Constitution, which provides in relevant part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The U.S. Supreme Court applies the federal Religion Clause against the states as well as Congress. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). These liberties taken together include the right of parents to select religious private schools when exercising their rights to direct their children's education. The loss of such constitutional rights constitutes irreparable harm under § 27-19-201, MCA.

C. Plaintiffs Are Entitled to the Relief They Seek.

Plaintiffs are entitled to the relief they seek for three main reasons: (1) Rule 1 contradicts the Program statute; (2) the Montana Constitution does not require Rule 1; and (3) Rule 1

actually violates the Religion and Equal Protection Clauses of both the Montana and federal Constitutions.

It is undisputed that Rule 1 redefines the statutory term "qualified education provider" to exclude religious schools, but DOR asserts that such action is necessary to conform to Article V, § 11(5) and Article X, § 6. In subsections 1 and 2 below, Plaintiffs demonstrate that neither provision relied on by DOR requires the exclusion of religious schools. Because DOR relies on a misunderstanding of these two constitutional provisions, it is not justified in failing to implement the statute as written by the Legislature. As such, its action is *ultra vires,* and it has violated § 2-4-305(6)(a), MCA by enacting a rule that is not "consistent" with the statute it is implementing. Moreover, as explained in subsection 3, the Rule violates the rights to religious freedom and equal protection in the Montana and federal Constitutions.

1. Article V, § 11(5) Does Not Support DOR's Rule 1.

Article V, § 11(5) does not apply to the Tax-Credit Program because this provision only applies to government appropriations, and the case law in Montana and across the country is unanimous that tax credits are not government appropriations.

Article V, § 11(5) provides as follows: "No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state." Article V is entitled "[t]he Legislature," and the plain language of Article V, § 11(5) forbids legislative "appropriations." The Tax-Credit Program, however, is not funded by legislative appropriations. Scholarships available under the Program are funded exclusively through private funds donated to private organizations, the SOs. The Program encourages those donations of private funds by allowing very modest tax credits to individuals and corporations for those donations to private charitable 501(c)(3) organizations that use the donations to fund scholarships awarded to families. Moreover, accepting DOR's reading of the word "appropriation" as encompassing the allowance of tax credits would jeopardize two pre-existing tax-credit programs that allow individuals and corporations to contribute funds directly to religious schools.

Montana case law shows that tax credits are not government appropriations. In *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 78, 195 P. 841, 845 (1921), the Montana Supreme Court defined an appropriation as:

> [A]n authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands against the state. It means the setting apart of a portion of the public funds for a public purpose, and there must be money in the fund applicable to the designated purpose to constitute an appropriation.

To reach the above definition, the Court in *Dixon* reviewed all instances in the 1889 constitution where the word "appropriation" appeared, including the predecessor to Article V, § 11(5). The current 1972 Constitution has renumbered and modified these provisions to some extent. Those revisions, however, have not expanded the meaning of the word appropriation to encompass the creation of tax credits, with which the Montana tax code is replete.[19]

The First Judicial District for Lewis and Clark County recently applied the *Dixon* definition to a lawsuit involving a legislative referendum to create a tax credit in *MEA-MFT v. McCulloch*, No. BDV, 2011-961, 2012 Mont. Dist. LEXIS 20 (2012), and held that tax credits do not constitute appropriations. In the order, Judge Sherlock stated that "[n]o Montana cases seem to be on point," 2012 Mont. Dist. LEXIS 20 at 5, but cited with approval a similar case addressed by the Supreme Judicial Court of Massachusetts, *Tax Equity Alliance for Mass., Inc. v. Comm'r of Rev.*, 401 Mass. 310 (1987), holding that a tax credit was not an appropriation. He quoted that Court's conclusion that:

> The granting of an income tax credit is not an appropriation according to any commonly understood sense of the word. An appropriation designates a sum of money to be devoted to some object. Even accepting that a "specific" appropriation under [the initiative] does not mean a definite dollar amount, we see nothing in the proposed measure that designated that any money in the treasury of the Commonwealth be devoted to any purpose.

Nor are the Montana and Massachusetts courts alone in distinguishing between appropriations and tax credits. Numerous other courts have concluded that tax credits are

[19] *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (Mont. 1975), which partially overruled *Dixon*, is not to the contrary. That case held that the 1972 Constitution extended the appropriation power of the legislature to revenues received from sources other than the general fund. The Court stated that "the legislative appropriation power now extends beyond the general fund and encompasses all those public operating funds of state government," referring to an additional eight funds enumerated in the Treasury Fund Structure Act of 1963. Thus, while the 1972 Constitution broadened the funds from which appropriations could be made, it did not change the meaning of the word appropriation to include funds in private hands that remain there thanks to tax credits created by the Legislature.

materially distinct from—and therefore do not constitute—appropriations. These include the U.S. Supreme Court, three more state supreme courts, and three state appellate courts.[20]

In addition, holding that the Program credits constitute appropriations of state funds would jeopardize several pre-existing tax credits—if not every tax-credit program in the State. The Department of Revenue's website lists 25 "Individual Income Tax Incentives" that individual taxpayers can use on their Montana tax forms, with the statutory cites for each.[21] Plaintiffs note that at least two of these tax credits, the "College Contribution Credit,"[22] and the "Qualified Endowment Credit,"[23] allow tax credits for contributions made to endowment funds of educational institutions, including Montana private colleges,[24] several of which are religious and all of which would fall into the category of promoting educational purposes under Article V, § 11(5). Plaintiffs are at a loss to understand why DOR believes that it violates Article V to allow taxpayers to receive tax credits if they donate to SOs awarding scholarships that parents may use to send their children to religious schools, when it does not violate Article V to allow taxpayers to receive tax credits if they donate *directly* to religious schools.

Moreover, Montana also allows taxpayers to take charitable deductions for donations made to these same religious schools and churches.[25] While deductions are less beneficial than the modest tax credits provided by the Program, which specifies that to the extent a taxpayer receives a credit for her donation she may not receive a deduction also, nothing prevents a taxpayer from donating more than the creditable amount and taking a deduction for the amount in excess of the permissible credit. That DOR's Rule 1 forbids taxpayers making donations to an SO from receiving tax credits for any part of their donations, while DOR simultaneously allows

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[20] *See supra* notes 4 & 5.

[21] Mont. Dep't. of Rev., Individual Income Tax Incentives, https://revenue.mt.gov/Portals/9/individuals/IncomeTax_Incentives/IndividualIncome_TaxIncentives.pdf.

[22] §§ 15-30-2326, 15-31-135 through 15-31-136, MCA.

[23] §§ 15-30-2327 through 15-30-2329, 15-31-161, 15-31-162, MCA.

[24] DOR's College Contribution Credit tax form lists eligible institutions and includes Carroll College, Rocky Mountain College, and the University of Great Falls, which are all religiously affiliated.

[25] § 15-30-2131, MCA ("Deductions allowed in computing net income") allows deductions for charitable contributions, which is also reflected on Schedule III to the Montana Income Tax Form entitled "Montana Itemized Deductions."

the same taxpayers to take tax deductions for those very same donations, borders on the nonsensical. It certainly violates the Montana Supreme Court's admonition in *Mills v. Stewart*, 76 Mont. 429, 441, 247 P. 332, 335 (1926), that "[c]ommon sense is the essence of the law, and that which is not good sense is not good law."

In addition, DOR's Rule does not make sense on its own terms because it is internally inconsistent. It applies Article V, § 11(5) to disqualify only religious schools from participation in the program and permits nonreligious schools to participate. If it violates Article V to provide tax credits resulting in scholarships to families choosing religious schools because those are "appropriations" to private individuals for "educational" purposes, then it must also violate Article V to provide scholarships to families choosing <u>non</u>religious schools for "educational" purposes. Yet Rule 1 only disqualifies religious schools from participating in the Program.

2. Article X, § 6(1) Does Not Support DOR's Rule 1.

Similarly, the plain language of Article X, § 6(1), which forbids "direct or indirect appropriation or payment from any public fund or monies" to religious schools, does not apply to the award of tax credits. Section 6 reads in full:

> Aid prohibited to sectarian schools.
>
> (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property 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.
>
> (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

Because the Program does not make any direct appropriation, or payment of funds or monies or grant any lands or other property for a sectarian purpose or to aid religious schools, it is obvious that in Rule 1 DOR must be interpreting the award of tax credits to be some sort of "indirect" appropriation, payment, or grant for a sectarian purpose or to religious schools.

There are two primary flaws underlying DOR's interpretation of Article X. First, as with Article V, § 11(5), tax credits are neither appropriations nor payments from public funds nor grants of property. The credits simply incentivize private donations to private organizations that provide scholarships to private individuals. The only funds involved are private dollars. Second,

Article X, § 6 does not forbid direct or indirect "appropriations" to individuals and families like Plaintiffs, let alone forbid other taxpayers from aiding parents like Plaintiffs. DOR misunderstands what an "indirect" appropriation or payment of public funds to religious schools is.

As a result, DOR has stretched the use of "indirect" so far that it places DOR in the position of violating the religious liberties and equal protection rights secured by the Montana and U.S. Constitutions. To avoid this conflict, this Court need only give the words of Article X, § 6 their ordinary and plain meaning.

a. The Program makes no "direct or indirect appropriation" or "payment."

The first of the primary flaws underlying DOR's Rule 1 is that the Program makes no direct or indirect appropriations or payments or grants of land or property to anyone, let alone a prohibited entity. This is the same mistake DOR makes with respect to Article V, § 11(5). The tax credits are neither direct nor indirect appropriations of funds from the treasury, as the donations made to the SOs are solely private funds. The same cases supporting Plaintiffs' argument regarding Article V apply with equal force to the use of the term "appropriations" in Article X.

Obviously, the actions prohibited in Article X are broader by encompassing payments from public funds or monies and grants of land or other property. This doubtless reflects the broader set of entities covered by Article X. Article V addresses only the Legislature, which funds activities through legislative appropriations, while Article X limits counties, cities, towns, school districts, and public corporations, in addition to the Legislature. Although some of these entities may make legislative appropriations, others of them obviously do not, but each could pay public funds or monies or grant lands or other public property. But the expanded list of prohibited activities still does not include the action DOR seeks to limit through Rule 1: tax credits to encourage private parties (i.e., taxpayers) to donate to scholarship-granting charitable institutions.

There are no direct appropriations, payments, or grants made as part of the Program, so any interpretation of Article X must rest on the prohibition of "indirect" appropriations, payments, or grants of property. But such an expansive reading of indirect appropriations, payments or grants is unjustified by Montana case law and logic. To do something indirectly means to accomplish the same end as if done directly. Some examples from Religion Clause

cases challenging public expenditures to religious entities illustrate the correct meaning of "indirectly."

In *Rosenberger v. Rector and Visitors of the University of Virginia*, the state university had a program providing subsidies to student publications from public funds. 515 U.S. 819 (1995). Based upon its reading of a Virginia Blaine Amendment and the federal Establishment Clause, the university refused to subsidize the publications of religious groups. The subsidies were not paid to the student organizations directly but rather sent to the publishers in payment of the organizations' obligations. No public funds passed through or ended up in the hands of the student organizations. Although student organizations received no actual funds, paying the publishers indirectly conferred precisely the same benefit as if the organizations had received the funds directly and then paid the publishers.

Similarly, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the states of Pennsylvania and Rhode Island had created salary supplement programs for teachers teaching secular subjects in nonpublic schools. Rhode Island provided the subsidies to the teachers, while Pennsylvania reimbursed the nonpublic schools themselves. In both cases, the nonpublic schools received aid from the programs because paying teachers is an essential expense of operating a school. The Rhode Island schools received the aid directly, while the Pennsylvania schools received it indirectly. Whether paid directly to the school or indirectly by payment to the teacher, the payments defrayed essential costs of the private schools and provided aid to them.

A year before *Lemon* was decided, the Montana Supreme Court addressed a similar program in its decision most relevant to this case. In *State ex rel. Chambers v. School District*, School District No. 10 of Deer Lodge County passed a tax levy to employ eight additional high school teachers to teach secular courses at the parochial high school in that county, Anaconda Central High School, which was owned, operated and controlled by the Roman Catholic Church. 155 Mont. 422, 472 P.2d 1013 (Mont. 1970). The Court held that Article XI, § 8 (the 1889 Constitution's precursor to Article X, § 6) clearly prohibited providing publicly paid teachers to the parochial school. Because no money was directly appropriated or paid to the parochial school, the Court implicitly found an indirect appropriation or payment to the school.

The common factor in these three cases is that whether the funds were appropriated directly to the schools or indirectly by paying necessary expenses of the schools, the governmental appropriations or payments benefitted the schools in precisely the same way—by

defraying their essential costs. Such institutional assistance was prohibited by these cases, whether received directly or indirectly.

The tax credits provided in the Program are quite different. No governmental entity will provide assistance to prohibited recipients by means of appropriations, payments, or grants of funds or other property. Tax credits such as those provided under this program obviously encourage taxpayers to donate to qualified SOs, but the taxpayers are not governmental entities, the decisions they make to donate are private decisions, and the donations they make are not governmental funds. The beneficiaries of the scholarships generated through these donations are the eligible families, not the schools chosen by the beneficiaries. Article X, § 6(1) is no more applicable to students and the Program than is Article V, § 11(5).

Finally, Plaintiffs note that the Montana Constitution has always authorized the Legislature to exempt from property taxation "[i]nstitutions of purely public charity, hospitals and places of burial not used or held for private or corporate profit, places for actual religious worship, and property used exclusively for educational purposes," which the Legislature has done. Mont. Const. Art. VIII, § 5(1)(b). These exemptions provided directly to churches and religious schools for their property are a more direct "benefit" to these entities, yet the law has never treated these exemptions, or the deductions for donations directly to them,[26] as inconsistent with Article X.

b. Even if the Program were viewed as making appropriations or payments, they are made to the families whose children receive scholarships, not to the schools they choose.

The second primary flaw in DOR's interpretation of Article X, § 6 is that, like all state Blaine Amendments, it prohibits direct and indirect aid to certain proscribed institutions,[27] but not aid to individuals and families such as Plaintiffs and other parents seeking scholarships for their children. This distinction is evident in the text of Article X, which states that the government may not aid certain institutions through appropriations or grants, specifically "church[es], school[s], academ[ies], seminar[ies], college[s], universit[ies], or other literary or

[26] *See* the discussion of the College Contribution Credit and the Qualified Endowment Credit, *supra* at p. 14.

[27] Although § 6 prohibits appropriations "for any sectarian purpose" as well as to proscribed entities, there is no evidence whatsoever that the Legislature acted for sectarian reasons or to promote any sectarian purpose, any more than exempting church and religious school property is done to promote their sectarian purposes.

scientific institution[s], controlled in whole or in part by any church, sect, or denomination." The distinction between aid to religious schools as institutions and aid to students who may freely choose religious schools under neutral school choice programs is also evident in (1) the history behind Article X, § 6, (2) federal Establishment Clause jurisprudence, (3) Montana's case law, and (4) other states' case law. Under such a distinction, the Program is perfectly permissible.

The history behind Article X, § 6 shows that it was meant to prevent government aid to religious schools, not religiously neutral aid to families. State Blaine Amendments like Article X, § 6 originated in the nineteenth century in response to Catholic demands for support for their parochial schools equal to that provided to the public schools. Arising at a time when the public schools were nondenominationally Protestant in orientation and oftentimes hostile to accommodating Catholics, the Blaine Amendments were designed to rebuff the Catholic demands for equal funding.[28] The Amendments take their name from a failed attempt to amend the federal Constitution in 1875-76 using language a number of states had already adopted, and which many more states, including Montana, adopted after the federal effort fell short.[29] Importantly, in *Mitchell v. Helms*, a plurality of the U.S. Supreme Court recognized that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow" and that exclusion of religious schools from otherwise permissible aid programs is a "doctrine, born of bigotry, [that] should be buried now." 530 U.S. 793, 828-829 (2000).

The language of Article X, § 6 is perfectly suited to its original purpose of preventing governmental entities from providing financial support to Catholic schools. These provisions were not, however, designed to address religiously neutral programs aiding families, because that was not what the Catholic Church sought: It sought the same sort of institutional assistance provided to the Protestant public schools.

Article X, § 6's purpose is reinforced by federal Establishment Clause jurisprudence. At the time that state Blaine Amendments like Montana's were adopted, the federal Establishment Clause had not yet been applied against the states: that did not occur until the U.S. Supreme

[28] *See, e.g.*, Lloyd P. Jorgenson, *The State and the Non-Public School 1825-1925* (1987); Joseph P. Viteritti, *Choosing Equality: School Choice, The Constitution, and Civil Society* 146-147, 150-152 (1999).

[29] *See, e.g.*, Viteritti, *supra* note 28, at 152-153.

Court's *Everson* decision in 1947, which upheld a New Jersey program providing transportation subsidies to public and private school children. Even before *Everson*, however, there was an assumption that the Establishment Clause prevented institutional aid to churches and religious schools. This assumption underlies both the majority and minority opinions in *Everson*, but the majority distinguished the religiously neutral transportation subsidies at issue in that case from institutional assistance to religious schools. The Court has continued to refine the distinction between aid to individuals and institutional aid through a series of cases leading from *Everson* through *Board of Education v. Allen*, 392 U.S. 236 (1968) (upholding free secular textbooks for private school students), *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding tax deductions for educational expenses, including private school tuition), *Witters v. Washington Department of Services For the Blind*, 474 U.S. 481 (1986) (upholding college tuition to attend a religious college), *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (upholding interpreter services for parochial school student), and culminating in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding religiously neutral private school tuition program). Simultaneously, the Court has continued to read the Establishment Clause as prohibiting unrestricted institutional assistance to religious schools. *Mitchell v. Helms*, 530 U.S. at 793.

The plain meaning of Article X, § 6 is consistent with distinguishing between programs aiding religious schools as institutions and programs aiding students who make an independent decision to use their program benefits at religious schools.

The only Montana case relevant to this point, *Montana St. Welfare Bd. v. Lutheran Social Services of Montana*, which was decided under the former version of Article X, § 6 in the 1889 Constitution, Article IX, § 8, supports this distinction. 156 Mont. 381, 480 P.2d 181 (1971). That former version of the provision was essentially the same as the current version. In *Lutheran Social Services*, the Supreme Court rejected a claim that payment of adoption assistance to an indigent woman would constitute an "appropriation" if she chose to give up her child to a private religious adoption agency, saying "[i]n no way do we find that private adoption agencies are directly or indirectly benefited by payments to or on behalf of a qualified recipient." *Lutheran Social Services*, 156 Mont. at 390-91, 480 P.2d at 186. The court noted that "the woman giving up her child to a private agency is penalized by the Board because she chooses the private over the public agency." *Id.* at 389, 185. The same goes for DOR's Rule 1. It penalizes families who choose religious schools rather than secular schools for their children's education.

Other states' supreme courts have recognized this distinction between aid to schools and aid to families in interpreting their state Blaine Amendments. Two cases are particularly instructive. In *Board of Education v. Allen*, New York's highest court considered whether New York's program of providing free secular textbooks to all students violated its Blaine Amendment or the federal Establishment Clause by including students attending religious schools. 228 N.E.2d 791 (N.Y. 1967), aff'd, 392 U.S. 236 (1968). The Court held that neither the state nor the federal Religion Clause was violated. The decision is noteworthy because New York's Blaine Amendment, Article XI, § 3, contains similar language to Montana's in prohibiting use of government funds or property, "directly or indirectly, in aid ... of any school or institution of learning wholly or in part under the control or direction of any religious denomination." The New York Court held that providing textbooks to students neither directly nor indirectly aided any religious schools they chose, but at most provided an incidental benefit. In doing so, the Court overruled an earlier decision in which it had held that providing transportation subsidies to all private school students indirectly aided any religious schools they chose.

Similarly, in *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013), the Indiana Supreme Court held that its Blaine Amendment (Article 1, § 6 of the Indiana Constitution), was not violated by state-provided scholarships that allowed students to choose any private schools, including religious ones. Indiana's section 6 provides that "[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution." The Indiana court distinguished between direct and indirect benefit on the one hand, and incidental benefit on the other. The court held that the scholarships in question provided at most incidental aid to the schools the families choose, not direct or indirect aid.

In summary, DOR's Rule 1 misinterprets Article X, § 6 in two fundamental ways, both of which is independently fatal to the validity of the Rule. Article X, § 6 does not apply to a tax-credit program, as no appropriation or payment of government funds is involved. And Article X, § 6 addresses aid to religious entities as institutions, not aid to families who may or may not use the aid to attend religious institutions. Therefore, Article X, § 6 cannot justify DOR's deviation from the statutory definition of qualified education provider and Rule 1 is *ultra vires*.

3. DOR's Rule 1 Conflicts with Other Provisions of the Montana and U.S. Constitutions.

Plaintiffs have shown that they are entitled to relief because DOR's Rule is not required by the Montana Constitution. They are entitled to relief for another reason, as well: not only is DOR's reading of Article X incorrect, but DOR's reading also unnecessarily brings Article X into conflict with the religious freedom and equal protection provisions of the Montana Constitution and the corresponding provisions in the U.S. Constitution.

Article II, § 5 of the Montana Constitution, entitled "Freedom of Religion," states that "[t]he state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Except for substituting "the state" for "the Congress," this is a verbatim copy of the Religion Clauses of the First Amendment to the U.S. Constitution. One cannot imagine a clearer expression of the intent of the Montana framers and electorate to mandate a parallel interpretation of the two constitutions' guarantees of religious liberty. DOR's overbroad interpretation raises obvious conflicts with the religious neutrality mandated by the Religion Clauses of both constitutions. It also raises conflicts with the Equal Protection Clauses of both constitutions, by interfering with the fundamental right to exercise religion and by classifying on a suspect basis, religion, in pursuit of no compelling state interest.

As a result of Rule 1, parents who wish to send their children to nonreligious private schools can do so with scholarships generated by the Program, while those parents who, like Plaintiffs, wish to send their children to religious private schools cannot. Plaintiffs make three arguments below. First, the Rule inhibits the free exercise of religion rights of the latter class of parents. Second, it inhibits religion in relation to non-religion, an establishment of religion violation. And third, because DOR's discrimination based on religion involves a suspect category (religion) and is not narrowly tailored to advance a compelling state interest, DOR is also violating Plaintiffs' right to equal protection guaranteed by both constitutions. These constitutional problems can be avoided by the narrower interpretation Plaintiffs urge and which accords perfectly with the plain language of both provisions on which DOR relies.

a. DOR's Rule 1 violates the Free Exercise Clauses of the Montana and U.S. Constitutions.

As the U.S. Supreme Court said in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." 508 U.S. 520,

523 (1993). Just as *Lukumi* presented such a violation, so too does DOR's Rule 1. The Court went on to say: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. While *Lukumi* presented a case involving facts of discrimination against one particular religion, Santeria, because of hostility toward its practice of animal sacrifice, this case presents a broader violation where Rule 1 on its face discriminates against all religions by placing religious schools and those who desire to use them for their children's education at a significant disadvantage vis-à-vis nonreligious private schools.

As the Court said in *Lukumi*, "[t]o determine the object of a law, we must begin with its text, for the minimum requirement of [religious] neutrality is that a law not discriminate on its face." *Id.* at 533. No one can seriously assert that Rule 1 is religiously neutral, because on its face, it disqualifies students attending religious schools from participating in a statutorily neutral program, and thereby disqualifies parents seeking scholarships to use at religious schools. There can be no doubt that Rule 1 burdens religious practice whenever it affects parents who desire a religious education for their children.

The only countervailing interest that DOR offers for the wholesale exclusion of religious schools and those who desire to use them from the benefits of the Tax-Credit Program is the asserted need to conform to Article V, § 11(5) and Article X, § 6. As Plaintiffs have demonstrated, however, DOR misreads those provisions, giving them an overly broad interpretation not supported by their plain language or any Montana cases interpreting them. DOR's overbroad interpretations brings these provisions into a clear conflict with the Free Exercise Clauses of both constitutions, and cannot serve to justify a departure from the religious neutrality demanded by those clauses.

b. DOR's Rule 1 violates the Establishment Clauses of the Montana and U.S. Constitutions.

The Establishment Clauses of the Montana and U.S. Constitutions also require religious neutrality. To determine if a program violates the Establishment Clause, the U.S. Supreme Court has long used a test derived from *Lemon*. As modified by more recent cases, to pass muster under the Clause, a program must: (1) have a secular legislative purpose and (2) have a principal or primary effect that neither advances nor inhibits religion. Although as enacted by the Legislature, the Program clearly meets both prongs of the *Lemon* test, DOR's Rule 1 inhibits

religion and renders the program in violation of the Establishment Clauses of both constitutions.[30]

Rule 1 inhibits religion by preventing parents from using tax-credit-generated scholarships to send their children to religious schools. It penalizes parents who want a religious school education for their children, while it encourages parents who prefer nonreligious private schools. It constitutes a wholesale exclusion of those parents who want to buy a religious school education from the benefits of the program, solely because they prefer a religious option for their children.

c. ***DOR's Rule 1 violates the Equal Protection Clauses of the Montana and U.S. Constitutions.***

The Equal Protection Clauses of the federal and Montana Constitutions do not permit the religious discrimination inherent in DOR's Rule 1. Under the Fourteenth Amendment and Article II, § 4, classifications involving fundamental rights like freedom of religion or based on suspect classifications like religion are subject to strict scrutiny. *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 43, 744 P.2d 895, 897 (Mont. 1987) ("[e]xamples of fundamental rights are ...freedom of religion"); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (stating suspect classifications are those "such as race, religion, [and] alienage"). "Under the strict scrutiny standard, the State has the burden of showing that the law, or in this case, the policy, is narrowly tailored to serve a compelling government interest." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, 325 Mont. 148, 154, 104 P.3d 445, 450.

Here, DOR's Rule 1 cannot pass strict scrutiny. The only justification DOR has given for the Rule is compliance with Article V, § 11 and Article X, § 6. Given that DOR has incorrectly interpreted these provisions to require Rule 1, DOR's justification must fail, regardless of the appropriate level of scrutiny. An erroneous constitutional interpretation fails even rational basis scrutiny. *Christian Sci. Reading Room v. Airports Comm.*, 784 F.2d 1010 (9th Cir. 1986)

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[30] There is no question that the Program, as designed by the Legislature, is constitutional under the federal Establishment Clause. Indeed, if instead of using a tax credit to encourage the private creation of private scholarships, Montana had chosen to create a state-funded scholarship program, that program would have also passed muster under the Establishment Clauses of both constitutions. The U.S. Supreme Court has already upheld just such a program. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). If a state-provided scholarship can be used at religious schools consistent with the U.S. Constitution, a tax credit-generated scholarship program must also pass muster.

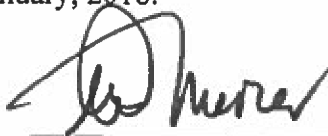
(holding that an erroneous interpretation of the Establishment Clause cannot satisfy the rational basis test).

V. CONCLUSION

Plaintiffs have more than satisfied the requisite showing for a preliminary injunction against Rule 1. First, Plaintiffs are likely to prevail in their challenge against the Rule because (1) Montana's Constitution does not require excluding religious schools from the Program, making DOR's Rule 1 *ultra vires*, and (2) the Rule unnecessarily creates constitutional problems with the State and federal Religious and Equal Protection Clauses.

Second, Rule 1 irreparably harms Plaintiffs by creating a chilling effect on both SO formation and fundraising and almost certainly ensuring that Plaintiffs will be unable to secure scholarships for the next school year, even if they were to prevail in this action. Finally, DOR's implementation of Rule 1 threatens to violate Plaintiffs' right to direct the education of their children and their right to religious liberty under both the Montana and U.S. Constitutions. For all of these reasons, this court should grant Plaintiffs' application for a preliminary injunction.

DATED this 28th day of January, 2016.



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CERTIFICATE OF SERVICE

I certify that on January 28th, 2016, a true and correct copy of the foregoing document was served on the following persons:

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ATTORNEYS FOR PLAINTIFFS

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER,	)	Cause No. DV 15-1152A
	)	Judge David M. Ortley
Plaintiffs,	)	
v.	)	
MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE,	)	**AFFIDAVIT OF KENDRA ESPINOZA IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
Defendants.	)	

STATE OF MONTANTA)
) ss:
COUNTY OF FLATHEAD)

KENDRA ESPINOZA, on oath, states:

1. I am a single mother raising my two daughters, Naomi and Sarah. Naomi is 10 years old and in the 4th grade, and Sarah is 7 years old and in the 2nd grade. My daughters and I are all Christians.

2. Before my husband unexpectedly left, I homeschooled my daughters. But after he left, my house went into foreclosure, and I had to get a job as a bookkeeper and put Naomi and Sarah in public school.

3. I was not happy with my daughters' public school. When Naomi started a daily Bible study for her friends that took place during recess, she was repeatedly bullied by other students and called a "goody two shoes." In addition, Sarah was easily distracted and was struggling academically.

4. I was also concerned about my daughters' peers in public school. For example, other students often used inappropriate language around my young girls.

5. When I first toured Stillwater Christian School, I had to hold back tears; I desperately wanted to send my children there, but knew I could not afford the tuition on my salary.

6. I started working to raise tuition funds. For example, I raffled off handmade quilts and held two yard sales. I also got part-time work cleaning houses.

7. Naomi insisted on helping raise tuition funds by getting a job mowing lawns.

8. This fundraising and the extra jobs, combined with generous financial aid from Stillwater, allowed me enough funds to start sending my children to Stillwater Christian School. I volunteer at the school in return for the financial aid.

9. Now both my children are thriving at Stillwater. I love that the teachers are so warm to my daughters and to the other students. Every morning, for instance, all the teachers stand in their classroom doorways and welcome in the children. I also never worry about my daughters being bullied at Stillwater.

10. An additional, and very important, reason that I chose Stillwater is because I am a Christian and I love that the school teaches the same Christian values that I teach at home.

11. It gives me great peace of mind to know that my children are happy at Stillwater.

12. But it is still a real financial struggle for me to pay the remaining tuition every month. I often worry that I will not have enough money to make the payments. I am especially concerned about the tuition increase at Stillwater when Naomi reaches high school.

13. I work very hard, and I cannot remember the last time I took a vacation.

14. It would be a tremendous financial and psychological relief for me if my children were to receive scholarships under Montana's new scholarship tax-credit program to help pay Stillwater's tuition.

15. My girls are eligible to receive scholarships under the program.

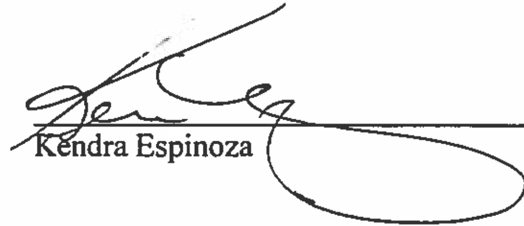
16. Stillwater Christian School is a qualified education provider under the program statute.

17. Because of the Department of Revenue's Rule 1, my girls and I could not use the scholarships at the school of our choice, Stillwater Christian School—simply because Stillwater is a religious school.

18. I am only aware of one nonreligious private school near me, Kalispell Montessori School, which only serves grades 1st to 8th. I do not wish to send my daughters to this school because it does not teach Christian values, and moreover, I could not send my daughters to high school there. I instead wish to use program scholarships to continue sending my daughters to Stillwater until they graduate high school.

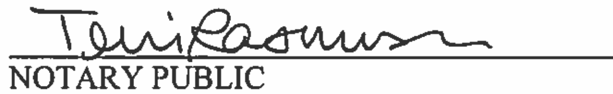
19. But for Rule 1, I would apply for program scholarships for both of my daughters as soon as an SO begins accepting scholarship applications.

20. If the Department is not enjoined from enforcing Rule 1, my family will be harmed. As long as the rule is in effect, SOs will not be able to flourish, which will be to the detriment of my family and similarly-situated families.



Kendra Espinoza

SUBSCRIBED AND SWORN TO
before me this 22nd day of January, 2016:



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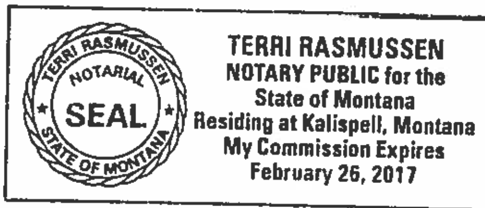

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ATTORNEYS FOR PLAINTIFFS

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER, Plaintiffs, v. MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE, Defendants.	Cause No. DV 15-1152A Judge David M. Ortley **AFFIDAVIT OF JERI ELLEN ANDERSON IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

STATE OF MONTANTA)
) ss:
COUNTY OF FLATHEAD)

JERI ELLEN ANDERSON, on oath, states:

1. I am a single mother raising my 8-year-old daughter, Emma. Emma is in the second grade at Stillwater Christian School. Emma and I are both Christians.

2. I adopted Emma from China when she was 9 months old. The entire process took 27 months.

3. Emma is academically gifted and loves to learn.

4. I went to public schools all my life, and there are public school teachers in my family. But I am not satisfied with my local public schools because, in talking to my friends and their children using the public schools, I concluded that the public schools are not academically challenging enough for Emma.

5. When I learned about Stillwater, I knew I had to send Emma there.

6. I made the decision to send Emma to Stillwater when I had just been laid off from my job at an insurance company. I got a new job at another insurance company, but I now make $6 dollars less an hour. Nevertheless, I was determined to pay Stillwater's tuition however I could.

7. I am a Christian and appreciate that Stillwater teaches religious values. That was one of the main reasons that I chose Stillwater for Emma.

8. My primary reason for choosing Stillwater is the rigorous academic education that it provides.

9. Emma's teachers at Stillwater carefully guide her learning and frequently refer her to books in the school library so Emma can learn more about topics that interest her. Emma soaks it all up like a sponge.

10. When Emma was learning about how to build houses at school, she told me that Stillwater is "like my foundation. I'm going to just keep growing."

11. I also really appreciate Stillwater's open door policy that allows me to pop into Emma's classrooms at any time. This was especially helpful when Emma was initially struggling with separation anxiety.

12. Stillwater has become like Emma's second home, and she loves it there.

13. I am fortunate enough to receive some financial aid from Stillwater, and in return, I volunteer for Stillwater's high school drama production. My sister also helps complete my required volunteer hours by helping judge Stillwater's science fairs.

14. I work very hard and budget very carefully.

15. Yet, paying the remaining tuition every month is still a serious struggle. I worry about it constantly. I pray that I will be able to keep Emma at Stillwater.

16. It would be a tremendous financial and psychological relief for me if Emma were to receive a scholarship under Montana's new tax credit scholarship program to help pay her tuition.

17. Emma is eligible to receive a scholarship under the program.

18. Stillwater Christian School is a qualified education provider under the program statute.

19. Because of the Department of Revenue's new Rule 1, Emma and I could not use the scholarship to attend the school of our choice, Stillwater Christian School—simply because Stillwater is a religious school.

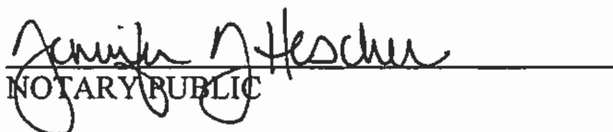
20. I am aware of only one nonreligious private school near me, Kalispell Montessori School. I do not wish to send Emma to this school because it only goes to the 8th grade. I instead wish to use program scholarships to continue sending my daughter to Stillwater through 12th grade.

21. If not for Rule 1, I would apply for a program scholarship for Emma to attend Stillwater as soon as an SO begins accepting applications.

22. If the Department is not enjoined from enforcing Rule 1, my family will be harmed. As long as the rule is in effect, SOs will not be able to flourish, which will be to the detriment of my family and similarly-situated families.

Jeri Ellen Anderson

SUBSCRIBED AND SWORN TO
before me this 22 day of January, 2016:



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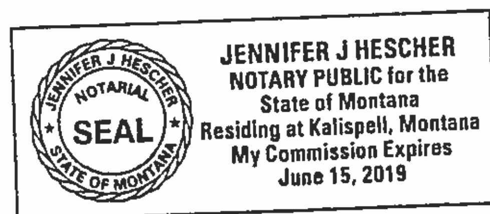

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ATTORNEYS FOR PLAINTIFFS

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER, Plaintiffs, v. MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE, Defendants.	Cause No. DV 15-1152A Judge David M. Ortley **AFFIDAVIT OF JAIME SCHAEFER IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

STATE OF MONTANTA)
) ss:
COUNTY OF FLATHEAD)

JAIME SCHAEFER, on oath, states:

1. My husband and I have two children: Ellie is 12 and in 7th grade, and Jake is 9 and in 4th grade. We are all Christians.

2. At first, I had Ellie in public school. But I was disappointed in the academic expectations there. For instance, Ellie already knew how to read in kindergarten, but her class was still learning the alphabet.

3. So I began homeschooling Ellie, and then did the same for my son. After a few years, I felt my children were ready for a more competitive environment and I wanted to put them back into school. I began researching our options, and liked what I learned about Stillwater Christian School.

4. So I got a job as an accountant to help pay tuition. Fortunately, we also receive some financial aid from Stillwater for both children.

5. My children are thriving at Stillwater. I am impressed that they are already learning speech and debate and that they can participate in Stillwater's well-developed music program. I especially like that my children's classmates are from likeminded families that teach similar values.

6. A very important reason that I chose Stillwater for my children is that the school teaches the same Christian values that I teach at home.

7. I am very involved at Stillwater. I coached the volleyball team and also volunteer 30 hours a year there, including by helping in the classrooms, chaperoning field trips, making bulletin boards, and helping fundraise.

8. But paying tuition every month is a huge struggle for my family. It is like a second mortgage payment. It is a year-by-year decision whether we can keep their children at Stillwater.

9. It would be a significant financial and psychological relief to my family if we were to receive scholarships for our children under Montana's new tax-credit scholarship program to continue sending our children to Stillwater.

10. My two children are eligible for scholarships under the program.

11. Stillwater Christian School is a qualified education provider under the program statute.

12. Because of the Department of Revenue's new Rule 1, I could not use the scholarships at the school of my choice, Stillwater Christian School—simply because Stillwater is a religious school.

13. I am aware of only one nonreligious private school near me, Kalispell Montessori School, which serves grades 1st to 8th. I do not wish to send my children to this school because my family loves Stillwater. Moreover, I know of no nonreligious private high school nearby and Ellie is soon to enter high school. I instead wish to use program scholarships to continue sending my children to Stillwater through high school.

14. But for Rule 1, I would apply for program scholarships for both of my children to attend Stillwater as soon as an SO begins accepting applications.

15. If the Department is not enjoined from enforcing Rule 1, my family will be harmed. As long as the rule is in effect, SOs will not be able to flourish, which will be to the detriment of my family and similarly-situated families.

____
Jaime Schaefer

SUBSCRIBED AND SWORN TO
before me this ____ day of January, 2016:

____
NOTARY PUBLIC