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**MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY**

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER,	**Cause No.: DV-15-1152A**
Plaintiffs,	
vs.	**MONTANA DEPARTMENT OF REVENUE'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE,	
Defendants.	

The Montana Department of Revenue (Department) now appears, by and through its counsel of record, in response to the Plaintiffs' Motion for Preliminary Injunction (Motion). The Motion is without merit and should be denied. Because the Plaintiffs lack standing to bring this matter, their Motion should immediately fail.

Plaintiffs also cannot establish that they have or will suffer irreparable harm if the rule is implemented, and they cannot show that they have a likelihood of success on the merits. On this alternate basis, the Motion is without merit and should be denied.

INTRODUCTION

On January 28, 2016, Plaintiffs filed a motion for a preliminary injunction asking this Court to enjoin "the Department of Revenue's 'Rule 1' which prohibits Plaintiffs and other families from using the State's new Scholarship Tax-Credit Program to send their children to religious schools."[1] Plaintiffs argue that they will suffer irreparable harm. Plaintiffs' primary arguments in support of their request for injunction are: (1) the Department is misreading the Montana constitutional provisions that influence the rule as implemented; (2) the Department's rule violates the Plaintiffs' right to the free exercise of religion; and (3) the implementation of the law violates their equal protection rights. None of these arguments is persuasive enough for a preliminary injunction to be issued prior to addressing the case on its merits.

The motion should be denied for several reasons. First, the Plaintiffs lack standing. Second, the Plaintiffs have failed to establish that there is an immediate danger of irreparable harm to anyone. Third, the Plaintiffs have failed to establish that there is a lack of adequate remedy at law. Fourth, the Plaintiffs have failed to establish that there is a substantial likelihood of success on the merits. Finally, if the injunction is granted as requested, the Plaintiffs will have effectively won their case without trial on the merits.

Implementation of the scholarship program is in the preliminary stages and no irrevocable decisions with respect to Student Scholarship Organizations (SSOs), contributor

[1] "Rule 1," as described by Plaintiffs, was implemented into the Administrative Rules of Montana as ARM 42.4.802, and will be referred to in this brief according to its official citation.

donations, scholarships awards, or dedication of those scholarships to qualified education providers (QEPs) have been requested or denied. At this time, only one SSO has registered with the Department, and that SSO has received very limited financial donations. Because few donations have been committed, it stands to reason that the SSO has received no applications for scholarships and, therefore, no scholarships will be awarded for some time. Whatever harm the Plaintiffs fear from ARM 42.4.802, that harm is neither actual nor imminent.

Plaintiffs have an adequate remedy at law at such time that they are harmed by the Department's implementation of the statutes and rules. If and when funds are donated, distributed to scholarship applicants, and awarded (or not awarded) to QEPs, then an adequate remedy will be available to plaintiffs who have standing before this or other Montana courts.

Plaintiffs contend that ARM 42.4.802 is *ultra vires* because it is inconsistent with the statute being implemented. However, the statutes to which the rule is applied are not as clear as the Plaintiffs claim, and the issue of *ultra vires* cannot be determined from unproven arguments not tried before this Court.

The request for injunction should be denied because Plaintiffs have no likelihood of success on the merits. Plaintiffs' claims of the statutes' clarity (§ 15-30-3101, *et seq.*, MCA, (the Program)), and further claims as to the purpose of Article V, § 11(5) and Article X, § 6 of the Montana Constitution are incorrect. Plaintiffs spend little time indicating why they are likely to succeed on the merits, instead arguing at length the substance of the issue that will be before the Court when parties with standing have legitimate claims of harm. This is beyond the purview of a motion for preliminary injunction.

If the Court imposes a preliminary injunction to stop the implementation of ARM 42.4.802, one of two results will occur. The preliminary injunction will result in

continuing ambiguity of the statute, thus leaving the Department without clear direction while this litigation runs its course. Or, in the alternative, if the Court enjoins the Department from implementing the rule, the Court will necessarily have to order the Department to allow scholarships to all QEPs, nonreligious and religious, resulting in the ultimate relief that Plaintiffs seek. This too is beyond the purpose of a preliminary injunction.

BACKGROUND

During the Montana 64th Legislative Session in 2015, the Montana Legislature considered and passed Senate Bill No. 410. That bill is codified as § 15-30-3101, *et seq.*, MCA. The portions of the bill relevant to this proceeding allows for state income tax credits for donations to student scholarship organizations, who in turn, may provide scholarships to students to attend private schools. Student scholarship organizations (SSOs) submit a notice of intent to operate in Montana with the Department of Revenue. § 15-30-3105, MCA. The SSO may accept donations from individuals or corporations for the purpose of providing scholarships to eligible students to enroll with a qualified education provider (QEP). § 15-30-3103, MCA. The SSO is required to submit to the Department an annual fiscal review that discloses for the three most recent calendar years the total number of contributions to the SSO, and the total number of contributors, as well as the total number and dollar value of scholarships obligated and awarded to students. § 15-30-3105, MCA. The Department is required to ensure that the SSO submits the annual fiscal review. *Id.* If the SSO fails to meet the requirements of §§ 15-30-3102, -3105, or -3107, MCA, it risks termination by the Department. § 15-30-3113, MCA.

Among other requirements, a QEP is an accredited education provider (or that has applied for accreditation) or a non-accredited tutor that administers a nationally recognized standardized assessment test. § 15-30-3102, MCA. A QEP may not be a public school or a

home school. § 15-30-3102, MCA. An eligible student applies for a scholarship from an SSO, and if awarded, may enroll with a QEP of the parents' choosing. § 15-30-3104, MCA. There is no obligation for an SSO to award scholarships to all applicants, and no statutory instructions related to this.

Any person who donates to an SSO may receive a tax credit of an amount equal to the donation, not to exceed $150, for the year in which the donation is made. § 15-30-3111, MCA. In any single year, a student receiving scholarships may receive no more than 50% of the per-pupil average of total public school expenditures, as calculated by the Office of Public Instruction. § 15-30-3103, MCA. At the time of the passage of SB 410, the per-pupil average was $5,636 for a high school student, and $4,775 for an elementary student. 2017 Biennium, SB 410 Fiscal Note (April 21, 2015). That fiscal note estimated the amount of scholarship an average student would receive in the first few years of the program. It anticipated that the average student scholarship would be $495 for calendar year 2016, and $543 for calendar year 2017. *Id.*

During the legislative process, the question arose concerning the constitutionality of the bill and whether granting a tax credit for the ultimate purpose of providing scholarships to allow students to attend private schools was a violation of the prohibition of aiding sectarian schools with public funds. As a result, the bill was amended to include two sections that instructed the implementing agency as to how the bill was to be implemented. One of those two provisions, Section 7 (codified at § 15-30-3101, MCA), provides:

> **15-30-3101.** ***(Temporary – effective January 1, 2016)*** **Purpose.** Pursuant to 5-4-104, the legislature finds that the purpose of student scholarship organizations is to provide parental and student choice in education with private contributions through tax replacement programs. The tax credit for taxpayer donations under this part must be administered in compliance with Article V, section 11(5), and Article X, section 6, of the Montana constitution.

Art. V, § 11(5) reads: " 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." Art. X, § 6, Mont. Const., prohibits the use of public funds to aid 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.

Following these legislative instructions, and passage of SB 410, the Department proposed three administrative rules to implement the bill. At issue in this lawsuit is Rule 1, now ARM 42.4.802, which was drafted in compliance with Art. V, § 11(5) and Art. X, § 6 of the Montana Constitution, implementing Mont. Code Ann. § 15-30-3101. ARM 42.4.802 effectively prohibits scholarships to a QEP that is a sectarian school, or is controlled by a faith-based organization. That rule in its entirety is:

> (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.

ARM 42.4.802.

The Department adopted the rule on December 24, 2015, and it became effective with § 15-30-3101, *et seq.*, on January 1, 2016. The Plaintiffs filed this lawsuit prior to the effective date of the law and prior to the rule's implementation.

In accordance with § 15-30-3106, MCA, the Department created a website for SSOs to register From the date the website became active on January 1, 2016, to the date of this filing, only one SSO has registered and been approved by the Department. No other SSOs have registered. *See*, Supplemental Affidavit of Larry Sullivan, attached hereto as Department's Ex. A. Only a few contributors have donated to the SSO, at a total amount of $600. Contributions made by these donors during the 2016 tax year may trigger their requesting a tax credit when filing their 2016 returns, or no later than April 15, 2017. Only one person has contacted Mr. Sullivan inquiring as to the donation process or as to available scholarships. *Id.*

LEGAL STANDARDS

An injunction may be granted under the following circumstances:

> (1) when 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;
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
> (3) 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 . . .

§ 27-19-201, MCA. Because the statute is written in the disjunctive, the Plaintiffs must meet only one of the subsections. *Sweet Grass Farms, Ltd. v. Bd. of Co. Comm'rs of Sweet Grass Co.*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825.

The Montana Supreme Court has further clarified the importance of potential irreparable harm in the analysis of awarding a motion for preliminary injunction, stating:

> [W]e previously have indicated that a likelihood of success on the merits is not always sufficient, in and of itself, to warrant injunctive relief. [Citation omitted]. There must also be a showing that, absent a preliminary injunction, the applicant would suffer harm which could not be adequately remedied after a trial on the merits and, therefore, a preliminary injunction is necessary to maintain the status quo and minimize harm to the parties. [Citation omitted]. In other words, the applicant also must make a showing of irreparable harm.

M.H. v. Montana High School Ass'n, 280 Mont. 123, 136, 929 P.2d 239, 247 (1996) (citing *Porter v. K & S Partnership*, 192 Mont 175, 183, 627 P.2d 836, 840 (1981).

"An applicant for a preliminary injunction must establish a prima facie case, or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated. If either showing is made, then courts are inclined to issue the preliminary injunction to preserve the status quo pending trial." *Porter v. K & S Partnership,* 192 Mont. at 183, 627 P.2d at 840. "[A]n applicant who could show that he is entitled to final judgment on the merits still might not be entitled to preliminary injunction. . . . the limited function of a preliminary injunction is to preserve the status quo and to minimize the harm to all parties pending full trial." *Id.*

The Montana Supreme Court has limited the relief available by the imposition of a preliminary injunction. Preliminary injunctions do not resolve the merits of the case. *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 19, 334 Mont. 86, 146 P.3d 714.

> In granting temporary relief by injunction, courts of equity should in no manner anticipate the ultimate determination of the questions of right involved. Rather, the court should decide merely whether a sufficient case has been made out to warrant the preservation of the property or rights *in status quo* until trial, without expressing a final opinion as to such rights. An applicant need not make out such a case as would entitle him to final judgment on the merits.

Porter, 192 Mont. at 183, 627 P.2d at 840 (emphasis in original). For an injunction to issue, an applicant must show that he "has a legitimate cause of action, and that he is likely to succeed on the merits of that claim . . . ." *Cole v. St. James Healthcare*, 2008 MT 453, ¶ 15, 348 Mont. 68,

199 P.3d 810 (*cited in Sandrock v. DeTienne*, 2010 MT 237, ¶16, 358 Mont. 175, 243 P.3d 1123). The Plaintiff bears the burden of showing that they are entitled to an injunction. *Benefis*, 2006 MT 254, ¶ 52.

ARGUMENT

I. THE PLAINTIFFS LACK STANDING

The Plaintiffs have not been harmed and are not likely to be harmed. As provided in its motion to dismiss for lack of standing and brief in support, the Department establishes that the new law providing for scholarships to qualified applicants is in its infancy, and that none of the Plaintiffs to this matter has been harmed by that law, by the Department's rule, or by the implementation of that rule. *See Motion to Dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief for Lack of Standing* (February 1, 2016) (Motion to Dismiss). The Department will not reiterate each and every argument submitted through that motion here, but a few points bear mentioning.

The Montana Supreme Court has consistently determined that the parties must present a justiciable controversy before a court can consider the merits of an issue. *Dennis v. Brown*, 2005 MT 85, ¶ 8, 326 Mont. 422, 110 P.3d 17. A justiciable controversy is a threshold requirement for a court to grant relief. *Powder River County v. State*, 2002 MT 259, ¶ 101, 312 Mont. 198, 60 P.3d 357. The Plaintiffs allege that they would, or will at some future time, participate in the scholarship program, but make no allegation that they are participants. They have not attempted to enter the program only to be denied. *See* Motion to Dismiss, *passim*. At this time, therefore, they have not been harmed and there is no justiciable controversy. Because the issue of standing is a threshold issue, and the Plaintiffs lack standing, this Court should grant

the Department's motion to dismiss for lack of standing and in turn dismiss this motion without the need to review any remaining issues on the motion for preliminary injunction.

As determined in *Cole, supra*, the Plaintiffs must show that they have a legitimate cause of action. Because the Plaintiffs lack standing, they have no cause of action for which injunction can be issued, thereby failing all three of the tests in § 27-19-201, MCA. For this reason alone, the motion for lack of standing should be granted and the Plaintiffs motion for preliminary injunction denied.

II. PLAINTIFFS FAIL ON THEIR CLAIMS TO SHOW IRREPARABLE HARM

Should the Court determine that the Plaintiffs have standing and that there is a justiciable controversy, the motion for preliminary injunction motion fails on its own. The Plaintiffs fail to meet the primary test for injunction because they have not suffered irreparable harm, which is borne out in their own claims of injury.

To demonstrate irreparable injury, Plaintiffs allege first, with no support, that ARM 42.4.802 "is already severely crippling" the Program's implementation. *See* Plaintiffs' Motion for Preliminary Injunction (Pl. Motion), at 9. They, however, do not provide justiciable examples of how the rule is crippling the program. The first step for implementation of the scholarship program is for SSOs to register with the Department. Only one SSO has registered. The Department did not make its determination of the SSO's qualifications based on the QEPs to which it will provide awarded scholarships. There may be QEPs listed with the SSO that have sectarian or faith-based ties, but the Department has not reviewed this as part of that application process. *See* Department's Ex. A. Additionally, while Plaintiffs claim that the ARM 42.4.802 reduces the incentive for SSOs to form, there is absolutely no evidence before this Court that the

Department's rule is preventing any SSO from submitting an application. *Id.* There is no level of harm, let alone irreparable harm.

The SSO is not limited in any way from receiving donations from contributors under § 15-30-3103, MCA. A total of $600 has been committed to the one existing SSO. *Id.* It stands to reason that no scholarships will be awarded until sufficient donations have been contributed. The Department is not aware of any scholarship requests by any parent on behalf of a child that may qualify.

The Plaintiffs admit that the Program will take some time to develop and that scholarships may not be available for the near future. *Id.* They hope to be able to take advantage of scholarship opportunities for the 2016-17 academic year. However, Plaintiffs admit that SSOs would have to "vigorously fundraise this winter," and that an SSO must "take several time-intensive steps, almost all of which need to happen in the next few months for an SSO to be able to award scholarships in time for the 2016-17 year." *Id.* Plaintiff provides the list:

> (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 revenue procedures for accepting scholarships and selecting applicants, (5) publicizing the availability of new scholarships to potential applicants, and (6) beginning to accept applications.

Additional items to this list include the necessity of the SSO to determine who will receive the scholarships. These steps that must take place before scholarships can be awarded are indeed daunting, labor intensive, and time consuming. *Id.*, at 9-10. Neither the Department nor the Plaintiffs have any control over this. Even if the Plaintiffs were granted the preliminary injunction, it is pure speculation to conclude that money for scholarships, or the scholarships themselves, will be available for the 2016-17 academic year under the best of circumstances. The harm surmised by Plaintiffs is not only speculative, but would occur as a natural course of

the Program, without any involvement or "interference" by the Department. It is indicative of the hiccups of any new program getting off the ground, but certainly does not rise to the level of irreparable harm.

Plaintiffs argue that they cannot wait for another year before they are awarded scholarships. They theorize that their children would be eligible for a scholarship. Plaintiffs imply that their children, if eligible, will be awarded a scholarship. Under § 15-30-3101, *et seq.*, MCA, there is no guarantee that the SSO will award scholarships to all applicants. That is at the discretion of the SSO. Plaintiffs state that their financial hardships and their anxiety would be alleviated through receiving scholarships. *Id.*, at 9-10. These claims are made without supporting evidence. Furthermore, as their affidavits indicate, they have chosen to send their children to Stillwater Christian School despite these difficulties. None has alleged that the failure to receive a scholarship will prevent their child from attending Stillwater. *See* Affidavits of Espinoza, Anderson, and Schaefer. There is no irreparable harm.

Ultimately, the questions related to the operation of the Program are evidentiary questions that must be fleshed out during the litigation process in order to determine whether the Department is operating the Program according to the statutes and the Montana Constitution. It is insufficient to speculate as to the so-called crippling of a program that is not yet off the ground.

III. THE DEPARTMENT HAS NOT INTERFERED WITH THE RIGHTS CLAIMED BY PLAINTIFFS

Plaintiffs' overarching arguments are that the Department's rule threatens two constitutional rights, "(1) their right to direct the education of their children, and (2) their right to religious liberty." Pl. Motion, at 11.

The Department does not deny that parents have a right to direct the education of their children. Whether this right rises to the level of a fundamental right under the U.S. Constitution is not apparent. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925). From that decision, it is clear that parents have a fundamental right to raise their children, but to what level parents' direction of education is fundamental is not as clear. Plaintiffs also cite *A.W.S. v. A.W.*, 2014 MT 322, ¶ 16, 377 Mont. 234, 339 P.3d 414, for the proposition that it supports the constitutional right to direct the education of their children. However, as a child custody case, it has limited bearing on the question of a parent's right to educate their child.

Regardless, the Department has not interfered in any way with the Plaintiffs' right to educate their children or choices thereto. Each Plaintiff has alleged in the Complaint and testified in their affidavits that they have chosen Stillwater Christian School because of their beliefs and the school's Christian teachings. The Department has not affected this decision in any way. They have not been denied the right to send their children to this school. The Plaintiffs contend only that paying for their children to attend Stillwater Christian School is financially difficult and stressful. Plaintiffs indicate that they already receive scholarships from the school directly. This does not change their choice, or the right to make that choice. There is no fundamental right at stake here.

There is no evidence that the Department is interfering with the Plaintiffs' right to religious liberty. The Program is in its infancy. These Plaintiffs have not participated in the Program, and have not afforded themselves of the benefits (or the potential denial of benefits) of the Program. Even if they were to have a colorable argument that they are participating in the Program and could possibly claim a right, there is no fundamental right to scholarships that would assist the Plaintiffs, and no guarantee that an SSO would award them one. These parents

have already enrolled their children in Stillwater and continue to enroll their children in that private school. Thus, there clearly is no injury to them.

Finally, to argue that there is a combined liberty of the right of parents to select religious private schools when exercising their right to direct their children's education is untested. Plaintiffs cite no legal support for this. Assuming there may be a right claimed, the Department has not interfered with this right. A preliminary injunction is clearly not proper here.

IV. THE PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Plaintiffs do not directly discuss that they are entitled to an injunction because of the likelihood of success on the merits. Under Section C. of their argument, Plaintiffs argue not the likelihood of success on the merits, but argue the merits themselves. Pl. Motion, at 11-25. "It is not the province of the district court, nor of [the Supreme Court], to determine finally matters that may arise upon a trial on the merits." *Porter*, 192 Mont. at 183 (citing *Atkinson v. Roosevelt County*, 66 Mont. 411, 425, 214 P. 74, 78 (1923)); *Blinn v. Hutterische Soc'y*, 58 Mont. 542, 554-555, 194 P. 140, 143 (1920)). The Court is in the unenviable position of having to separate that evidence necessary for determining the Plaintiffs likelihood of success on the merits, without determining the ultimate issues to be decided at trial. Nevertheless, the Department urges this Court to determine that the Plaintiffs are not likely to succeed on the merits.

Plaintiffs' arguments on the merits clearly show the weaknesses of their motion for preliminary injunction. Even a cursory examination of the Plaintiffs' arguments reveals that the issues related to the Program and the implementation of the law are more complex and less certain than Plaintiffs aver. A comparison of Montana's Program and the application of Montana's Constitutional language are unique enough to be set apart from other states' determinations.

The Program is the culmination of legislative efforts under Senate Bill No. 410 (2015) (SB 410). As described previously, unique to that bill are two provisions that instruct the implementing Executive agency--the Department--as to how to implement the Program. "The tax credit for taxpayer donations under this part must be administered in compliance with Article V, section 11(5), and Article X, section 6, of the Montana constitution." § 15-30-3101, MCA. As previously indicated, Art. V, § 11(5), prohibits appropriations made for religious purposes to any private individual or organization. Art. X, § 6 prohibits "any direct or indirect appropriation or payment from any public fund or monies" to any school that is controlled in whole or in part by any sect, church, or denomination.

The Legislature, therefore, directed the Department to implement the Program after careful consideration of how those two provisions control the prohibitions of payment of public funds to schools with religious ties. ARM 42.4.801 is one result of the Department's interpretation and application of the constitutional provisions to the statutes. The Plaintiffs' dispute that the Department's interpretation is correct, both on its face and in contravention of other states that have adopted similar programs. Whether the Department has correctly interpreted the law will need to be addressed at trial, not by way of a motion for preliminary injunction. To determine the appropriateness of the Department's implementation of the Program, the Court will have to consider the plain language of the statutes, the language of the constitutional provisions, the intent of the Constitutional Convention in adopting those provisions, the interplay of those provisions and the fundamental rights issues raised by Plaintiffs, the application of the Montana Constitution to those statutes, and whether the Department has correctly interpreted those provisions in adopting its rules. Many other issues also exist. Despite their attempt at an exhaustive review of the substantive issues, Plaintiffs'

review of these issues may barely scratch the surface of the full review to be determined by the Court at trial.

The Plaintiffs claim that this case is a clear winner for them. But these claims are quieted by a review of the evidence. First, as previously indicated, there is no showing of injury or irreparable harm to any of the individual Plaintiffs. The Program is in its preliminary stages and there has been little activity for SSOs or donations. The Plaintiffs have chosen to enroll their children in a private sectarian school without interference from the State. Second, whether a tax credit for donations for scholarships program is allowed is not as settled as Plaintiffs claim. No more than a cursory review of the Plaintiffs' citations exposes the dissimilarities between Montana and other states.

Plaintiffs assure the Court that up to 14 states have adopted tax credit programs similar to Montana's Program, and that the issue of whether a tax credit is an appropriation has been put to rest in those states. Pl. Motion, at 3-4. However, a review of the cases cited by Plaintiffs only serves to raise more questions than cement their claims. Plaintiffs argue that *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) is controlling as the first state to adopt a tax credit program of this nature. Pl. Motion, at 3. However, the language in Arizona's applicable constitutional provision is different and written more narrowly than Montana's Art. X, § 6. The *Kotterman* Court cited the two Arizona constitutional sections:

> Article II, § 12 states in part: "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." Article IX, § 10 says, "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.

Kotterman, 972 P.2d at 617. These provisions cannot be directly compared with Montana's much broader prohibition of "any direct or indirect appropriation or payment from any public

fund or monies to any school that is controlled in whole or in part by any sect, church, or denomination." Mont. Const., Art X, § 6. Many of the other cases cited by Plaintiffs suffer from the same flaw. *See, i.e., Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. Ct. 2001); *Toney v. Bower*, 747 N.E.2d 351 (Ill. App. Ct. 2001); *Magee v. Boyd*, 175 So.3d 79 (Ala. 2015); and *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Gaddy v. Georgia Department of Revenue*, (2014CV244538) Fulton County Superior Court, Georgia (February 5, 2016). This inhibits Plaintiffs' likelihood of success on the merits. Without in-depth review, this Court cannot rely wholesale on claims that other Courts have already fully vetted the issues that are currently before this Court.

Other cases cited by Plaintiffs to support the argument that a tax credit is not an appropriation or that a tax credit program has received universal approval are dissimilar to Montana's Program for various reasons. Some state courts faced decisions related to whether students could receive vouchers to attend sectarian schools was appropriate, not whether a tax credit program is constitutional. *Bush v. Holmes*, 886 So.2d 340 (Fla. Dist. Ct. App. 1st Dist., 2004);[2] *Meredith, supra.* Plaintiffs cite to *Oliver, et al. v. Hofmeister*, 2016 OK 15, in their February 18, 2016 *Plaintiffs' Notice to the Court Regarding Supplemental Authority.* This matter is distinguishable because it involves a voucher program that was allowed by the Court because the public money spent provided for a value being given back to the state. This is not the case with respect to Montana's Program. Of the Montana cases that Plaintiffs cite for the proposition that a tax credit is not an appropriation, none considered the entirety of Art. X, § 6 as to whether this tax credit is a direct or indirect appropriation, or a direct or indirect payment. Pl.

[2] The voucher program was ultimately held unconstitutional by the Florida Supreme Court in *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006). The Court declined to "approve or disprove" the lower court's determination as to whether the voucher program violated the "no aid" provision in Florida's Constitution. *Id.*, at 413.

Motion, at 12-13. *See State ex rel. Bonner v. Dixon*, 59 Mont. 58, 195 P. 841 (1921); *MEA-MFT v. McCulloch*, (First Jud. Dist. BDV 2011-961), 2011 Mont. Dist. LEXIS 20;[3] *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975). Plaintiffs make unsupported statements that tax credits are not "direct or indirect appropriations" or "payments" under Art. X, § 6. No case cites are provided to sustain these claims. Pl. Motion, at 15-18. It is clear from the above discussion that the issue of what is a direct appropriations is unsettled. The law for defining indirect appropriations is even more unstable.

Plaintiffs cite *Rosenberg v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to argue that Montana's Program does not include an indirect appropriation, but neither case applies. Pl. Motion, at 17. The *Rosenberger* Court addressed whether access to university services on a neutral basis to a wide array of student groups, religious and nonreligious, was a violation of the Establishment Clause. *Id.* It did not address indirect appropriations or payments like those at issue here. In *Lemon*, the Court held unconstitutional direct payments made by Pennsylvania and Rhode Island to supplement teacher salaries at nonpublic schools. The Court reasoned that these supplemental payment programs provided for direct financial aid to church-related schools, and were an excessive entanglement between government and religion.[4]

Curiously, Plaintiffs then attempt to distinguish *Rosenberger*, *Lemon*, and *State ex rel. Chambers v. School Dist.*, 155 Mont. 422, 472 P.2d 1013 (1970), because in those cases, payments were made directly to the institutions to defray the institutions' costs, rather than

[3] On appeal to the Montana Supreme Court in *MEA-MFT v. McCulloch*, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075, the Court did not address the District Court's determination related to whether a tax credit is or is not an appropriation.

[4] *Agostini v. Felton*, 521 U.S. 203, 234, (1997) requires ensuring that the law does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.

scholarship payments directly to students. First, this is not quite accurate, since in *Lemon*, payments were made directly to private school teachers to supplement their salaries. Second, Plaintiffs' citations are not persuasive. If the Court is to compare Montana's Program to similar states' programs, then there are programs that have been found unconstitutional. The belief that the Plaintiffs have a likelihood of success fails drastically and merits denial of the motion.

Importantly, whether these situations are in fact distinguishable is not a matter for the Court to consider in a motion for preliminary injunction. These arguments go to the merits of the case. Neither Art. V, § 11(5), nor Art. X, § 6 have been conclusively dissected when applied to the law at issue. Plaintiffs cannot demonstrate that they have a likelihood of success.

It is clear from this discussion that Plaintiffs have merely brushed the surface of several areas of statutory and constitutional law related to the Department's implementation of the Program, and it is not clear as to the likelihood of success that the Plaintiffs may ultimately have. As a result, an injunction should not be issued.

V. THE RULE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

"[T]he line between neutrality to religion and state support of religion is not easy to locate." *Board of Education v. Allen*, 392 U.S. 236, 242, (1968). "The problem, like many problems in constitutional law, is one of degree." *Id.* (citing *Zorach v. Clauson*, 343 U.S. 306, 314, (1952)). The test for determining whether a state law violates the Establishment Clause of the First Amendment of the U.S. Constitution is:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the *Establishment Clause* there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Abington School District v. Schempp, 374 U.S. 203, 222, (1963) (citing *Everson v. Board of Education*, 330 U.S. 1 (1947); *Allen*, 392 U.S. at 243.

Despite the difficulty of locating the line between neutrality and state support of religion, the Plaintiffs assure the Court that the Department is clearly over that line. They argue that "no one can assert that" ARM 42.4.802 is religiously neutral, "there can be no doubt that [ARM 42.4.802] burdens religious practice," and the "DOR misreads" the constitutional provisions. These unsupported statements go not to the question of whether the Plaintiffs have been harmed irreparably or whether they have a chance of success on the merits, they are arguments on the merits that should not be considered here.

The substantive question to ask when considering the impact of the law on the free exercise of religion clauses of the U.S. Constitution (Amend. I) and the Montana Constitution (Art. II, § 5), is whether the law either advances or inhibits religion. Plaintiffs insist that ARM 42.4.802 inhibits religion. The Department's implementation of the Program clearly does neither. The Plaintiff parents enrolled their children in Stillwater Christian School prior to the enactment of the law, and intend to continue to do so. The rule does not inhibit religion and, therefore, should stand.

In addition to testing whether the law inhibits religion, the Court must consider the other half of the balance--whether the law, without the Department's application of the Montana Constitution though the administrative rule, would advance religion. If the Department is forced to accept that scholarships may be used for QEPs with religious school ties, then the advancement of religion results.

If the rule neither advances nor inhibits religion, it is then neutral and therefore constitutional. *Mitchell v. Helms*, 530 U.S. 793 (2000). But a motion for preliminary injunction

is an inappropriate place for a Court to attempt to determine whether a state law is in violation of the Establishment Clause. "In the over 50 years since *Everson*, we have consistently struggled to apply these simple words in the context of governmental aid to religious schools." *Id.*

In cases cited by Plaintiffs, such as *Church of the Lukumi Babalu Aye. v. City of Hialeah*, 508 U.S. 520 (1993), they compare a city council's denial of a church to establish in the community because its practices included animal sacrifice with the potential of limitation of scholarships to children who already attend private religious schools and intend to continue to attend. This case is not at all applicable to the situation that this Court is being asked to consider.

Montana has a strong constitutional history of separating public funds from sectarian purposes. ARM 42.4.802 demonstrates this history. It is not an invasion of religious beliefs. It does not prevent or inhibit parents from choosing to enroll their children in private religious schools. In the case of the Plaintiffs, that choice has already been made. By their own admission, they intend to continue to send their children to Stillwater Christian School. That their interpretation of § 15-30-3101, *et seq.*, MCA, includes scholarships to sectarian QEPs would ease their financial burden, does not rise to the level of a constitutional question. To find in their favor would result in an entanglement not allowed by the Establishment Clause.

Regardless of the question of the impact of the law on the Establishment Clause, the Court must not lose sight of the requirement in a motion for preliminary injunction to determine if there is irreparable harm to the Plaintiffs. Since there is none here, the question of the impact on the Establishment Clause can wait to be determined on the merits. This motion should be denied.

VI. ARM 42.4.802 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE U.S. OR MONTANA CONSTITUTIONS

Once again, the determination of whether there has been a violation of equal protection is a substantive issue to be determined by a trial on the merits, not by way of preliminary injunction. Plaintiffs argue that the test for determining equal protection claims of religious discrimination is strict scrutiny, that the government must have a compelling state interest for the law. They, however, fail to fully develop whether the Department has discriminated against the Plaintiffs (assuming that there is injury), other than to cite to cases related to the rational basis test. Plaintiffs bear the burden to establish their rights to an injunction. *Smith v. Electronic Parts, Inc.*, 274 Mont. 252, 256, 907 P.2d 958, 960 (1995). As such, this argument also fails.

VII. IF THE PLAINTIFFS MOTION IS GRANTED, THE COURT WILL INADVERTENTLY DECIDE THE CASE ON ITS MERITS

The Plaintiffs ask this Court to enjoin the Department from implementing ARM 42.4.802. If the Court enjoins the Department, the legitimate question remains as to whether the statutes are clear as to the intent of the Legislature. And, the poll taken by the Legislature subsequent to the enactment of the bill only continues to raise the question of what was intended, especially in light of the same Legislature's unique instruction to adhere to Art. V, § 11(5) and Art. X, § 6. Because of the lack of clarity provided by the Legislature, what the Court can order on injunction is also unclear. If, however, the Court enjoins the Department from implementing its rule, and additionally orders that scholarships under the Program must be allowed to sectarian or faith-based QEPs, the Plaintiffs will have succeeded on the merits of their case. To do so on a motion for preliminary injunction fails to meet the Supreme Court's requirement to maintain the status quo. "Status quo" has been defined as "the last actual, peaceable, non-contested condition which preceded the pending controversy." *Sweet Grass Farms*, ¶ 28 (citing *Porter*, 192 Mont. at 181). The status quo here is to allow the Program to

develop organically without allowing interference from Plaintiffs who have not been injured, and for the law to be implemented as intended and according to the Montana Constitution.

CONCLUSION

For the reasons set forth above, the Plaintiffs' Motion for Preliminary Injunction should be denied.

Dated this 22 day of February, 2016.

MONTANA DEPARTMENT OF REVENUE

DANIEL WHYTE
BRENDAN BEATTY
Special Assistant Attorneys General

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2016, I served true and accurate copies of the foregoing *Montana Department of Revenue's Brief in Opposition of Plaintiffs' Motion for Preliminary Injunction* by the method(s) indicated below, addressed as follows:

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**MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY**

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER,	**Cause No.: DV-15-1152A**
Plaintiffs,	
vs.	**SUPPLEMENTAL AFFIDAVIT OF LARRY SULLIVAN**
MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE,	
Defendants.	

VERIFICATION

STATE OF MONTANA)
: **ss.**
COUNTY OF Lewis & Clark)

Larry Sullivan, being first duly sworn upon oath, states:

I am the Unit Manager for the Withholding Tax Unit in the Business and Income Tax Division for the Montana Department of Revenue (Department).

One of my duties as Unit Manager is to administer the Department's oversight of the student scholarship organizations pursuant to § 15-30-3101, et seq., MCA.

MDOR EXHIBIT
A

The Department has received only one registration request from a Student Scholarship Organization (SSO). The request was approved.

Section 15-30-3111, MCA, allows for a tax credit of up to $150 for individuals that contribute to a registered Student Scholarship Organization (SSO). The contributions can be made beginning on January 1, 2016, with the first tax returns claiming the credit being filed in the beginning January 1, 2017. Therefore, no credits have been allowed under the program as of this point.

As of the date of this affidavit, the Department has received only one registration for an SSO to begin to receive contributions that would qualify for the credit. Further, only a few donations have been made to that SSO in a total amount of $600.

As the Unit Manager, all inquiries for information related to the scholarship program are to be sent to me. As that conduit for the Department I have received only one inquiry from a member of the public related to making additional donations to the scholarship programs, or as to the availability of scholarships under the program.

Dated this 22 day of February, 2015.

MONTANA DEPARTMENT OF REVENUE

LARRY SULLIVAN

SUBSCRIBED AND SWORN to before me this 22nd day of February, 2016.

TIA CORWIN
NOTARY PUBLIC for the
State of Montana
Residing at East Helena, Montana
My Commission Expires
July 24, 2018