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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 **PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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Plaintiffs move for summary judgment as there are no genuine issues of material fact in dispute; in fact, this controversy requires no evidence at all. Instead, this case concerns the pure legal question of the validity and constitutionality of the Department of Revenue's Rule 1, which bans the State from giving tax credits for donations to private scholarship organizations that help children attending religious private schools. As Plaintiffs' brief shows, Rule 1 is in direct defiance of the Legislature and violates both the Montana and U.S. Constitutions. Plaintiffs thus request that this Court declare "Rule 1" *ultra vires* and unconstitutional and permanently enjoin the Rule's enforcement

I. INTRODUCTION

The Montana Legislature has created a mechanism to assist parents who wish to send their children to private elementary and secondary schools, regardless of the size of their bank account. In May 2015, the State passed its first school choice program, the Montana Tax-Credit Scholarship Program (the "program"). The program provides a modest tax credit (up to $150 annually) to individuals and businesses who donate to private scholarship organizations. Those scholarship organizations ("SOs") can then use the donations to give scholarships to families who enroll their children in private schools.

On December 14, 2015, however, the Department of Revenue ("DOR") defied the Legislature by passing an implementing rule excluding religious private schools from participating in the program. DOR has attempted to justify "Rule 1" by claiming it was required by the Montana Constitution's prohibition on the State giving grants to religious entities. DOR persisted in this claim despite a poll of the Legislature and formal comments from the Solicitor General, among others, concluding that DOR's constitutional interpretation is wrong. Moreover, as the Solicitor General concluded in his comments on the Rule, Rule 1 violates the U.S. Constitution by discriminating against religion.

Rule 1 is *ultra vires* and unconstitutional, and its enforcement would virtually guarantee the failure of the scholarship program. Approximately 69 percent of Montana's private schools are religious,[1] Smith Aff. § 2, and many Montana families do not even live near a nonreligious private school or only live near one that teaches elementary school. *See, e.g.*, Espinoza Aff. ¶ 18,

[1] This statistic does not include schools that are only day cares and/or preschools, of which there are three in the state. It does, however, include several therapeutic secular private schools that are for special needs and special education students.

Anderson Aff. ¶ 20, Schaefer Aff. ¶ 13. As a result, Rule 1 would deprive families of the genuine school choice the Legislature intended.

Plaintiffs are three such families. All are low-income mothers who currently struggle to afford the tuition of their children's school, Stillwater Christian School. Rule 1 disqualifies them from applying for program scholarships solely because the school of their choice is religious. To protect their right to apply for these scholarships, Plaintiffs sued DOR on December 16, 2015.

On March 31st, this Court issued a preliminary injunction against DOR's enforcement of Rule 1. Order Granting P.I. at 13. Specifically, this Court found it was "likely" that (1) Rule 1 contradicts the program statute and is not otherwise required by the Montana Constitution, making Rule 1 *ultra vires*; and (2) Rule 1 violates the Religion and Equal Protection Clauses of both the Montana and U.S. Constitutions by discriminating against religion. *Id.* at 13-15.

Plaintiffs now move for summary judgment to ask this Court to make its injunction permanent and to declare Rule 1 unconstitutional. There are no genuine issues of material fact in dispute; in fact, this dispute requires no evidence at all. This Court needs only to analyze Rule 1 in order to conclude that it is both invalid and unconstitutional as a matter of law.

II. STATEMENT OF FACTS

A. 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." Erica Smith Aff., Ex. 1 (SB 410), § 7.[2] The program went into effect on January 1, 2016. *Id.* § 31. Montana is now one of 28 states (including the District of Columbia) with a program that helps parents afford a private school for their child, regardless of whether that school is religious.[3]

Montana's program is based on a tax-credit scholarship model used in 15 other states.[4] Under the program, the State encourages the formation of private SOs, which raise scholarship funds through private donations. The SOs distribute the scholarships to families who wish to start or continue sending their children to private schools. Smith Aff., Ex. 1, § 9. Eligible

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[2] The program statute is also available at §§ 15-30-310—15-30-3114, MCA.

[3] *See, e.g.*, Friedman Foundation, School Choice in America, http://www.edchoice.org/school-choice/school-choice-in-america/ (last visited May 9, 2016).

[4] These states are Alabama, Arizona, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Virginia, and South Dakota. *Id.*

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 cannot discriminate against families based on their choice of school, and donors may not direct or designate their donations to a parent, child, or school. *Id.* §§ 9(1)(b), 14(1).

Individuals and corporations who donate to a scholarship organization 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). 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).

Under the program as designed by the Legislature, 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" so as to allow virtually all private schools to participate in the program, regardless of whether they are religious or nonreligious. *Id.* § 8(7).

B. Plaintiffs.

Although this case presents a pure question of law, it is useful for the Court to understand the real world impact of both the scholarship program and this litigation. The program has great potential to help both families who cannot afford to send their children to the school of their choice and families who make tremendous financial sacrifices in order to do so. One of these families is the Espinozas, a devout Christian family who lives in Flathead County. Plaintiff Kendra Espinoza is a single mom with 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. Espinoza Aff. ¶ 1.

The Espinozas' lives were thrown into turmoil four years ago when Ms. Espinoza's husband unexpectedly left them. Their house went into foreclosure, and Ms. Espinoza —then a stay-at-home mom— had to find a job, starting out as a housekeeper, then eventually as a full-time bookkeeper. Espinoza Aff. ¶ 2. As a result, Ms. Espinoza had to stop homeschooling her daughters and put them into public school. But she quickly became concerned about her daughters' public school, where Sarah struggled in her classes and Naomi was bullied for starting a Bible study group with her friends. Ms. Espinoza was also concerned about the

influence of older students in the school, who seemed undisciplined and used inappropriate language around her young girls. Espinoza Aff. ¶¶ 2-4.

When Ms. Espinoza first toured Stillwater Christian School in Kalispell, she nearly cried; Ms. Espinoza desperately wanted to send her children to Stillwater, but she knew she could not afford the tuition on her salary. Espinoza Aff. ¶ 5. So Ms. Espinoza started working to raise tuition funds. She held two yard sales and auctioned off handmade quilts made by a generous donor. She also found additional work cleaning houses. Even Naomi chipped in by getting a job mowing lawns. Espinoza Aff. ¶¶ 6-7. Along with partial financial aid that Stillwater provided, the girls were able to begin school there in September 2015. Espinoza Aff. ¶ 8.

Now Ms. Espinoza's girls are flourishing at Stillwater. Naomi and Sarah love their teachers, and their mother does not worry about them being neglected or bullied. It gives Ms. Espinoza great peace of mind to know that her children are happy and safe while she is at work. Espinoza Aff. ¶¶ 9-11. Ms. Espinoza is also reassured by the fact that the school teaches the same Christian values that she teaches at home. Espinoza Aff. ¶ 10. But even with Stillwater's assistance, it is still a real financial struggle for Ms. Espinoza to pay the tuition every month. Ms. Espinoza often worries that she will not have enough money to make the payments. Espinoza Aff. ¶¶ 12-13.

Ms. Espinoza is not alone—parents across Montana, like Plaintiffs Jeri Anderson and Jaime Schaefer, also want to take advantage of the new program for their children. Ms. Anderson is a single mom who adopted her academically gifted, 8-year-old daughter, Emma. Anderson Aff. ¶¶ 1-3. Ms. Schaefer and her husband have a 12-year-old daughter, Ellie, and a 9-year-old son, Jake. Schaefer Aff. ¶ 1. Like Ms. Espinoza, Ms. Anderson and Ms. Schaefer also send their children to Stillwater and struggle to pay the tuition. Anderson Aff. ¶ 15, Schaefer Aff. ¶ 8. As Ms. Schaefer said, she does not know on a "year-by-year" basis whether she will be able to continue affording the payments. Schaefer Aff. ¶ 8.

The children of all three Plaintiffs were eligible to apply for scholarships under the program for Stillwater Christian School. Espinoza Aff. ¶¶ 15-16, Anderson Aff. ¶¶ 17-18, Schaefer Aff. ¶¶ 10-11. That changed on December 14, 2015 when DOR enacted "Rule 1."

C. DOR's Rule 1.

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 faith based organization." *See* Smith Aff. Exs. 2-3 (DOR's notice of proposed Rule 1 and DOR's adoption of Rule 1 unchanged). Under Rule 1, more than 80 of Montana's private schools are banned from participating in the program. Smith Aff. ¶ 2. This includes Plaintiffs' chosen school, Stillwater Christian. Daniel Makowski Aff. ¶ 7.

As this Court has already found, "Rule 1 interjects qualifiers into the definition of 'qualified education provider' that were not included by the Legislature in the plain language" of the statute. Order Granting P.I. at 14. A November 2015 poll of the Legislature confirms that the Legislature intended that the program allow scholarship recipients to select both religious and nonreligious schools and that Rule 1 was contrary to the statute. *See* Smith Aff., Ex. 4.

DOR argues, however, that Rule 1 is required by the Montana Constitution, specifically article V, section 11(5) and article X, section 6(1), which prohibit the State from appropriating funds to religious entities. *E.g.*, Smith Aff., Exs. 2-3. Yet prior to enacting the Rule, DOR received several comments stating that not only was Rule 1 not required by the Montana Constitution, but also that its discrimination against religion violated the U.S. Constitution. Smith Aff., Ex. 3.[5]

One of these comments came from Dale Schowengerdt, Solicitor General for Montana, who strongly urged DOR not to adopt the Rule. Smith Aff., Ex. 6. Mr. Schowengerdt additionally stated that if DOR nevertheless adopted Rule 1, the Rule "would not be defensible" in court. *Id.* at 1, 8. DOR formally rejected these comments when it adopted the Rule. Smith Aff., Ex. 3, Responses 34-36. DOR is represented by its own lawyers and not the Department of Justice in this lawsuit.

D. This Court's Preliminary Injunction Against Rule 1.

On March 31, 2016, this Court issued a preliminary injunction against Rule 1, holding that it was likely *ultra vires* and unconstitutional. This injunction partially dispelled the legal cloud of uncertainty under which the program has operated for its first three months. Implementation of the program is now proceeding.

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[5] These comments were consistent with a formal legal opinion written 23 years before, by Director of Legal Services to the Legislature Gregory J. Petesch. Mr. Petesch concluded that "a tax credit for tuition paid to a private school would pass constitutional muster in Montana," even if the private schools included religious schools. *See* Smith Aff., Ex. 5.

Big Sky Scholarships, the State's first SO, is currently working to fundraise donations for scholarships. Kristen Hansen Aff. ¶¶ 12. More than 27 schools have committed themselves to working with Big Sky to help needy families receive scholarships to attend their schools, including Stillwater Christian. Timothy Uhl Aff. ¶¶ 5-8, Christian Bumgarner Aff. ¶¶ 5-8, David Pulis Aff. ¶¶5-8, Makowski Aff. ¶¶ 5-7. The sooner Big Sky and Montana families have certainty regarding the legal viability of Rule 1, the better.

III. LEGAL STANDARD

"Under M. R. Civ. P. 56(c), summary judgment is appropriate where there is a complete absence of genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. All reasonable inferences from the evidence are drawn in favor of the non-moving party." *Fenwick v. State*, 2016 MT 80, ¶ 12, 383 Mont. 151 (citation omitted). A district court may reach conclusions about the absence of material factual disputes from the pleadings, discovery on file, or affidavits. As the moving party, Plaintiffs have the initial burden of establishing the absence of a genuine issue of a material fact and that they are entitled to judgment as a matter of law. *Russell v. Masonic Home of Mont., Inc.*, 2006 MT 286, ¶ 9, 334 Mont. 351, 147 P.3d 216. The burden then shifts to DOR, as the non-moving party, to present substantial evidence essential to one or more elements of the claim in order to raise a genuine issue of material fact. *Id.*

IV. ARGUMENT

Plaintiffs are entitled to summary judgment on two independent grounds: (1) Rule 1 is *ultra vires* because it contradicts the program statute's definition of a "qualified education provider" and this contradiction is not justified by either article V, section 11(5) or article X, section 6 of the Montana Constitution; and (2) even if Rule 1 were not *ultra vires*, it would still be unconstitutional under the Religion and Equal Protection Clauses of both the Montana and U.S. Constitutions.

No evidence is required to resolve this dispute; this Court needs only to examine Rule 1 in order to conclude that it is both invalid and unconstitutional as a matter of law. Plaintiffs therefore respectfully request that this Court declare Rule 1 invalid and unconstitutional and permanently enjoin enforcement of the rule.

A. Rule 1 is *Ultra Vires* Because it Contradicts the Program Statute and is Not Required by the Montana Constitution.

Rule 1 is invalid as *ultra vires* because its definition of "qualified education provider" conflicts with the definition provided by the statute. As this Court recognized, agency rules are "not valid" unless they are "consistent [with] and not in conflict with the statute." § 2-4-305 (6)(a), MCA; *see also* Order Granting P.I. at 14. While DOR argues that the Montana Constitution requires Rule 1, this argument is unpersuasive.

The conflict between the program statute and Rule 1 is clear from their plain text. The statute allows parents to choose virtually *any* private school for their children, while Rule 1 forbids parents from choosing religious schools. *See, e.g., Dep't of Health & Envtl. Scis. v. Lasorte*, 182 Mont. 267, 274 (1979), 596 P.2d 477, 481-82 (invalidating agency definition of a statutory term when it conflicted with the statute). This conflict was confirmed with the November legislative poll showing that a majority of Montana legislators believe Rule 1 is contrary to the statute. Such a legislative poll is "conclusive[]" evidence in court proceedings that an administrative rule conflicts with a statute. § 2-4-404(2015), MCA; Order Granting P.I. at 13-14.

DOR argues, however, that the program statute otherwise grants DOR the power to enact Rule 1. Specifically, DOR points to a provision of the statute requiring DOR to administer the program "in compliance with Article V, section 11(5), and Article X, section 6, of the Montana [C]onstitution." Smith Aff., Ex. 1, § 7; *see also* Smith Aff., Exs. 2-3.[6]

DOR's legal interpretation of these provisions is incorrect. Article V, section 11(5), and article X, section 6 merely prohibit the State from appropriating public funds to religious entities, which the program does not do. As shown below, the program instead just allows private individuals and businesses to donate money to help families, in exchange for tax credits.

1. Rule 1 Is Not Required By Article V, Section 11(5).

Article V, section 11(5) states, "[n]o *appropriation* shall be made for *religious, charitable, industrial, educational, or benevolent purposes* to any private individual, private

[6] This provision is not unique to the tax-credit scholarship program. For instance, the same provision is included in the tax-credit program that encourages private donations to public schools. Smith Aff., Ex. 1, § 1.

association, or private corporation not under control of the state." Mont. Const. art. V, § 11(5) (emphases added). This provision cannot justify Rule 1 for two reasons.

First, this provision only applies to public "appropriation[s]," and Montana case law and case law across the country show that tax credits are not public appropriations. Second, if tax credits were appropriations, then section 11(5) would bar them from being used not just for "religious" purposes, but also for "educational, or benevolent purposes." This would prohibit tax-credit scholarships from being used at any private school—not just religious schools— *and* it would invalidate a whole host of Montana's existing tax benefit programs. An interpretation leading to such an absurd result must be rejected.

i. Tax credits are not public appropriations.

Montana case law and case law across the country show that tax credits are not public appropriations.

As this Court recognized, the case most on point is *MEA-MFT v. McCulloch*, No. BDV, 2011-961, 2012 Mont. Dist. LEXIS 20 (2012) (J. Sherlock), from the First Judicial District for Lewis and Clark County. *McCulloch* involved a challenge to a legislative referendum to create a tax credit. The challengers claimed that the referendum was invalid because the Montana Constitution prohibits a public "appropriation" from being approved by referendum. *Id.* at *1-*2; Mont. Const. art. III, § 5(1). In rejecting that tax credits constitute appropriations, *McCulloch* relied on the Montana Supreme Court's longstanding definition of "appropriation," first established in *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 78 (1921):

> [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.[7]

[7] 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, section 11(5). Although the current 1972 Constitution has renumbered and modified these provisions to some extent, they have not expanded the meaning of the word "appropriation" to encompass the creation of tax credits, with which the Montana tax code is replete.

McCulloch, at *4-*5. As *McCulloch* found, tax credits do not come out of the state "general fund." *Id.* at *5. Tax credits instead just allow taxpayers to keep more of their own money. At no point does the state own the money legally or possess it physically.

McCulloch also relied on a case reaching the same conclusion from the Supreme Judicial Court of Massachusetts, *Tax Equity Alliance for Massachusetts, Inc. v. Commissioner of Revenue*, 401 Mass. 310 (1987). There, the court found that "[t]he granting of an income tax credit is not an appropriation according to any commonly understood sense of the word. . . . we see nothing in the proposed [tax credit] measure that designated that any money in the treasury of the Commonwealth be devoted to any purpose." *McCulloch*, at *6 (quoting *Tax Equity Alliance*, 401 Mass. at 315). *Tax Equity Alliance* emphasized that this conclusion holds even when tax credits are issued in the form of refunds from the treasury, as the funds were only in the treasury "contingently." *Id.* Thus, tax credits could not be appropriations.

The Montana and Massachusetts courts are not alone in distinguishing between appropriations and tax credits. Nine other courts across the country, including the U.S. Supreme Court, have also concluded that tax credits are not public appropriations. Most of these cases involved school-choice programs, usually ones that were challenged under state Blaine Amendments[8] like article X, section 6(1).[9] Other cases involved other types of tax-credit

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[8] Blaine Amendments are state constitutional provisions that bar the use of public appropriations to aid "sectarian" institutions, at a time when "sectarian" was understood to refer to Catholic institutions. *See Mitchell v. Helms*, 530 U.S. 793, 828-829 (2000) (plurality). They are referred to as "Blaine Amendments" because they are similar to, and often were modeled after, a failed United States constitutional amendment proposed by Congressman James G. Blaine in 1875. *See, e.g., id.* Thirty-seven states have Blaine Amendments in their constitutions.

[9] *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("Like contributions that lead to charitable tax deductions, contributions yielding [Scholarship Organization] 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 constitutional in part because "a tax credit cannot be equated to a government expenditure"); *Kotterman v. Killian*, 972 P.2d 606, ¶ 40 (Ariz. 1999) ("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."); *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), *appeal granted*; *Gaddy v. Ga. Dep't of Revenue*, No. 2014 CV 2445538 (Fulton Cnty. Super. Ct., Feb. 5, 2016) (finding scholarship tax-credit program was constitutional under the state's Blaine Amendment because tax credits are not state funds), *appeal granted*; *Toney v. Bower*, 744 N.E.2d 351, 357 (Ill. App. Ct. 2001) (finding that the terms "public fund" and "appropriation"

programs.[10] All of these courts use the same reasoning as *McCulloch* and *Tax Equity Alliance*: donations made with tax credits are taxpayers' money, not the government's.

As tax credits are not public appropriations, then article V, section 11(5) does not apply to the program and cannot require Rule 1.

ii. If tax credits were public appropriations, article V, section 11(5) would not only make the entire program unconstitutional, but it would also jeopardize Montana's entire tax system.

If DOR were correct and tax credits were public appropriations under article V, section 11(5), then the State of Montana would have serious constitutional troubles. Not only would the entire tax-credit scholarship program be unconstitutional, but so would dozens of existing Montana tax benefits. An interpretation leading to such an absurd and radical result should be rejected.

First, DOR's distinction between religious and non-religious schools in Rule 1 cannot be justified under any consistent reading of article V, section 11(5). Presumably, DOR is using Rule 1 to avoid an "appropriation" for "religious . . . purposes." *See* Mont. Const. art. V, § 11(5). But section 11(5) also prohibits appropriations for "educational" or "benevolent purposes." Educational and benevolent purposes clearly justify tax credits to raise funds for scholarships to non-religious schools (just as they justify tax credits for scholarships for religious

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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); *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, section 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").

[10] *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*, 76 Cal. Rptr. 3d 507, 510, 515 (Cal. Ct. App. 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).

schools). Thus, by DOR's view of what constitutes an appropriation, *all* program scholarships would be unconstitutional, not just those used at religious schools. DOR's application of section 11(5) solely to religious schools is therefore completely arbitrary. Either all schools are out or all schools are in.

Moreover, DOR's interpretation of article V, section 11(5) would jeopardize dozens of the State's existing tax benefit programs. For instance, DOR's website lists 25 "Individual Income Tax Incentives" for which individual taxpayers are eligible.[11] Not only do two of these programs allow credits for donations made *directly* to religious schools,[12] but all of the 23 other tax credits listed are for "benevolent purposes." Under DOR's position that tax credits are appropriations, each of these 25 separate tax credits would be unconstitutional.

DOR's interpretation would risk other tax benefits, as well. Montana allows taxpayers to take charitable deductions for donations made to religious schools, secular schools, and other charities.[13] Montana also provides for a variety of tax exemptions, including for religious entities and schools. *E.g.*, Mont. Const. art. VIII, § 5(1)(b) (allowing the legislature to exempt from property taxes "[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"); § 15-6-201(1), MCA (exempting from property taxes certain properties for religious, educational, and other nonprofit purposes). Although tax credits, deductions, and exemptions result in different financial benefits to taxpayers, the courts have found that they are legally indistinguishable.[14] DOR's interpretation of article V, section 11(5) thus invalidates a substantial chunk of Montana's tax benefits.

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

[12] MCA §§ 15-30-2326, 15-31-135 through 15-31-136 (The Qualified Endowment Credit); MCA §§ 15-30-2327 through 15-30-2329, 15-31-161, 15-31-162 (The College Contribution Credit).

[13] § 15-30-2131, MCA (Deductions Allowed in Computing Income") allows deductions for charitable deductions, which is also reflected on Schedule III to the Montana income Tax Form entitled "Montana Itemized Deductions."

[14] *See, e.g.*, *Toney*, 744 N.E.2d at 357 ("Giving the term [public fund] such a meaning may have broad implications for other tax credits, deductions, and exemptions from taxation . . . . We are unwilling to interpret the term "public fund" so broadly as to endanger the legislative scheme of taxation.") (citations omitted); *Kotterman*, 972 P.2d at 618, ¶ 38 ("If [tax] credits constitute public funds, then so must other established tax policy equivalents like deductions and exemptions."); *see also Winn*, 564 U.S. at 144 ("Like contributions that lead to charitable tax

An incorrect interpretation of "appropriation" leading to such an absurd and radical result should be immediately rejected. *See Mills v. Stewart*, 76 Mont. 429, 441, 247 P. 332, 335 (1926) ("Common sense is the essence of the law, and that which is not good sense is not good law.").

2. Rule 1 Is Not Required By Article X, Section 6(1).

DOR also argues that article X, section 6(1) of the Montana Constitution gives DOR the authority to adopt Rule 1. Section 6(1) 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.*

(Emphases added).

Article X, section 6(1) does not justify Rule 1 for two reasons. First, not only are tax credits not public appropriations, as discussed above, but they are also not "indirect appropriation[s]." Second, even if tax credits were a type of public appropriation, section 6(1) would still not apply. That is because the tax-credit scholarships are not given "for any sectarian purpose or to aid" any sectarian entity. Instead, the scholarships are given to families, who use them to help pay tuition at the school of their choice. The courts have been clear that school-choice programs, like Montana's, have the purpose of benefiting families, and any benefit schools receive is merely incidental and the result of families' independent choices.

i. Tax credits are not "indirect" public appropriations.

As discussed above, courts agree that tax credits are not public "appropriations," whether under state Blaine Amendments or otherwise. The same is true for Blaine Amendments governing "indirect" appropriations, like Montana's article X, section 6(1).

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deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."); *Olson*, 742 N.W.2d at 683 (concluding that tax credits and tax exemptions are not public expenditures); *Manzara*, 343 S.W.3d at 661 ("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.").

Georgia, New York, and Oklahoma all have such amendments,[15] and all have found that school choice programs do not violate their Blaine Amendments.[16] Georgia, for instance, recently concluded that its tax-credit scholarship program was perfectly constitutional under its Blaine Amendments, as tax credits do not constitute indirect appropriations. As the court stated, "[f]unds that remain entirely under the control of private citizens and private institutions cannot be considered tax dollars." *Gaddy v. Ga. Dep't of Revenue*, No. 2014 CV 2445538, *17 (Fulton Cnty. Super. Ct., Feb. 5, 2016), *appeal granted.*

This result makes sense; if tax credits are not the government's money, then the government cannot "appropriate" them, even indirectly. By way of contrast, examples of an indirect appropriation to a religious school would be the state paying for the financial obligations of that school, such as by subsidizing construction for school buildings or by paying its teachers' salaries. While the state would not be paying the school directly, the end benefits to the school would be the same. *See, e.g., State ex rel. Chambers v. Sch. Dist. No. 10 of Deer Lodge Cnty.*, 155 Mont. 422, 472 P.2d 101 (1970) (striking down state's employment of eight high school teachers to teach secular courses at a Catholic school under article XI, section 8, the 1889 Constitution's precursor to article X, section 6).

As tax credits are neither direct or indirect appropriations, article X, section 6 does not preclude the inclusion of religious schools in the tax-credit scholarship program.

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[15] GA. Const. art. I, § II, ¶ VII ("No money shall ever be taken from the public treasury, *directly or indirectly*, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.") (emphasis added); N.Y. Const. art. XI, § 3 ("Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, *directly or indirectly*, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.") (emphasis added); Okla. Const. art. II, § 5 ("No public money or property shall ever be appropriated, applied, donated, or used, *directly or indirectly*, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.").

[16] *See, e.g., Bd. of Educ. v. Allen*, 228 N.E.2d 791, 804 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968) (rejecting Blaine Amendment challenge to state program providing textbooks to religious and nonreligious private school students under Blaine Amendment); *Oliver v. Hofmeister*, 2016 OK 15 (2016) (rejecting Blaine Amendment challenge to a state scholarship program for special education students to attend both religious and nonreligious schools).

ii. Even if the scholarships did involve public appropriations, they aid families, not the schools they choose.

Even if the program did involve appropriations under article X, section 6(1), this provision would still not bar scholarships for students attending religious schools. That is because article X, section 6(1) only bars appropriations "for any sectarian purpose or to aid" any sectarian entity. Here, the scholarship monies are instead given for the neutral "purpose" of enhancing educational choice, and the only "aid" they give is to families. This distinction between aid to schools and aid to families is evident in five ways. First, in the plain text of article X, section 6(1); second, in the history behind article X, section 6(1); third, in Montana case law interpreting article X, section 6(1); fourth, in federal Establishment Clause jurisprudence; and fifth, in other states' case law interpreting similar Blaine Amendments.

First, the plain text of section 6(1) merely bars "aid" to sectarian entities. "Aid" does not include money that a religious school receives from program scholarships, which is instead merely payment from families in exchange for services rendered. No "natural and ordinary" meaning of the word "aid" encompasses a consumer purchasing services from a private enterprise.

Second, the history behind article X, section 6(1) confirms that it was meant to prevent government aid to religious schools, not religiously neutral aid to families. State Blaine Amendments like article X, section 6(1) originated in the late 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.[17] The language of article X, section 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

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[17] *See, e.g.*, Lloyd P. Jorgenson, *The State and the Non-Public School 1825-1925*, 136-44 (1987); Joseph P. Viteritti, *Choosing Equality: School Choice, The Constitution, and Civil Society* 146-147, 150-155 (1999).

sought: It sought the same sort of institutional assistance provided to the Protestant public schools.[18]

Third, the only Montana case on point, *Montana St. Welfare Bd. v. Lutheran Social Services of Montana*, supports the distinction between aid to schools, which is impermissible, and aid to families, which is permissible. 156 Mont. 381, 480 P.2d 181 (1971). In *Lutheran Social Services*, religious adoption agencies challenged a state board rule that paid expectant mothers for their medical and other expenses when they gave their children up for adoption to the state, but did not similarly provide such assistance when they gave up their children to private adoption agencies—most of which were religious.[19] The board tried to use article X, section 6[20] to justify its rule, arguing that paying assistance to expectant mothers choosing a religious agency would excuse the religious agencies from paying for these expenses themselves. *Id.* at 186. The Supreme Court rejected this argument because the "primary" purpose and effect of the assistance payments was to help expectant mothers, not the agencies. The Court further stated that the adoption agencies were not "directly or indirectly benefited by payments to or on behalf of" the mothers, and it was a "purely incidental result that the adoption agencies would not have to pay the bills of the indigent expectant mothers" as a result. *Id.*

This important distinction between aid to schools and aid to families is also recognized in federal Establishment Clause jurisprudence. The Supreme Court has long held that it is permissible for neutral government programs to aid children attending religious schools, while simultaneously striking down programs that aided the religious schools themselves. *Compare Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding religiously neutral private-school tuition program); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (upholding interpreter services for parochial school student); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding tax deductions for educational expenses, including private school tuition); *Witters v. Washington Dept. of Services For the Blind*, 474 U.S. 481 (1986) (holding the Establishment Clause was not violated by a state vocational rehabilitation assistance program that aided student studying to be a minister in a religious college); *Board of Education v. Allen*, 392 U.S. 236

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[18] *Id.*

[19] There were three private adoption agencies at the time, and two were religious. *Id.* at 382. It is unclear if the third agency was religious as well.

[20] At the time, this provision was found at article IX, section 8.

(1968) (upholding program providing free secular textbooks for private school students); *Everson v. Bd. Of Educ.*, 330 U.S. 1 (1947) (upholding state program providing transportation subsidies to public and private school children), *with Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down two state programs that reimbursed private schools the cost of teachers' salaries, textbooks, and instructional materials in certain secular subjects).

Finally, the overwhelming majority of state courts that have considered challenges to school-choice programs under state Blaine Amendments that prohibit "aiding" religious schools have concluded that school choice programs "aid" and "benefit" students—not schools.[21]

Thus, DOR misinterprets article X, section 6(1) in two fundamental ways. First, the provision does not apply to tax-credit programs, as no public appropriation is involved. And second, article X, section 6 does not prohibit aid to families who independently decide to use that aid to attend religious institutions. Therefore, article X, section 6(1) cannot justify DOR's deviation from the statutory definition of "qualified education provider."

* * *

DOR cannot use the Montana Constitution to justify its deviation from the program statute's definition of qualified education provider. Rule 1 is invalid as *ultra vires*.

B. Rule 1 Violates the Religious Freedom and Equal Protection Provisions of the Montana and U.S. Constitutions.

Even if enacting Rule 1 were within DOR's authority, the Rule must still be struck down as unconstitutional under the Free Exercise, Establishment, and Equal Protection Clauses of the

[21] *E.g.*, *Meredith v. Pence*, 984 N.E.2d 1213, 1228-29 (Ind. 2013) ("The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend."); *Magee v. Boyd*, 175 So. 3d 79, 136 (Ala. 2015) ("[t]he Section 8 tax-credit provision was designed for the benefit of parents and students, and not for the benefit of religious schools"); *Niehaus v. Huppenthal*, 310 P.3d 983, 987, ¶ 15 (Ariz. App. 2013) ("The specified object of the ESA is the beneficiary families, not private or sectarian schools."); *Toney*, 744 N.E.2d at 360-63 (finding persuasive the reasoning in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 12 (1993), that "[t]he direct beneficiaries of the aid were disabled children; to the extent that sectarian schools benefitted at all from the aid, they were only incidental beneficiaries"); *Kotterman*, 972 P.2d at 620, ¶ 46 ("The way in which an STO is limited, the range of choices reserved to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach"); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999) ("The primary beneficiaries of the School Voucher Program are children, not sectarian schools."); *Jackson v. Benson*, 578 N.W.2d 602, 626-27, ¶¶ 81-82 (Wis. 1998) (describing the vouchers as "life preservers" that have "been thrown" to students participating in the program).

Montana Constitution and the U.S. Constitutions. Montana cases, as evidenced by the fact that they follow federal case law, recognize that the state provisions should be interpreted in the same way as the federal provisions. *E.g.*, *Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 61, 358 Mont. 193, 244 P.3d 321; *Big Sky Colony, Inc. v. Mont. Dep't of Labor & Indus.*, 2012 MT 320, ¶¶ 17-22, 44, 368 Mont. 66, 291 P.3d 1231.

These clauses all require "government neutrality" toward religion. *See, e.g.*, Order Granting P.I. at 9. As a result, the government cannot exclude religious people and entities from otherwise generally available student benefit programs. *See, e.g.*, *Everson*, 330 U.S. at 16 (holding that the government cannot exclude "the members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation"); *Mitchell*, 530 U.S. at 828 (plurality) (explaining that the Court's jurisprudence "prohibit[s] governments from discriminating in the distribution of public benefits based upon religious status.").

By excluding families who wish to send their children to religious schools from the scholarship program, Rule 1 violates this required neutrality. This Court needs only to analyze Rule 1 in order to reach this conclusion; no evidence is required.

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

Rule 1 violates the Establishment Clauses of both the Montana and U.S. Constitutions. Mont. Const. art. X, § 6(1); U.S. Const. amend. 1. As noted above, Montana courts follow federal case law when interpreting article X, section 6(1). Just as these clauses prohibit the government from "favoring religion," they also prohibit government from "discriminating *against* religion." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."). After all, the government "may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963). Rather, "[t]he First Amendment . . . requires the state to be neutral in its relations with groups of religious believers and nonbelievers. . . . State power is no more to be used so as to handicap religions than it is to favor them." *Everson*, 330 U.S. at 18.

Courts employ the U.S. Supreme Court's *Lemon* test to determine when the Establishment Clause is violated. *See Lemon*, 403 U.S. at 612. A law fails the *Lemon* test *either* if its "actual purpose is to endorse or disapprove of religion" *or* "if it has the primary or principal effect of inhibiting or advancing religion." *E.g.*, *Zelman*, 536 U.S. at 668-669.[22]

Rule 1's primary—and really only—effect is to inhibit religion. This is evident in two ways. First, the Rule penalizes parents who wish to send their children to a religious school. To choose such a school would mean forgoing the opportunity for a scholarship. By contrast, the Rule encourages and rewards parents who choose secular private schools—in fact, they are the *only* group for which the Rule allows scholarships. This system of penalties and rewards, by design, inhibits families from choosing religious schooling.

Moreover, the Rule broadcasts a message of government "disapproval of religion." *See Big Sky Colony, Inc.*, 2012 MT 320, ¶ 47 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989) (stating a law has the effect of inhibiting religion under the Establishment Clause when "it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion.")). In fact, taking away DOR's erroneous interpretation of the Montana Constitution, disapproval of religion is the *only* conceivable justification for the Rule.

Rule 1's effect of inhibiting religion violates both article II, section 6 of the Montana Constitution and the Establishment Clause of the First Amendment.

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

Similarly, Rule 1 violates the Free Exercise Clauses in the Montana Constitution and in the First Amendment to the U.S. Constitution by discriminating against religion. *See* Mont. Const. art. V, § 11(5); U.S. Const. amend. 1. As noted above, Montana courts follow federal case law when interpreting article V, section 11(5).

The U.S. Supreme Court said in *Lukumi* that "[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. at 523. The Court went on to say, "[a]t a minimum, the

[22] While *Big Sky Colony, Inc.*, 2012 MT ¶ 44 states that the *Lemon* test has three prongs, the third being whether the program results in excessive entanglement of the state and religion, the case law has now merged the third prong into the second. *E.g.*, *Zelman*, 536 U.S. at 668-669.

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. Indeed, a law that discriminates against religion "on its face" is presumptively unconstitutional and must be analyzed under the "strict scrutiny" test. *Id.* at 533.[23]

Here, no one can dispute that Rule 1 discriminates against religion on its face. Rule 1 explicitly prohibits families from using scholarships at a school "owned or controlled in whole or in part by any church, religious sect, or denomination," including any school accredited "by a faith based organization." Smith Aff., Ex. 2. As a result, the Rule discriminates against religious families who wish to send their children to schools that align with their own beliefs. *See, e.g.*, Espinoza Aff. ¶ 10, Anderson Aff. ¶ 7, Schaefer Aff. ¶ 6. This is exactly the type of religious discrimination the Free Exercise Clauses prohibit.

Rule 1's facial discrimination subjects the Rule to strict scrutiny—a heavy burden that DOR cannot meet. Strict scrutiny requires the state to show that the law is "the least restrictive means of achieving some compelling state interest." *E.g.*, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). The only interest that DOR has set forth for Rule 1 is constitutional compliance with article V, section 11(5) and article X, section 6. But as discussed above, DOR's interpretation of these two provisions is erroneous.

The case law is clear that erroneous interpretations of constitutional provisions do not constitute a compelling government interest. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008) (rejecting the state's attempt to justify its discriminatory scholarship program using the state's Blaine Amendment after the court concluded that the state had incorrectly interpreted that amendment); *Columbia Union College v. Oliver*, 254 F.3d 496, 510 (4th Cir. 2001) (finding the state's desire to avoid an Establishment Clause violation was not a compelling interest when the state incorrectly interpreted that clause). In fact, an erroneous constitutional interpretation fails even rational basis scrutiny. *Christian Sci. Reading Room v. Airports Comm.*, 784 F.2d 1010, 1013-14 (9th Cir. 1986). Rule 1 thus violates the Free Exercise Clauses.

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[23] Evidence of government "hatred" or "bigotry" against religion is not necessary to show the requisite discrimination against religion to violate the Free Exercise Clause. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008). Instead, simply treating a religious individual or group differently because of religion is sufficient. *Id.*

Indeed, as this Court recognized, Order Granting P.I. at 14-15, courts have already found that similar laws violate the Free Exercise Clause. *See Colo. Christian Univ.*, 534 F.3d at 1245 (holding that Colorado's exclusion of "pervasively sectarian" schools from postsecondary student-aid programs violated the Free Exercise Clause); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (holding that a Minnesota regulation prohibiting school districts from providing special education benefits to students at religious schools violated the Free Exercise Clause when it created an "unconstitutional distinction between private religious schools and private nonreligious schools"); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (holding that a regulation barring providers that "teach or promote religious doctrine" from a federal child-care program violated the Free Exercise Clause).

Rule 1 thus violates the Free Exercise Clauses in the Montana and U.S. Constitutions.

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

Rule 1 additionally violates the Equal Protection Clauses of the Montana and U.S. Constitutions. *See* Mont. Const. art. II, § 4; U.S. Const. amend. 14. As this Court found, legal distinctions drawn on the basis of religion are "inherently suspect." *Small v. McRae*, 200 Mont. 497, 524, 51 P. 2d 982 (1982); Order Granting P.I. at 9. Like with the Free Exercise analysis, such distinctions must undergo strict scrutiny. As discussed above, DOR cannot come close to satisfying strict scrutiny here.

V. CONCLUSION

Plaintiffs are entitled to the relief they seek for two reasons: (1) Rule 1 is *ultra vires* because it contradicts the program statute's definition of a qualified education provider and this contradiction is not justified by article V, section 11(5) or article X, section 6 of the Montana Constitution; and (2) even if Rule 1 were not *ultra vires*, it would still be unconstitutional under the Religion and Equal Protection Clauses of both the Montana and U.S. Constitutions.

There are no material facts in dispute, and in fact, no evidence is required to resolve this case. Plaintiffs instead prevail as a matter of law. Not only is discovery unnecessary, but it would delay giving Plaintiffs and other Montana families much needed certainty regarding the unconstitutionality of Rule 1.

Plaintiffs therefore respectfully request that this Court declare Rule 1 invalid and unconstitutional and make its preliminary injunction permanent.

DATED this 13th day of May, 2016.

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